Iowa Industrial Commissioner

Decisions

1988

Jan.-June

Vol. 3

DECISIONS OF THE
IOWA INDUSTRIAL COMMISSIONER
1988

001360

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARGARET A. OLSEN,

Claimant,

vs.

FRUEHAUF CORP.,

Employer,

and

CNA INSURANCE,

Insurance Carrier,
Defendants.

FILE NO. 825115

A R B I T R A T I O N

D E C I S I O N

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Margaret A. Olsen, claimant, against Fruehauf Corporation, employer (hereinafter referred to as Fruehauf), and CNA Insurance, insurance carrier, for workers' compensation benefits as a result of an injury on June 19, 1986. On March 2, 1988, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of the hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing 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 June 19, 1986, claimant received an injury which arose out of and in the course of employment at Fruehauf.

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $243.23 per week.

3. Claimant is entitled to healing period benefits from June 20, 1986 through December 9, 1987 and claimant has been paid these benefits.

4. If permanent disability benefits are awarded, they shall begin as of December 10, 1987.

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

ISSUES

The only issues submitted 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 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 prior to the injury she worked for Fruehauf for 13 years as an assembler. Fruehauf manufactures semi-trailers. Claimant continues to work at Fruehauf at the present time but since her return to work after the work injury she has been placed in a light duty janitor job. Due to physician imposed work restrictions, claimant cannot return to assembly work. Claimant testified that she earned $9.97 per week ($20,000.00 annually) at the time of the work injury in this case. Claimant states that her current job normally pays $.18 per hour less than the assembly wages but that she continues to receive assembly wages at the present time. However, claimant testified that management at Fruehauf has told her that her current job and wages are only a temporary arrangement.

The facts surrounding the work injury are not in dispute. Claimant testified that on the date of the injury her upper body was accidently crushed between two semi-trailers that were being constructed at Fruehauf. Claimant was immediately transported to the hospital where she was admitted with a diagnoses of fractured ribs, fractured left and right scapular and laceration of the right ear. Hospital records indicate that claimant suffered severe pain from the injury. Claimant was discharged from the hospital care on June 29, 1986.

Claimant was initially treated by Duane Nelson, M.D., an orthopedic surgeon. This treatment involved pain medication, fitting claimant with a figure 8 clavical strap and gradual increase in activity including physical therapy. However, despite this treatment claimant's recovery was slow and she

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

ISSUES

The only issues submitted 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 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 prior to the injury she worked for Fruehauf for 13 years as an assembler. Fruehauf manufactures semi-trailers. Claimant continues to work at Fruehauf at the present time but since her return to work after the work injury she has been placed in a light duty janitor job. Due to physician imposed work restrictions, claimant cannot return to assembly work. Claimant testified that she earned $9.97 per week ($20,000.00 annually) at the time of the work injury in this case. Claimant states that her current job normally pays $.18 per hour less than the assembly wages but that she continues to receive assembly wages at the present time. However, claimant testified that management at Fruehauf has told her that her current job and wages are only a temporary arrangement.

The facts surrounding the work injury are not in dispute. Claimant testified that on the date of the injury her upper body was accidently crushed between two semi-trailers that were being constructed at Fruehauf. Claimant was immediately transported to the hospital where she was admitted with a diagnoses of fractured ribs, fractured left and right scapular and laceration of the right ear. Hospital records indicate that claimant suffered severe pain from the injury. Claimant was discharged from the hospital care on June 29, 1986.

Claimant was initially treated by Duane Nelson, M.D., an orthopedic surgeon. This treatment involved pain medication, fitting claimant with a figure 8 clavical strap and gradual increase in activity including physical therapy. However, despite this treatment claimant's recovery was slow and she

continued to complain of bilateral shoulder and arm pain. Claimant remained off work for almost two years.

After Dr. Nelson moved from the area, claimant's care was transferred to another orthopedic surgeon in December, 1986, Koert R. Smith, M.D. At that time claimant was still complaining of lingering pain in the left shoulder. Claimant was also diagnosed as having carpal tunnel and cubical tunnel syndrome problems in the right extremity causing numbness and aching of the right extremity. Claimant returned to work on December 10, 1987 with restrictions imposed by Dr. Smith consisting of no vigorous lifting or over the head lifting or other extensive activity involving the left shoulder.

In his deposition Dr. Smith opined that claimant has permanent defects from the injury consisting of a five percent permanent partial impairment to the left extremity. Dr. Smith did not believe that the carpal tunnel or cubical tunnel problems were much of a problem at this time. Despite his rating to the arm, Dr. Smith explained that the source of claimant's problems is a limited range of motion of the left shoulder due to residual pain from the fracture of the left scapula and injury to the surrounding ribs and muscle. Dr. Smith adds that this is more than an injury to the joint. The doctor explained that the injury goes to the upper body or back as the scapular forms a portion of the socket of a ball-socket shoulder joint. Dr. Smith stated that he does not anticipate significant improvement in claimant's condition in the future. Finally, Dr. Smith said that claimant could probably lift 25 to 30 pounds on an intermittent basis during the course of an average work day so long as she did not have to lift above her waist.

Claimant testified that she has not made an effort to look for employment elsewhere because she does not feel anyone else would hire her. She stated at hearing that she is 50 years of age and has a high school education. She did not describe her work history other than her work at Fruehauf over the last 13 years.

Little has been shown in the record with reference to claimant's rehabilitation potential as she has not been evaluated by a rehabilitation specialist.

Claimant's appearance and demeanor at the hearing indicated that she 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, claimant contains that her injury extends beyond the arm. Although Dr. Smith only gives a rating to the arm, the question of whether the injury is to the body as a whole or to the arm is not a medical but a legal question. Admittedly, there is a conceptual problem in determining whether a disability should be measured functionally or industrially when a major body joint is involved. A shoulder injury can be a loss of an arm or a loss to the body as a whole and the determination depends upon the extent of injury. However, it is the anatomical situs of the injury, not the situs of the disability caused by the injury which determines whether or not to apply the schedules in Iowa Code section 85.34(2)(a-t). Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lumber Co., 233

Iowa 758, 10 N.W.2d 569 (1943); Blacksmith, 290 N.W.2d 248 (Iowa 1980). Finally, it is well established in Iowa that a shoulder injury is an injury to the body as a whole and not to a scheduled member injury simply because of the function of those joints' impact on a scheduled member. Lauhoff, 395 N.W.2d 834 (Iowa 1986); Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); Nazarenus v. Oscar Mayer & Company, II Iowa Industrial Commissioner Report 281 (1982); Godwin v. Hicklin G.M. Power, II Iowa Industrial Commissioner Report 170 (1981).

In the case at bar, the testimony of Dr. Smith is clear that the situs of the injury is into the body although the effect is only upon the arm. Therefore, claimant has sustained a body as a whole permanent injury. The exact percentage of the body as a whole impairment is unknown as Dr. Smith incorrectly rated the disability to the arm rather than to the body. However, given his permanent restrictions on claimant's activity, the extent of impairment certainly is not insignificant from an industrial disability standpoint as will be discussed below.

II. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As the claimant has shown that the work injury was a cause of a permanent physical impairment or limitation upon activity involving the body as a whole, the degree of permanent disability must be measured pursuant to Iowa Code section 85.34(2)(u). However, unlike scheduled member disabilities, the degree of disability under this provision is not measured solely by the extent of a functional impairment or loss of use of a body member. A disability to the body as a whole or an "industrial disability" is a loss of earning capacity resulting from the work injury. Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). A physical impairment or restriction on work activity may or may not result in such a loss of earning capacity. The extent to which a work injury and a resulting medical condition has resulted in an industrial disability is determined from examination of several factors. These factors include the employee's medical condition prior to the injury, immediately after the injury and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. 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 functional impairments or ascertainable disabilities despite her age. Claimant was able to fully perform physical tasks involving repetitive lifting, bending, twisting, stooping and lifting above waist level and above her head. As a result of the painful injuries she can no longer do any of these tasks and must remain on a light duty status for the rest of her working life. Claimant's only employment history to the knowledge of this administrative law judge is the type of work she can no longer perform. Certainly, claimant has suffered a very serious industrial disability or loss of earning capacity.

Also, claimant is currently earning a substantial income. Claimant testified, however, that her current job is only temporary. This testimony is uncontroverted. Therefore, claimant's current employment is suitable but it is not stable. Finally, an actual loss of earnings is only one factor not the only factor in determining her industrial disability. The industrial disability is a loss of earning "capacity" not solely a loss of earnings. See Michael v. Harrison County, Thirty-Fourth Biennial Report of the Iowa Industrial Commissioner 218, 220 (1979).

The availability of suitable employment outside of Fruehauf is an important consideration in awarding industrial disability benefits in this case. However, claimant made no attempt to look for suitable employment elsewhere. Also, she has not made use of the burden shifting aspects on this issue under the so-called "odd-lot doctrine." See Klein v. Furnas Electric Co., 384 N.W.2d 370, 375 (Iowa 1986); Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985). Therefore, claimant has not shown that suitable, sedentary light duty employment is not available to her outside of Fruehauf although it made indeed pay much less than her current factory work.

Claimant is 50 years of age and in the middle of her working career. Her loss of future earnings from employment due to her disability is much more severe than would be the case for an older or younger individual. See Becke v. Turner-Busch, Inc., Thirty-Fourth Biennial Report of the Iowa Industrial Commissioner 34 (1979); Walton v. B & H Tank Corp., II Iowa Industrial Commissioner 428 (1981).

Claimant has shown motivation to remain employed despite her chronic pain and difficulties.

Although claimant has a high school education and exhibited average intelligence at the hearing, little was shown to indicate her potential for vocational rehabilitation.

After examination of all the factors, it is found as a matter of fact that claimant has suffered a 30 percent loss of her earning capacity from her work injury. Based upon such a finding, claimant is entitled as a matter of law to 150 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 30 percent of 500 weeks, the maximum number of allowable weeks for an injury to the body as a whole in that subsection.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. On June 19, 1986, claimant suffered an injury to both of her shoulders, ribs and ear which arose out of and in the course of employment with Fruehauf.

3. The work injury of June 19, 1986 was a cause of approximately a two year period of temporary total disability from work.

4. The work injury of June 19, 1986 was a cause of a significant permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no frequent lifting over 25 to 30 pounds or any lifting overhead or above waist level. The work injury is to the left scapular which forms the socket of a ball and socket shoulder joint. This joint has permanent residual effect from the fracture which prevents full range of motion of the shoulder and loss of use to the arm and the shoulder.

5. The work injury of June 19, 1986 and the resulting permanent partial impairment and permanent work restrictions is a cause of a 30 percent loss of earning capacity. Claimant is unable to return to her assembly job that she held at the time of the work injury or to any other work which she has held in the past at Fruehauf. Claimant has a current job as a janitor earning substantially the same income as before is suitable but only a temporary arrangement. Claimant is 50 years of age and has a high school education. Suitable light duty work may be available to claimant outside of Fruehauf but at substantial less money than her factory work at Fruehauf.

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 one hundred fifty (150) weeks of permanent partial disability benefits at the rate of two hundred forty-three and 23/100 dollars ($243.23) per week from December 10, 1987.

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

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

4. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 including the deposition costs of Dr. Smith in the amount of three hundred ninety-seven and 80/100 dollars ($397.80).

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 12 day of May, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. James P. Hoffman
Attorney at Law
Middle Road
Keokuk, Iowa 52632-1066

Mr. Elliott R. McDonald, Jr.
Attorney at Law
P. O. Box 2239
Davenport, Iowa 52809

1402.40, 1803, 2700
Filed May 16, 1988
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH J. PAYNE, Claimant, vs. FROMMELT INDUSTRIES, INC., Employer, and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 718975 A R B I T R A T I O N D E C I S I O N

1402.40, 1803, 2700

In a case where the facts of injury and disability were admitted and the trauma and disfigurement was limited to the left index finger, the disability was compensated as a disability of the left index finger, even though the claimant complained of pain extending into the hand and arm.

The claimant sought further surgery and a change of care to a physician who would perform further surgery, but none of the evidence indicates that further surgery is, in fact, recommended. The evidence showed that surgery presented a significant risk of worsening the claimant's condition. Claimant's request for a change of authorized physicians and/or for authorization for additional surgery was denied.

001369

FILED

MAY 16 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH J. PAYNE,	:	
Claimant,	:	
vs.	:	
FROMMELT INDUSTRIES, INC.,	:	File No. 718975
Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
ST. PAUL FIRE AND MARINE INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Kenneth J. Payne against Frommelt Industries, Inc., his former employer, and St. Paul Fire and Marine Insurance Company, the employer's insurance carrier.

The case was heard and fully submitted at Dubuque, Iowa on December 15, 1987. The record in this proceeding consists of testimony from Kenneth J. Payne and joint exhibits numbered 1 through 28.

ISSUES

Claimant seeks compensation for a 90% permanent partial disability of his left hand based upon an injury that occurred on August 31, 1982. Claimant also seeks alternate medical care from George G. Auer, M.D., and authorization for additional amputation surgery. Claimant also seeks additional healing period compensation for times subsequent to February 20, 1985. He acknowledged payment of all healing period compensation due prior to February 20, 1985. The issues for determination are whether claimant's permanent partial disability is limited to his left index finger or extends into the hand. The second issue for determination is whether claimant is entitled to additional compensation for healing period. The third issue is whether claimant is entitled to have alternate medical care and authorization for additional surgery.

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.

The facts of this case are not in substantial dispute with regard to the events which have occurred.

On August 31, 1982, Kenneth J. Payne's left index finger was smashed while he was operating an automatic grommet machine at the employer's place of business (exhibit 1). A split thickness skin graft of the tip of the finger was performed to repair the damage. Persistent pain, necrosis and osteomyelitis of the tip of the bone developed and an amputation of approximately 1.8 centimeters was performed (exhibit 5).

Claimant continued to be symptomatic and was referred to Bruce L. Sprague, M.D., a hand surgeon at Iowa City, Iowa. Dr. Sprague examined claimant and, on December 1, 1983, performed further surgery to revise the amputation through the PIP joint of the finger (exhibits 9 and 10). The pathology report shows that claimant had a traumatic neuroma (exhibit 15).

Over the following months, Payne continued to have problems with the finger and returned to Dr. Sprague on several occasions. Claimant complained to Dr. Sprague, as he did at hearing, that he has constant pain in his hand at all times and that he is unable to properly grip or hold anything with his left hand. At hearing, claimant stated that he has two extremely sensitive spots. One is on the palm side of the stump and is so sensitive that he is unable to touch anything with it. He described experiencing pains which are like an electrical shock going up his arm. Claimant stated that activities, even such as driving an automobile or a truck, an occupation in which he has recently engaged, are problematic for him due to the condition of the finger and hand.

Claimant testified that he desires to have the remaining stump of the finger amputated so that it would not be in a position where it could be bumped and aggravated. Claimant stated that he has visited with Dr. Auer who has expressed willingness to perform the amputation. Claimant stated that Dr. Sprague had originally indicated he was intending to amputate the finger at the place where it joins the hand, but has since declined to do so.

Claimant testified that he has only one part of the index

finger remaining. He stated that only the finger was caught in the machine and that it did not injure the remaining portion of the hand. Claimant was unable to state whether the symptoms with which he is afflicted have their origin in the finger or elsewhere in the hand.

When claimant returned to Dr. Sprague on June 20, 1984, the report that was issued indicates Dr. Sprague spent a long time discussing the problem with claimant. The report indicates Dr. Sprague felt that, since claimant has had two amputations without a good result from either, a third amputation would not assure relief of symptoms and thát, if it was performed and a neuroma developed in the palm of the hand, claimant would be worse off than he is at the present time. Dr. Sprague stated he was reluctant to consider further revision of the amputation (exhibit 21).

Dr. Sprague last saw claimant on February 20, 1985, at which time he assigned an 85% impairment rating of the left index finger (exhibit 22). In a subsequent report dated November 25, 1985, Dr. Sprague indicated that claimant's condition had not changed since February of 1985 and that he does not expect it to change (exhibit 23).

Exhibit 28 is a typewritten note of May 14, 1986 from Dr. Auer which states:

> Long history of pain in 2 revised amputations.
> Stump of L. index finger is hyper sensitive &
> causes problem with working-appears well healed.
> Etiology of this is questionable - told patient
> would be willing to amputate at M-P joint level, no
> guarantee it will relieve all his pain.

In response to a request from Donald Gordon, claims supervisor with St. Paul Insurance Companies, Dr. Auer made a handwritten response which appears to read:

> Wish I could help you on this problem, but I have
> no other information on this man.
>
> This man had his injury treated elsewhere & was
> operated on elsewhere a few times re his finger &
> the subsequent problem. I saw him on consultation
> for a few minutes on May 14-86.
>
> I suggest you contact the people that did the
> treatment & get their opinion as it would be of
> better judgement than mine, since I saw him only
> briefly.

APPLICABLE LAW AND ANALYSIS

The workers' compensation statutes are to be interpreted broadly in favor of the injured worker, but its beneficient purpose cannot be extended to the point that it contravenes the clear provisions of the statute. Halstead v. Johnson's Texaco, 264 N.W.2d 757, 759 (Iowa 1978).

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).

Where an injury is limited to a scheduled member, the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983). Where an injury is limited to a finger, it cannot be compensated for impairment to the hand. Morrison v. Wilson Foods, I Iowa Industrial Commissioner Report, 224 (1980); Herold v. Constructors, Inc., 271 N.W.2d 542 (Nebraska 1978).

Claimant complained of loss of use of his hand, yet none of the medical information in the case suggests that there is any impairment, abnormality or physical derangement in claimant's left hand, other than, of course, in the index finger. The highest rating given for the index finger is the 85% rating made by Dr. Sprague on February 20, 1985 as shown in exhibit 22. That rating is accepted as correct and claimant is entitled to receive compensation pursuant to the provisions of Iowa Code section 85.34(2)(b). This computes to 29.75 weeks of compensation.

Claimant seeks care from Dr. Auer and authorization for further amputation surgery. The handwritten report from Dr. Auer, which is the most recent and therefore considered to be his best assessment, clearly does not recommend further amputation surgery. When viewed in conjunction with the May 14, 1986 typewritten note, it appears that Dr. Auer is agreeable to performing the amputation if claimant desires it, but when viewed as a whole, it does not appear that Dr. Auer is recommending it be performed. Dr. Sprague's report of June 20, 1984 (exhibit 21) sets forth his reluctance to perform additional amputation surgery due to his concern that a neuroma may develop in the hand. In view of the results of the prior surgeries, his concern is warranted. The assessment made by Dr. Sprague is accepted as being correct and the employer will not be required to provide medical services or healing period for any further amputation.

Section 85.27 of The Code gives the employer the right to

choose the medical care. The record of this case presents no basis for finding that the care which has been given was inappropriate or that care from Dr. Auer would in any way be preferable to the care arranged by defendants in the past or which might be arranged by the defendants in the future, if additional care becomes warranted. Claimant's request for alternate care is therefore denied.

The last reference in the record to claimant being in a recuperative status is found in the report dated January 18, 1984 when claimant was released to return to work effective January 23, 1984 (exhibit 19). There is no basis in the record of this case for awarding further healing period compensation.

Inasmuch as defendants have, by stipulation, paid all healing period compensation due up to February 20, 1985 and have paid 35 weeks of compensation for permanent partial disability, there has, in fact, been an overpayment of 5.25 weeks of compensation for permanent partial disability and no further weekly compensation is due or payable to claimant. The workers' compensation law does not provide for repayment of overpayments, however. Comingore v. Shenandoah Artificial Ice, Power, Heat and Light Co., 208 Iowa 430, 226 N.W. 124 (Iowa 1929).

FINDINGS OF FACT

1. Kenneth J. Payne sustained an 85% loss of use of his left index finger as a result of the injuries he sustained on August 31, 1982.

2. The disability is limited to the left index finger and does not extend into his hand.

3. The medical care that defendants have provided has been reasonable care.

4. The record shows no basis for changing care to Dr. Auer.

5. Further amputation of the remaining portion of the left index finger is not shown by the evidence to be advisable in view of the risk of developing a neuroma in the hand.

6. The record fails to show any time, subsequent to February 20, 1985, when the claimant was medically incapable of engaging in gainful employment due to the condition of his finger.

CONCLUSIONS OF LAW

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

2. Claimant is entitled to receive 29.75 weeks of compensation

for permanent partial disability under the provisions of Iowa Code section 85.34(2)(b), an amount which is less than the amount that has been previously paid voluntarily by the defendants.

3. Claimant is not entitled to recover any additional compensation for healing period under the provisions of Iowa Code section 85.34(1).

4. Claimant has failed to show a basis for changing medical care from that which had been arranged and provided by the defendants.

5. Claimant has failed to show that it is likely that further amputation would improve his condition.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing further from this proceeding as his entire entitlement has already been paid in full.

IT IS FURTHER ORDERED that the employer and insurance carrier retain the right to select and control the providers of medical care in accordance with Iowa Code section 85.27.

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

Signed and filed this 16th day of May, 1988.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Michael J. Schuster
Attorney at Law
318 South River Park Drive
P.O. Box 488
Guttenberg, Iowa 52052

Mr. Greg Egbers
Attorney at Law
600 Union Arcade Building
111 East Third Street
Davenport, Iowa 52801-1550

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEONARD PEARSON, Claimant, vs. IOWA CONCRETE PRODUCTS INC., Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 738738 R E V I E W - R E O P E N I N G D E C I S I O N

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Leonard Pearson, claimant, against Iowa Concrete Products, Inc., employer, and Wausau Insurance Companies, insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an alleged injury sustained July 18, 1983. The matters addressed in file numbers 738738, 783442, 636855 and 814511 came on for hearing before the undersigned deputy industrial commissioner January 27, 1988. The record was considered fully submitted at the close of the hearing. The record in this case consists of the testimony of claimant and Debra Pearson, his wife; and joint exhibits 1 through 20, inclusive.

ISSUES

Pursuant to the prehearing report and order approved January 27, 1988, the issues presented for determination are:

1. Whether there has been a change of claimant's condition to warrant review-reopening since the settlement of April 1985;

2. The extent of claimant's entitlement, if any, to additional permanent partial disability benefits; and

3. Claimant's entitlement to certain medical benefits pursuant to Iowa Code section 85.27.

FACTS PRESENTED

On May 6, 1980, claimant fell off a ladder onto a solid cement floor landing on his left arm and shoulder. Claimant testified he was off work for an extensive period of time, underwent at least three different surgical procedures on his left elbow and hand and returned to work in approximately August 1981 after receiving a settlement on permanent partial disability benefits. On July 18, 1983, while putting a fork on a forklift, claimant's left foot was injured when a fork fell across it. Claimant explained he had two surgical procedures done on his foot during which "hardware" was put in. On December 13, 1984, bilateral carpal tunnel surgery was performed. Defendants agree all three of these injuries arose out of and in the course of claimant's employment.

Claimant testified December 5 was the last day he worked in 1985 and that he had been having trouble with his shoulder throughout the months of November and December 1985. He explained he had been rolling and patching pipe and running a material truck using a pick and shovel. Claimant stated he saw Robb Fulton, M.D., who prescribed pain medication and physical therapy and that he was released to return to work January 31, 1986.

Claimant testified he continues to experience pain in his shoulder, that he has a loss of grip in both hands, and that he is able to reach above his head but not without pain. He acknowledged he is able to perform all of the responsibilities of his job, that he is under no restrictions, and that he fully intends to continue in his employment with Iowa Concrete Products. Claimant relates his pain to the accident of 1980 and admitted he is not now under any current medical treatment for any of these injuries.

Debra Pearson testified she was aware of no problems claimant had with his hands, wrists, shoulder, or left foot prior to his work injuries. She opined claimant tends to "baby" himself and put restrictions on himself as a result of perceived pain. She did not describe these symptoms of pain as constant or continual but rather testified that claimant "feels pretty good most generally."

X-rays taken following claimant's July 18, 1983 foot injury did not reveal evidence of fracture but showed diastasis of the 4th and 5th metatarsals. William Boulden, M.D., operated on claimant November 9, 1983 for repair of this condition and, when claimant did not recover as expected, performed an open reduction and internal fixation of metatarsal diastasis and fusion using 3 AO screws to solidify the fixation. Claimant was given a 10 percent permanent partial impairment rating of the left foot from Dr. Boulden on June 6, 1984. Claimant was also given a 45 percent permanent partial disability rating due to the injury from Dr. Charles Parker, Podiatrist, on November 1, 1984.

Claimant has had multiple operations on his left upper extremity since his fall from the ladder in May 1980, including two left carpal tunnel releases, two cubital tunnel compressions and a left lateral epicondylitis release. On July 17, 1981, claimant underwent surgery by J.D. Bell, D.O., for a nerve entrapment syndrome on the left. Further surgery was done October 19, 1982 by Peter D. Wirtz, M.D., for tendon removal at the left elbow. Arnis Grundberg, M.D., performed an ulnar nerve exploration and transfer at the elbow and in the wrist area. Dr. Wirtz released claimant to return to work opining claimant had no permanent partial impairment. Dr. Grundberg gave claimant a five percent permanent partial impairment rating of the upper left extremity.

Claimant was evaluated February 10, 1987 by Robert Breedlove, M.D., who concluded:

> I feel that the 10% permanent partial impairment of the left foot is appropriate at this point considering the patient's inability to walk long distances and the difficulty he has with kneeling and bending forward which is required in part of his job. I would rate the permanent partial impairment of his left shoulder at 7% of the left upper extremity. I base this on the fact that he has 120 degrees of abduction for a 3% permanent partial impairment. He has 150 degrees of forward flexion but he also has moderate pain for the last 60 degrees and would rate that at 2% permanent partial impairment. Internal rotation 1% and extension 1%.

(Joint Exhibit 8, page 5)

Dr. Breedlove recommended:

> Treatment for the patient's left foot pain would include obtaining Rockport shoes in order to better cushion his feet when he is walking. They do not make steel toed Rockport shoes, so I feel Sorbothane full sole inserts would be applicable for his work boots.

(Jt. Ex. 8, p. 5)

With regard to claimant's alleged December 1985 injury, Dr. Breedlove writes:

> Mr. Pearson states that either in November or December 1985 he was unloading frozen sand off of a truck using a pick and shovel and then began experiencing left shoulder pain. On further

questioning, the patient denies having had left shoulder pain previous to this accident. He did mention the multiple carpal tunnel releases and ulnar nerve releases. In reviewing the records that I have available from December 13, 1985, by Dr. Fulton, he states that Mr. Pearson had pain in the left shoulder in the fall of 1984. He also states that in 1983 following an accident at work in which he fell off of a ladder onto the concrete floor landing on his left shoulder he did experience some difficulty with pain.

(Jt. Ex. 8, p. 3)

Claimant was seen for evaluation February 6, 1987, by Jerome G. Bashara, M.D., who concluded:

> In reviewing the history and all of the records on this patient, it is my opinion that the patient has a 15% permanent partial physical impairment of his left upper extremity. I believe that 10% of this impairment rating is related to an injury which he sustained at work on May 10, 1980 to his shoulder and elbow.
>
> I believe that 5% of the above 15% rating is related to repetitive trauma to his wrist which he sustained at work over the next several year period resulting in the development of a carpal tunnel syndrome with subsequent surgery.

(Jt. Ex. 6, p. 1)

Dr. Bashara makes no note of any alleged December 1985 injury.

Claimant saw Robb Fulton, D.O., November 27, 1985 for pain in the left shoulder radiating to the left elbow. Dr. Fulton notes the onset of pain was in 1983 "following an accident at work in which he fell off a ladder onto concrete floor on his left shoulder." Dr. Fulton found "tenderness to palpation of left shoulder muscles in general and on the tendon of the long head of left biceps in particular. There is significant weakness of left grip, forearm, triceps and biceps; however, range of motion is essentially normal." (Jt. Ex. 8, p. 2)

APPLICABLE LAW

Iowa Code section 86.14(2) provides:

> 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.

A party seeking a review-reopening of an award or agreement for settlement must demonstrate by a preponderance of the evidence, a change of condition subsequent to an initial award or agreement. Stice v. Consolidated Ind. Coal Co., 228 Iowa 1031, 1035, 291 N.W. 452 (1940). In Stice, the Iowa Supreme Court stated that the Act's review-reopening provisions provide no basis for concluding that "the commissioner is to re-determine the condition of the employee which was adjudicated by the former award." Id. at 1038.

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

An agreement for settlement was filed in this case January 29, 1985 under which claimant was paid for 22 1/2 percent of the left foot together with all reasonable medical expenses and healing period benefits incident thereto. As a scheduled injury, disability to claimant's foot is evaluated by the functional method. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983). The medical evidence submitted shows no higher permanent partial impairment rating currently than the amount paid in disability on settlement. Claimant has, therefore, failed to establish a change of condition with respect to the impairment of his left foot and is entitled to no further weekly benefits. Claimant has, however, established his entitlement to the Rockport shoes and Sorbothane full sole inserts for his work boots as supplies for the reasonable treatment of the injury pursuant to Iowa Code section 85.27.

FINDINGS OF FACT

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

1. Claimant sustained an injury arising out of and in the course of his employment July 18, 1983 when a fork fell across his foot.

2. Claimant filed an agreement for settlement as a result of the work injury under which he was paid 22 1/2 percent permanent partial disability benefits of the left foot together with all reasonable medical expenses and healing period benefits incident thereto.

3. Medical evidence shows no higher permanent impairment rating currently than the amount paid in disability for claimant's scheduled injury.

4. There has been no change of claimant's condition since the agreement for settlement.

5. Rockport shoes and Sorbothane full sole inserts are supplies for the reasonable treatment of claimant's work injury to which claimant has established his entitlement.

CONCLUSIONS OF LAW

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

Claimant has failed to meet his burden of proof that there has been a change of condition since an agreement for settlement was filed.

Claimant has established his entitlement to Rockport shoes and Sorbothane full sole inserts as supplies for the reasonable treatment of the work injury.

ORDER

THEREFORE, IT IS ORDERED:

Claimant is entitled to no further weekly benefits.

Defendants shall reimburse claimant for the cost of Rockport shoes and Sorbothane full sole inserts.

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

Signed and filed this 26th day of February, 1988.

Deborah A. Dubik

DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. Barry Moranville
Attorney at Law
974 73rd Street, Suite 16
Des Moines, Iowa 50312

Mr. Marvin Duckworth
Attorney at Law
Terrace Center, Suite 111
2700 Grand Avenue
Des Moines, Iowa 50312

001386

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONNA M. PETERS, Claimant, vs. ELKS LODGE #84, Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	:	FILED JAN 27 1988 File No. 526221 IOWA INDUSTRIAL COMMISSIONER A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision awarding claimant 50 percent permanent partial disability benefits.

The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits 1, 2, 4, 5, 6 and 7; and defendants' exhibits A through K. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

I. Whether claimant was required to show a change of condition to receive further benefits.

II. Whether the award of 50 percent permanent partial disability was supported by the evidence.

REVIEW OF THE EVIDENCE

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

Briefly stated claimant was 55 years old at the time of the hearing. She worked for Elks Lodge #84 at Burlington, Iowa, as a waitress. Her education is limited to the eighth grade and

she has worked as a cook, a waitress, and has done factory sorting work all her adult life.

On December 5, 1978, while moving a table, claimant suffered a back injury arising out of and in the course of her employment. She experienced pain and sought medical attention. She attempted to return to work but found she could no longer do so because of difficulty in bending, standing, sitting and lifting. She had no such difficulty prior to December 5, 1978. A memorandum of agreement was filed February 8, 1979. In 1980 she received 50 weeks of permanent partial disability benefits.

Claimant stated she had no groin pain in 1980, but now has such pain. Her pain now radiates into her side and legs. She testified her back pain is worse now than before. She disclosed that in 1983 she was bedridden at least one time per month because of back pain. In 1984 she began wearing a back brace. She states she cannot lift more than five pounds and cannot sit or stand more that one-half hour at a time. She states she is not physically able to look for a job and has pain daily.

Frank I. Russo, M.D., examined claimant and in his report of June 13, 1979 stated:

> Straight leg raising elicits complaints of hamstring pain at about 75° bilaterally. Range of motion of the back is limited to about 75% of normal in all planes of discomfort at these extremes of motion but no gross spasm or splinting. This woman is able to walk on her heels and toes without significant difficulty....
>
> IMPRESSION: 1) Chronic low back pain, probably secondary to musculoligamentous strain with subsequent deconditioning of the low back muscular and possible mild underlying degenerative disc disease but no evidence of acute lumbar radiculopathy.

In August of 1979 Dr. Russo added:

> She shows some very minimal limitation in motion, but complains of pain at the extreme of straight leg raising which elicits complaints of back pain at about 85° bilaterally.... At the present time I am uncertain how legitimate all this woman's complaints are. I quite honestly don't see any hard abnormal physical findings. The limitations -. and complaints are purely subjective.... Quite frankly I think I am giving this woman the benefit of the doubt at this point.... [Q]uite personally,

> at this point, I am tending to feel further and further that her symptoms or symptom complex may be psychologically fueled at any rate, if not entirely caused by psychological causes.

Burton Stone, M.D., examined claimant and reported on February 29, 1980 that:

> [X]-rays did not show any evidence of any degenerative disc disease....
>
> ....
>
> ...She was able to flex 40° and complained of a great deal of pain as she flexed....
>
> ....
>
> ...I am really at a loss to explain her pain and certainly she does not have any objective findings to support this.

Dr. Stone also suggested to claimant that her work as a waitress would aggravate her condition and she should seek other work.

J. Nicholas Fax, Jr., M.D., orthopedic surgeon, stated in a report of January 14, 1981, that:

> She can bend over and get down to the lower third of her tibias and come back up quickly and easily without hesitation. She leans back and to the right and the left through a full range of motion which she also does without hesitation. She curiously seems to have tenderness to palpation everywhere in her whole lumbar spine and lower thoracic spine area beginning at the buttock area and going clear up to the lower third of her ribs. It even hurts when I press on rolls of fat. She walks on her heels and toes without difficulty and with good balance. Ankle jerks and knee jerks are equal and brisk bilaterally. There is no toe or ankle extensor weakness. She has normal dorsal pedal pulses bilaterally....
>
> Knee-chest position is possible through a full ROM with mild discomfort in the back. SLR is possible to almost 90° bilaterally while supine with the only complaint being some hamstring tightness. Cross-leg test causes some pulling in the groin muscles but no complaints of back pain. Hip rotation is negative bilaterally.

....

IMPRESSION: 1. Chronic lumbosacral strain with possible chronic disc degeneration but no evidence of significant neurological abnormality.

He concluded, "I feel this patient's problem is going to be a permanent one."

G. K. Reschly, M.D., opined on March 30, 1983 that:

This patient has had persistent continual low back pain.... Her activities have been limited to very light housework and no heavy lifting. The patient having had pain for four or more years, has had the usual types of depression that associated with chronic pain syndrome.... I feel that this patient is probably going to have continual chronic pain and unfortunately there is no great deal to totally alleviate this pain....

On June 29, 1984 Dr. Reschly disclosed that:

I feel that this is going to be a chronic problem and a problem that is not going to be curable. As time goes by I feel this lady is going to have increased problems with her back and pain due to inflammatory degenerative changes that usually occur with years.

Michael Murphy, M.D., reported on July 2, 1984 on his examination of claimant:

Lumbar range of motion is as follows:

Forward flexion: 80 degrees extension, 15 degrees. Lateral bending to the right: 15 degrees. Lateral bending to the left: 20 degrees. Rotation to the right: 25 degrees. Rotation to the left: 25 degrees.

Hip range of motion:

Flexion: 120 bilateral, full extension. There is no limitation of rotation.

Passive ranges of motion:

Straight-leg raising: Negative bilateral.

Crossed-leg testing: Positive on the left, negative on the right.

....

X-rays: X-rays of the lumbar spine are obtained. These show vertebral bodies of normal height. There is some mild L5-S1 disk space narrowing. There is no evidence of spondylolysis or spondylolisthesis on these films. This individual has a scoliosis which is about 8-10 degrees mildly convex to the right, with the apex appearing to be at about the T-11 level. This may well be positional. There is no rotatory component to this scoliosis. Her pedicles are well-visualized.

IMPRESSION:

1. Chronic lumbosacral spine strain.

....

COMMENT:

This individual's examination is characterized by complaints of stiffness of the joints of the lower lumbar region, hips, and feet. Objectively, she does have some mild limitation of motion of the lumbar spine, as noted in the physical examination. Any work which this individual would do would have to allow for the ability to change positions frequently and not stay in either a seated/standing position for greater than a half-hour at a given time.

Norman Logan, M.D., Winfred H. Clarke, M.D., and Faulkner A. Short, M.D., orthopaedic surgeons, found in September of 1984 that:

> She walks without difficulty, equally weight bearing. There is no limp or list, and she can readily walk on her toes and heels without difficulty. She does 75% of a squat and rise, but can get to the floor on her knees and raise herself. There is no evidence of scoliosis. A normal dorsal kyphotic curve is present, and the lumbar lordotic curve is felt to be increased. Her spinal posture is fair only.
>
> She can bend forward approximately 60 to 70 degrees with her fingertips 14 inches from the floor. Her lumbar curve flattens, and in fact straightens but does not reverse. There is no catch upon straightening. She can bend backwards 20 degrees. She can bend to the right 30 and to

the left the same, and rotate to the left and right 30 degrees.

Muscle strength in the lower extremities is considered normal without isolated evidence of weakness, but there is giveway on testing in the right lower extremity, and has a cogwheel effect which is voluntary. She has strong gluteals and the abdominal muscles are fair only.

Passive hip rotation is full. Bent leg testing is to 120 degrees bilaterally, straight leg raising is 80 degrees bilaterally, and she has negative dorsiflexion, plantar flexion....

....

She can fully extend both knees, while sitting, to 180 degrees, and bring her fingertips within 10 inches of the toes.

In our opinion there is a functional disturbance present manifested by mild interference and inconsistencies on range of motion. Also it is felt there is a functional problem present.

Drs. Logan, Clarke and Faulkner concluded that "the patient's symptoms are out of proportion with the physical findings," and that "if she does have impairment, it is on a subjective basis only."

Claimant underwent a psychological evaluation in 1979. George S. Laird, Jr., Ph.D., concluded that claimant "has a strong sense of right and wrong, and lives by some pretty hard and fast rules. She is conscientious and concerned.... and it is felt that [claimant] is well motivated for return to her previous employment."

None of the medical evidence contained a rating of impairment. The parties stipulated that claimant's weekly rate of compensation is $52.28.

APPLICABLE LAW

Under Caterpillar Tractor Company v. Mejorado, 410 N.W.2d 675 (Iowa 1987), a claimant is not required to prove a change in condition upon review-reopening based upon a memorandum of agreement. Claimant's proper burden is to prove that increased disability for which no compensation has been paid was caused by the injury. Also see Chamberlin v. Ralston Purina, Appeal Decision filed October 29, 1987, File No. 661698; Shoemaker v. Adams Door Company, Appeal Decision filed August 30, 1985, File No. 653861.

A memorandum of agreement settles two issues: That an employer-employee relationship existed; and that the injury arose out of and in the course of employment. Freeman v. Luppes Transport Company, Inc., 227 N.W.2d 143, 149, 150 (Iowa 1975).

Iowa Code 86.13 (1977) states:

> If the employer and the employee reach an agreement in regard to the compensation, a memorandum thereof shall be filed with the industrial commissioner by the employer or the insurance carrier, and unless the commissioner shall, within twenty days, notify the employer or the insurance carrier and employee of his disapproval of the agreement by certified mail sent to their addresses as given on the memorandum filed, the agreement shall stand approved and be enforceable for all purposes, except as otherwise provided in this and chapters 85 and 87.
>
> Such agreement shall be approved by said commissioner only when the terms conform to the provisions of this and chapter 85.
>
> Any failure on the part of the employer or insurance carrier to file such memorandum of agreement with the industrial commissioner within thirty days after the payment of weekly compensation is begun shall stop the running of section 85.26 as of the date of the first such payment.

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 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

This case is a review-reopening proceeding with a prior memorandum of agreement filed with the industrial commissioner. A memorandum of agreement merely establishes an employer-employee relationship between claimant and defendant, and establishes that her injury arose out of and in the course of her employment. It did not establish the extent of her disability. Thus, claimant was not required to show a change of condition in order to receive further benefits.

Doctors Logan, Clarke and Short concluded that claimant's symptoms were "out of proportion" to their physical findings. Dr. Stone and Dr. Russo also could offer no physical reason for her continued pain. However, the testimony of Dr. Laird showed that claimant's psychological test revealed her to be "conscientious" and "well motivated for return to her previous employment." Her testimony throughout the record is consistent as to the frequency and extent of her pain. The evidence is uncontroverted that her back injury is permanent.

The extent of that disability is determined by several factors. Claimant is 55 years old and has an eighth grade education. Both claimant's age and education limit her ability for retraining. Her impairment restricts her from working at a job that would require her to remain in either a standing or seated position for longer than one-half hour at a given time. She cannot bend, stoop or lift. She has received medical advice that her work as a waitress would aggravate her condition. Her work experience is limited to jobs that involve standing or sitting for long periods of time, as well as bending, lifting, or stooping. Her psychological test shows her motivation to be good. She attempted to return to her job but found she could not perform the duties she did previously. She is periodically bedridden. Defendants, in their appeal brief, acknowledge that claimant suffers from "a pronounced disability," and has an "extremely negative employability profile."

Based on all factors, claimant is found to have an industrial disability of 50 percent.

FINDINGS OF FACT

1. Claimant was 55 years old at the time of the hearing.

2. Claimant has only an eighth grade education and has been employed solely at manual labor jobs.

3. Claimant started working as a waitress for Elks Lodge #84 in Burlington in August 1976.

4. On December 5, 1978 claimant was working as a waitress for Elks Lodge #84 and sustained an injury arising out of and in the course of her employment.

5. Claimant sustained permanent partial impairment to her body as a whole as a result of her back injury on December 5, 1978.

6. In 1980 defendants paid claimant 50 weeks of permanent partial disability benefits.

7. Since 1980 claimant's back condition has significantly deteriorated.

8. Since 1980 claimant's back condition has not improved to the extent anticipated.

9. Claimant currently has a low back problem with a lifting restriction, and has difficulty bending, standing, sitting, and walking.

10. Claimant wears a back brace and is often bedridden.

11. Claimant is not able to sit or stand in one position longer than one-half hour.

12. Claimant cannot now perform the duties of her job.

13. Claimant is not a malingerer.

14. Claimant's stipulated weekly rate of compensation is $52.28.

15. Dr. Reschly was and is a physician authorized by Aetna to treat claimant for her injury of December 5, 1978.

16. The contested medical bills in this case are causally connected with claimant's injury of December 5, 1978.

17. Claimant's industrial disability is 50 percent as it relates to the body as a whole.

CONCLUSIONS OF LAW

Claimant was not required to show a change of condition on review-reopening based on a memorandum of agreement.

Claimant's injury arose out of and in the course of her employment.

As a result of her injury of December 5, 1978 claimant has a permanent partial disability of 50 percent.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant two hundred fifty (250) weeks of permanent partial disability benefits at a rate of fifty-two and 28/100 dollars ($52.28) per week from January 26, 1980.

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

That defendants shall reimburse claimant in the amount of one hundred eighty-five and 42/100 dollars ($185.42) for medical bills.

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

That defendants are to be given credit for benefits previously paid.

That defendants are to pay the costs of this action.

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

Signed and filed this 27th day of January, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. William Bauer
Attorney at Law
Sixth Floor, Burlington Bldg.
Burlington, Iowa 52601

Mr. Larry L. Shepler
Attorney at Law
111 East Third Street
600 Union Arcade Bldg.
Davenport, Iowa 52801-1550

That the type of permanent disability is industrial disability to the body as a whole.

That the commencement date for permanent partial disability benefits is August 29, 1983.

That the rate of compensation in the event of an award is $219.20 per week.

That all requested medical benefits have been or will be paid.

That defendants paid claimant 75 weeks of permanent partial disability benefits prior to hearing in the total amount of $16,440.00 and that defendants are entitled to a credit for this amount in the event of an award of permanent partial disability benefits.

That defendants claim no credit for benefits paid under an employee nonoccupational group plan.

That there are no bifurcated claims.

ISSUE

The sole issue presented by the parties for determination at the time of the hearing was: whether claimant is entitled to permanent partial disability benefits, and if so, the nature and extent of benefits.

APPLICAPLE LAW AND ANALYSIS

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

Milton L. Hanson testified that he has been a practicing attorney in Avoca, Iowa since 1962. Avoca is 12 miles from Harlan, 18 miles from Atlantic and 32 miles from Council Bluffs. The witness related that he met claimant as a client in 1966. She became his full-time secretary in December of 1968. Her work has improved over the years, she was given more and more responsibilities and she has received pay increases and bonuses for her work. Hanson stated that he does not provide health insurance, life insurance or a pension or profit sharing plan but claimant does accumulate sick leave for which she would be paid if she leaves his employment without using it.

Hanson testified that claimant actually serves as a paralegal or legal assistant in some matters such as opening estates, preparing tax returns and drafting a number of legal documents. He said that she also does all of the office accounting and bookkeeping. He confirmed that the quality of her work is

excellent or better. Prior to her injury, she enjoyed good health and probably did not lose ten days from work from the time she started. Since she has returned to work she does not appear to feel good. She now takes a 25 minute break in the morning, whereas before the injury she took a ten minute break.

Prior to this injury, claimant worked a lot of overtime during tax season for which she was paid overtime and received some bonuses. She did not work any overtime in 1984, 1985 and 1986 and Hanson did not pay her any bonuses during these years except for her Christmas bonus. Hanson stated that he quit paying bonuses in 1983 because he increased claimant's regular pay and also because he did not have the overtime hours for her to work after 1983. He maintained that it was a personal decision not to pay a bonus after 1983 which was based purely on office economy. Hanson stated that claimant had worked a little overtime in 1987. The witness reiterated that he has continued to increase her regular pay over the years and that he has never reduced her compensation due to this injury.

Hanson stated that he has no intention of terminating claimant. On the contrary, he hopes that she will continue to work for him indefinitely or at least for the next seven years until she reaches retirement age at age 65. He felt that based on her current physical condition that she can do it. He plans to continue to increase her compensation in future years.

Claimant was born October 8, 1928. She was 54 years old at the time of the injury and 58 years old at the time of the hearing. She is married and has two adult children. She graduated from high school and also from Iowa Western Community College (IWCC) with an associate degree after three years of night school. In 1981, claimant received the Professional Legal Secretary Certificate (PLS) from the National Association of Legal Secretaries (NALS) after studying intensively for one year and taking a seven part examination. Past employments include a variety of clerical and secretarial jobs in which claimant did well and was often promoted. Exhibit 27 is a salary history from her employment with Hanson from 1975 through 1986 which was prepared by claimant from her own records. Claimant testified that she always voluntarily worked overtime, received overtime pay and was also paid bonuses until 1984. Claimant acknowledged that she was never required or obligated to work overtime, but she did it because the work needed to be done. Claimant avers that exhibit 27 illustrates her overtime and bonus pay and further verifies that she did not receive any of it in 1984, 1985 and 1986. Claimant contended that the work was there but she was not capable of doing it due to her injury because she was not able to sit and concentrate that long anymore. She further stated that she is too fatigued due to the cervical and lumbar damage in her back.

On February 23, 1983 while at work, claimant rolled her chair back from her desk. The roller caught in the floor mat and she fell over backward. She struck her back against the back of the chair. The whole chair went over backward and her whole body went with it. She later developed pain in her lumbar spine that radiated down into her left leg. She also complained of pain in her left shoulder and neck.

Approximately six weeks after the injury occurred, she went to see E. John Welbes, D.C., on April 6, 1983. Dr. Welbes recorded marked spasms of the lumbosacral musculature bilaterally and sharp pain in the lower back on flexion and extension (Ex. 11).

Then, approximately two months after that, she saw Maurice P. Margules, M.D., a neurosurgeon on June 12, 1986 (Ex. 12). Electromyographic and nerve conduction studies on both the left upper and left lower extremities were within normal limits (Ex. 25, page 2). Dr. Margules hospitalized claimant for additional diagnostic tests from June 27, 1983 to July 3, 1983. She received a cervical and lumbar myelogram as well as chest, pelvis and lower spine x-rays (Ex. 25).

Claimant was again hospitalized for surgery by Dr. Margules from July 7, 1983 to July 16, 1983 (Ex. 26). The admitting diagnosis was "Herniated lumbar disc, L4-L5 interspace, LEFT, due to trauma sustained in an accidental fall while at work on February 23, 1983. Internal derangement of the LEFT shoulder due to trauma sustained as in #1 above." (Ex. 26, p. 2).

On July 8, 1983 Dr. Margules performed an intralaminal chymopapian injection at L-4, L-5 (Ex. 26, p. 4).

While claimant was hospitalized Dr. Margules requested Ronald K. Miller, M.D., to examine her left shoulder. Dr. Miller saw claimant again on August 24, 1983. Dr. Miller thought that her left shoulder would improve and if it did not she could return to see him in six weeks (Ex. 18).

Dr. Margules released claimant to return to work on August 15, 1983 (Ex. 12). Claimant testified that she returned to work full time on August 29, 1983. She has continued to work full time ever since. Dr. Margules wrote on November 17, 1983:

> Mrs. Peters was evaluated in this office on the 31st of October 1983, at which time, her condition was found to be progressing satisfactorily. As you know, the patient has returned to work and is working daily. The patient experiences no major problem with her lumbar region and lower extremities but still has residual pain at the level of the Left shoulder which in our opinion is the result of an internal derangement of the Left shoulder joint

due to trauma of February 23, 1983. No specific treatment is recommended at this time for the Left shoulder.

(Ex. 14)

Claimant saw R. D. Harris, M.D., a personal physician, concerning her left shoulder on September 23, 1983 (Ex. 16). Dr. Harris later wrote:

> It is felt that she has muscle soreness and tenderness of the posterior cervical, trapezius, and rhomboid muscle areas extending up into the attachment of these muscles at the base of the skull. This pain has been present since the injury and certainly probably stems from the injury and the fact that she has cervical disc. Also this injury probably has aggravated her pre-existing degenerative arthritis of the cervical vertebrae, however, this is difficult to prove.

(Ex. 17)

On October 2, 1984, Dr. Margules reported "It is our opinion, at this time, that Mrs. Peters has a partial permanent physical disability which is rated at 15% of the body as a whole. This is to cover both the injury to the lumbar spine and her Left shoulder." (Ex. 15).

Claimant saw Dr. Harris about her neck again on October 28, 1985 and he reported as follows on November 6, 1985:

> Marian Peters was seen in our office on Oct. 28, 1985 for severe neck pain due to an accident at work on February 23, 1983. Examination revealed significant muscle spasm in the trapezius area especially on the left. She was given Soma 350mg qid to take for relief of the spasms.

(Ex. 20)

Claimant's counsel wrote to Dr. Margules for further clarification about claimant's neck (Ex. 21). Dr. Margules then reported as follows:

> This is in answer to your letter of August 12, 1986 concerning Mrs. Marian Peters who was under our care from June 6, 1983 to June 21st, 1984. Because of the complaints of pain in the cervical spine, a Myelography was performed during the admission of June 27, 1983 covering the cervical region. It was then determined, during the Myelography of June 28,

1983, that the patient showed evidence of posterior marginal arthritic spurring and disc degeneration, maximally involving the C5-C6 and C6-C7 interspaces.

At this time, the patient complains of minimal to moderate pain at the level of the cervical spine which, in our opinion, does not require any specific treatment.

It is therefore obvious from our previous evaluation, that the patient presented evidence of pre-existing degeneratvie cervical disc disease prior to the initial trauma of February 23rd, 1983.

We do not believe that the patient had sustained an aggravation of this pre-existing condition which requires any specific treatment at this time.

(Ex. 22)

Claimant received an Iowa Code section 85.39 examination from Behrouz Rassekh, M.D., on December 10, 1986. Dr. Rassekh summarized claimant's condition by a report dated December 15, 1986 in the following words.

At the present time, she has no radicular pain. On examination, examination of the head is normal. Neck is supple. She has no spasm of the cervical musculature. The cervical spine motion is normal for her age but at maximum extension, she complains of some discomfort in posterior cervical region. She is able to touch her chest with her chin. Lateral motion of the neck is free. Examination of upper and lower extremities has normal tone. Motor examination is normal. She has well-healed scar of lumbar laminectomy. Antiflexion of spine at 85° produced some discomfort. Straight-leg raising at 75° to 80° produced some discomfort also, but no radicular pain.

Based on my examination, the patient shows good recovery from the previous chymopapain injection. She has minimal residual discomfort in lumbar region. As far as the cervical spondylosis is concerned, I do not find any clinical evidence of being symptomatic or need of further treatment. Therefore, although she may have aggravation of cervical spondylosis following injury, I do not find any evidence of aggravation or permanent disability as result of trauma at present time.

(Ex. 23)

Dr. Rassekh further clarified his position by a follow-up letter on November 20, 1986 by stating:

> In answer to your letter dated December 16, 1986 pertaining to Marian Peters, my statement of no partial permanent disability was related to only the cervical spondylosis of the patient and did not imply that Ms. Peters did not have other disability.
>
> As far as amount of partial permanent disability to her low back, I would defer that determination to Dr. Margules; but, would concur with his determination of disability to her low back.

(Ex. 24)

The following is a summary of the workers' compensation benefits paid to claimant.

TYPE OF PAYMENT	PERIOD	WEEKS	AMOUNT
Temporary Total Disability	6-27-83 to 8-14-83	7	$ 1,534.40
Temporary Partial Disability	8-15-83 to 8-28-83	2	176.45
Permanent Partial Disability	8-29-83 to 2-05-85	75	16,440.00
	TOTAL		$18,150.85

(Ex. 9, p. 2)

Claimant testified that currently she tires easily. She has lost stamina and endurance. She cannot type for long periods. She has frequent and severe pain from her left shoulder to her left skull which she never had before and which limits her movements. Even though the doctor said her degenerative disc disease predated the injury she, nevertheless, had no trouble with it until after the injury. The pain sometimes limits her concentration and causes her to make errors.

Claimant testified that she cannot squat. She must sit on a chair to file in the lower file drawer. She cannot sit or stand for very long, possibly for only 15 to 20 minutes, and then she has to move around. Claimant said she can only lift 20 pounds now, but had no weight limit prior to this injury. She has pain and limitation of motion in her left leg, hip, neck, shoulder and lower back.

Claimant testified that she is making $10.60 per hour. In her opinion, however, she should be earning $11.60 per hour. She attributed her loss of income to the fact that she has not worked overtime and received bonuses as in former years and also, because her pay increases had not been as large as they used to be. Claimant stated that she earns $20,600.00 per year,

but feels that her financial loss is $3,000.00 per year. She feels she should have earned $23,600.00. She maintains that she has been paid less because she is not as good or as productive as she was before the injury. Claimant said that she wants to work until age 65, but does not know if she will be able to do it or not due to her limitations of pain while typing and performing desk work and her lack of concentration. It takes her much longer to get ready for work in the morning and she is exhausted at the end of the day when she arrives home at night. She plans to continue with Mr. Hanson.

Claimant calculated and submitted an estimate of what she believed she should be earning:

HOURS	TYPE OF HOURS	RATE	TOTAL
1,950.00	Regular Hours	$11.60	$22,620.00
46.92	Overtime Hours at regular rate	11.60	544.27
32.78	Overtime Hours at overtime rate	17.40	570.37
		TOTAL	$23,734.64

(Ex. 8, interrogatory no. 23)

Claimant's income tax returns show that claimant received a salary increase in every year from 1981 through 1986, except in the year 1983.

EXHIBIT	YEAR	INCOME
1	1981	$15,782.80
2	1982	17,856.40
3	1983	17,361.53
4	1984	18,476.25
5	1985	19,207.52
6	1986	19,938.75

In 1983; claimant also received workers' compensation benefits that were not taxable and are not set out above (Ex. 9, p. 2).

Claimant admitted and it appears in the medical reports that after 1982 claimant had a number of personal and family problems at home to cope with in addition to doing her job at work. Her husband suffered a stroke. He retired and receives income from the Iowa Public Employees Retirement Systems (IPERS) and social security. Claimant's married daughter became quite ill and was hospitalized in Council Bluffs. Claimant endeavored to spend as much time with her as possible while she was in the hospital. Claimant and her husband were appointed legal guardians of their

grandchild and cared for the grandchild in their home after the daughter became ill. Claimant also granted that she likes to and does play golf with her husband.

Comparisons were made with how much claimant would earn at other jobs and how her income compared with other persons with the same general legal secretarial qualifications (Ex. 28). It was generally agreed that these earnings were available to persons working in larger cities. Claimant testified, however, that she had no intention of applying for other employment. She stated that she intended to continue working for Hanson at Avoca, Iowa until her anticipated retirememt in approximately seven years at age 65.

Lyle Peters, claimant's husband, testified that he suffered a stroke in 1982 which affected his right side. He acknowledged that he receives income from IPERS and social security and that he is also dependant upon his wife's salary. He keeps house and watches the grandchild while claimant works and is gainfully employed. He corroborated that prior to the injury claimant had no problems with her back, neck or shoulder. Since the injury, claimant has suffered pain and has to limit her activities. Now she has trouble getting up in the morning. At night she is so tired she hurts. She used to go to work early and stay late, now she can't do it anymore. She used to work overtime but does not do that anymore.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 23, 1983 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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 operative phrase in industrial disability is loss of earning capacity. Ver Steegh v. Rolscreen Co., IV Iowa Industrial Commissioner Reports 377 (1984).

Claimant was age 54 at the time of the injury and age 58 at the time of hearing. Retirement in seven years at age 65 was mentioned more than once at the hearing. The industrial commissioner commented as follows in Becke v. Turner-Busch, Inc., Thirty-fourth Biennial Report of the Industrial Commissioner, 34, 36 (1979).

> It is held that the approaching of later years when it can be anticipated that under normal circumstances a worker would be retiring is, without some clear indication to the contrary, a factor which can be considered in determining the loss of earning capacity or industrial disability which is causally related to the injury.

In this case, however, it should be considered that claimant may need to work to support herself and her disabled husband. Claimant stated that she planned to work until age 65. Hanson said that he wanted her to continue to work for him until then. Claimant said she had no intention of changing jobs. Claimant also testified that she had been making contributions to an individual retirement account over the years for her retirement.

In the area of education and qualifications claimant is certainly a high achiever. She attended that area community college and received an associate degree and completed the requirments to obtain the PLS certificate. Annually claimant attends tax and secretarial continuing education seminars. Claimant is probably one of the best educated and most highly qualified legal secretaries in her area. In fact, she actually

performs as a paralegal or legal assistant in many matters in the Hanson Law Office operations. These matters, of course, improve her employability and at the same time, tend to be a consideration that would tend to limit her industrial disability. Hebensperger v. Motorola Communications and Electronics, Inc., II Iowa Industrial Commissioner Report 187 (Appeal Decision 1981). Presumably, a person would rather be gainfully employed than receive workers' compensation benefits and likewise a person will be better off in the long run through gainful employment than through the receipt of workers' compensation benefits.

Claimant is fully able to perform her job. She testified to certain self determined limitations such as not lifting over 20 pounds, not stooping or bending, not engaging in prolonged standing or sitting and sitting to file in the lower file drawers. However, these are self determined limitations. None of the doctors, in particular Dr. Margules, her treating physician, issued any restrictions or imposed any limitations whatsoever on claimant's activities. Claimant testified that she is able to modify the job to blend in with her limitations, including her lack of concentration and stamina. There was no evidence that any other legal secretarial job would be foreclosed to claimant due to what she considers to be her physical limitations. Michael v. Harrison County, Thrity-fourth Biennial Report of the Industrial Commissioner 218, 220 (Appeal Decision 1979). She could suffer reduced earnings if it became necessary to leave her employment with Hanson and to compete in a metropolitan job market with younger persons that have not sustained a previous back injury.

In one situation, however, it was determined that when claimant returned to her former employment without loss or earnings that there was no industrial disability. Mason v. Armour-Dial, Inc., I Iowa Industrial Commissioner Reports 227, 229 (1981).

At the same time there is no 100 percent assurance or guarantee that Hanson will be able to provide remunerative employment for claimant until she is age 65. Rohrberg v. Griffin Pipe Products Co., I Iowa Industrial Commissioner Reports 282 (Appeal Decision 1981). There are an infinite number of reasons that a solo law practitioner might cease to practice law. If claimant were forced to travel to Omaha or Council Bluffs to find employment, it would appear that claimant could not earn as much, salary wise, as she is now being paid by Hanson, even though she might acquire additional fringe benefits (Ex. 28). In addition, claimant would have the time, expense and inconvenience of commuting to and from work every working day in all seasons and weather conditions.

Claimant testified to pain and certain limitations in doing

her job. Her testimony is credible and reasonable. However, pain that is not substantiated by clinical findings is not a substitute for impairment. Waller v. Chamberlain Mfg, II Iowa Industrial Commissioner Report 419, 425 (1981).

Claimant contends that she lost overtime pay and bonuses that she would have received if she had not been injured. Hanson testified that he did not have the overtime for her to work or the money to pay bonuses in 1984, 1985 and 1986. His testimony was that it was a matter of office ecomony rather than claimant's injury. Hanson testified, and the income tax returns verify, that claimant's regular income has increased each year since the injury except in 1983, and in that year she received workers' compensation which was tax exempt.

It is true that claimant's regular pay increases after the injury were less than before the injury. A bonus is something extra that is paid when business conditions permit. Salary increases would also be linked to business conditions in a one man law office.

Another factor to be considered is whether claimant, who voluntarily chose to work overtime in the first place, and not because it was required of her, chose not to work overtime for reasons other than her injury. Claimant's motivation to work overtime would be reduced because her husband suffered a disabling stroke in 1982, her daughter became critically ill and was hospitalized and claimant and her husband were appointed legal guardians for their grandchild.

Dr. Margules awarded claimant a 15 percent permanent functional impairment rating of the body as a whole. Dr. Rassekh did not independantly determine a separate impairment rating. However he stated that he concured in Dr. Margules' award. Dr. Margules said that his award included her back and her left shoulder. Industrial disability need not exceed functional impairment. Birmingham v. Firestone Tire & Rubber Co., II Iowa Industrial Commissioner Report 39 (1981). Industrial disability can be equal to, less than or greater than functional impairment. Lawyer & Higgs, Iowa Workers' Compensation -- Law & Practice, section 13-5, p. 116 and 1987 supplement page 20.

Neither Dr. Margules, or any of the other doctors imposed any restrictions or limitations on claimant's activities. Claimant has been able to perform her job satisfactorily to her employer, has received yearly raises and has no intention of leaving this employment. Claimant's surgery occurred on July 8, 1983 and she returned to work on August 15, 1983, approximately six weeks later. She has continued to work full time since then and has not lost any time from work due to the injury. She has not seen a doctor for over two years on account of the injury. Her employment appears to be very secure in that she wants to do

this job and can do it and her employer is equally desirous of keeping her employed in this job.

In conclusion, based on claimant's impairment rating, the nature of the surgery, her healing period, the absence of medical restrictions or limitations, her ability to perform her old job for the same pay in a satisfactory manner albeit with some difficulty, the fact that claimant has earned salary increases and all the other factors of industrial disability, and claimant's contention that she now earns less due to her injury, it is determined that claimant has sustained an industrial disability of 15 percent of the body as a whole.

FINDINGS OF FACT

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

That claimant is 58 years old and extremely well educated and qualified to be a legal secretary.

That claimant received a lumbar chymopapian injection on July 8, 1983 due to an injury sustained in a fall at work.

That claimant returned to the same job at the same pay and has received salary increases since returning to work.

That claimant has performed the job satisfactorily and has lost no time from work.

That claimant was assigned a 15 percent permanent functional impairment rating for both her back and left shoulder condition by her treating physician.

That none of the physicians imposed any restrictions or limitations on claimant's activities of any kind.

That claimant has sustained an industrial disability of 15 percent of the body as a whole.

CONCLUSION OF LAW

WHEREFORE, based upon the evidence presented and the principles of law previously discussed it is determined that claimant is entitled to 75 weeks of permanent partial disability benefits and that entitlement has been previously satisfied by the prior payments which have been made to claimant.

001410

ORDER

WHEREFORE, IT IS ORDERED:

That claimant take nothing from this proceeding as her entitlement has previously been fully paid.

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

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

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

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Dennis Gray
Attorney at Law
PO Box 1166
Council Bluffs, Iowa 51502

Mr. Cecil Goettsch
Attorney at Law
1100 Des Moines Bldg
Des Moines, Iowa 50307

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHERRY PETERS, Claimant, vs LAMONI AUTO ASSEMBLIES, INC., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 809203 A R B I T R A T I O N D E S C I S I O N

INTRODUCTION

This is a proceeding in arbitration brought by Sherry Peters, claimant, against Lamoni Auto Assemblies, Inc., employer, and Liberty Mutual Insurance Co., insurance carrier for benefits as the result of an alleged injury or occupational disease which occurred on October 18, 1985. A hearing was held in Des Moines, Iowa on April 20, 1987 and the case was fully submitted at the close of the hearing. The record consists of joint exhibits one through six; defendants' exhibit A; the testimony of Sherry Peters (claimant), Terry Barnes (group manager), Jim Brackett (claim manager) and Steve Roth (production manager).

PRELIMINARY MATTER

The hearing assignment order specifies that one of the hearing issues is claimant's entitlement to an Iowa Code section 85.39 examination. However, the parties agreed when the hearing began that this was not an issue in this case at this time. No evidence was presented on this issue. No determination will be made with respect to an Iowa Code section 85.39 examination.

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 or occupational disease.

That the rate of compensation, in the event of an award of

weekly benefits, is $114.38 per week.

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

That defendants paid claimant 15.857 weeks of workers' compensation benefits at the rate of $114.38 per week prior to the hearing.

ISSUES

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

Whether claimant sustained an injury on October 18, 1985 which arose out of and in the course of employment with employer.

Whether the alleged injury is the cause of temporary disability during a period of recovery.

Whether the alleged 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 medical benefits under Iowa Code section 85.27.

Whether claimant sustained an occupational disease and if so, if she is entitled to industrial disability.

SUMMARY OF THE EVIDENCE

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

Claimant is 42 years old. She attended high school through the eleventh grade. A GED was obtained in May of 1986. Claimant's work history prior to commencing employment for employer includes the raising of five children, working at a day care center and the leasing of newspaper routes.

Claimant began working for employer on October 29, 1983. Employer manufactures wiring harnesses that go under the dash of a car and in car windows. Claimant's first job was inspecting harnesses; her second job was taping; her third job was splicing. As a splicer, she gathered five wires and clipped them together by pushing a foot pedal with her foot. The splicing job was

very repetitive. Claimant testified that she was expected to complete 360 pieces per hour. Claimant further testified that she exceeded this requirement and actually produced over 3,000 pieces per day. A production record shows that claimant produced 3,486 pieces on March 26, 1985; 4,231 pieces on March 27, 1985; and 4,253 on March 28, 1985 (Exhibit 4). Claimant testified that her pay was not dependent on her production; however, keeping the job was dependent on her production. If she and other employees did not produce sufficiently there was a shutdown of the line and she would be sent home.

A performance review on March 28, 1985 rated claimant as an outstanding employee (Ex. 5). The plant manager wrote a letter of recommendation about claimant on November 21, 1985 (Ex. 6).

Claimant admitted that she had trouble with her right hand prior to her employment with this employer. She stated that Dr. Phil Sullivan of Leon performed a right carpal tunnel surgery on her right hand in approximately 1980 or 1981. She said that she was not employed at this time outside of her home. Claimant did not mention this carpal tunnel condition or this carpal tunnel surgery at the time she completed her employment application for this employer on September 22, 1982 (Ex. A).

Claimant did not relate a specific incident or accident with her employer for the onset of her problem. Rather, claimant testified that in approximately August of 1985 problems developed with her hands. She was sent to William R. Boulden, M.D., in Des Moines in October of 1985. Claimant stated that her primary problem was pain and numbness in her left hand. She also had pain in her right hand. Claimant stated that her right hand is her dominant hand.

Dr. Boulden's office notes for October 21, 1985 show that claimant reported she has had a lump in the middle of the dorsum of her hand and tingling in the thumb, long and index fingers for about two years. (The doctor did not say it was her left hand but it is presumed that he meant the left hand.) The doctor found a lot of thickening of the extensor tendon of the dorsal wrist. His EMG showed changes but he proceded conservatively with a wrist split and aspirin (Ex. 3. page 16). Claimant also complained of irritation over the front of the left foot (Ex. 3, p. 15).

Thomas W. Bower, L.P.T., reported on October 31, 1985 that the EMG revealed mild to moderate carpal tunnel compression on the left side (Ex. 3, p. 7).

On December 5, 1985 Dr. Boulden reported that claimant continued to have left hand pain and tingling. It was now waking her up at night. She did not show improvement with the wrist splint. He recommended a carpal tunnel release and she

was agreeable to it. A left carpal tunnel release was performed on December 13, 1985. The followup examination on December 24, 1985 indicated that claimant was not having any problems at all. Dr. Boulden did not anticipate any permanancy from the operation (Ex. 3, pp. 12 & 13).

On January 20, 1986 Dr. Boulden reported that none of her preoperative symptoms were noted but claimant had wrist pain and weakness. He anticipated a release to active duty status in ten days (Ex. 3, pp. 8 &14).

On February 3, 1986 claimant had nondescript pain and recurrence of tingling in her fingers. She was to wear a wrist splint and get active around the house. Dr. Boulden thought that she might be a candidate to return to work in a week (Ex. 3, pp. 11 & 14). On February 11, 1986 claimant had complaints in both hands and so Dr. Boulden ordered repeat EMGs. The right hand was completely normal. The left hand showed marked improvement after the surgery. Since grip strength was still decreased claimant was not released to return to work for at least two more weeks (Ex. 3, pp. 14 & 19).

On February 19, 1986 Dr. Boulden said claimant had chronic tenosynovitis and that a return to work might aggravate these symptoms. He said that she may need to find other work if she continues to have these problems after she returns to work (Ex. 3, p. 10 & 16).

On February 25, 1986 Dr. Boulden found that the extensor tendon pain on the top of the left hand was increasing. Therefore, he recommended that she not return to work, but rather, he recommended she seek different employment where she would not have to stress her fingers and hands. He, nevertheless, ended her healing period as of March 3, 1986 and said that she could return to work. He did not specify any restrictions (Ex. 3, pp. 9 & 17). Claimant testified that she did not receive any medical treatment for this condition after she saw Dr. Boulden on February 25, 1986, with one exception. She did see Dr. Ron Miller who told her she had carpal tunnel syndrome. Dr. Miller did not complete a medical report.

On April 8, 1986 Dr. Boulden wrote a letter to claimant's counsel that he treated claimant for tendonitis of the left foot and left wrist. He further stated that these tendonitis problems were basically stress phenomenons caused by her work activities. He recommended against returning to the kind of work she had been doing, otherwise, her problems would occur again (Ex. 3, p. 5).

On April 18, 1986 Dr. Boulden and Mr. Bower sent the following evaluation to claimant's counsel.

This patient's EMG previously done in February of

1986 demonstrated a very slightly prolonged median sensory response at the left wrist. Otherwise, the study was completely within normal limits. There was no evidence of axon change.

The patient's range of motion is good and there is no evidence of previously described neurologic change. Her grip strength is certainly down and decreased which is in my opinion due more to lack of use as opposed to actual nerve damage.

Therefore, by the standards encountered in the AMA guides, there is no evidence of permanent impairment. Certainly we would advise not performing jobs that require repetitive bending of the wrist for prolonged periods of time and if she begins to become symptomatic then attention needs to be paid to this.

(Ex. 3, p. 6)

In May of 1986 claimant obtained her GED.

On July 8, 1986 Dr. Boulden wrote to defendants' counsel. He confirmed that claimant's carpal tunnel syndrome was related to claimant's work at Lamoni Auto Assemblies. He further stated that there was a high incidence of carpal tunnel syndrome for this type of work. He confirmed again, that, he did not feel that there was any permanency from the carpal tunnel release (Ex. 3, p. 18).

Claimant was examined by Theodore W. Rooney, D.O., at the arthritis center at Mercy Hospital in Des Moines on July 23, 1986 for pain in both hands and left foot. His physical examination showed mild tenosynovitis of the left wrist involving the extensor tendon to the middle and index finger. He said the right wrist was unremarkable. He found no active synovitis in her feet. X-rays of both hands were normal (Ex. 3, pp. 2 & 3). His diagnosis was: "1) Status post bilateral carpal tunnel symdrome. 2) Probable extensor tendonitis involving both hands, that is slowly resolving. 3) Mild tendonitis of the extensor tendon of the left big toe." (Ex. 3, p. 1). Dr. Rooney did not award an impairment rating. In fact, he did not mention impairment. He did say that claimant's carpal tunnel syndrome was likely secondary to the repetitive nature of her work. He also added that claimant's increased discomfort over the dorsal aspect of both hands was difficult to explain, since she had been off work for some time, and this condition usually improves when repetitive activities are avoided (Ex. 3, p. 1).

Claimant saw Dr. Boulden again on February 24, 1987. She had a full range of motion of the left wrist. Her clinical test results were all normal. Dr. Boulden stated that claimant had

persistant tendonitis of the left wrist. Again he stated that he declined to award a permanent partial impairment rating (Ex. 3, p. 4).

Claimant testified that Dr. Boulden came to the plant from Des Moines in late October or the first of November in 1985 because so many people were getting carpal tunnel syndrome. This was corroborated by Terry Barnes, former plant manager and now group manager, in his testimony.

Jim Brackett, claims supervisor for the insurance carrier, stated that he did not send Dr. Boulden to the plant and he did not know who did. The insurance carrier does have a loss prevention department but he did not know if they had taken this action or not. He did not know how many carpal tunnel syndrome cases have occurred at this plant.

Claimant testified that when she was released to return to work on March 3, 1986 there was no work due to a production layoff. When the layoff ended, in approximately August or September of 1986, claimant testified that she was told that she could come back to work if Dr. Boulden approved it. She said that her attorney at that time told her that employer was simply using this as an opportunity to have her checked again. Claimant conceded however, that it was her decision not to go and see Dr. Boulden again. She further admitted that she did not return to work. She explained that Dr. Boulden had already recommended against repetitive work and all of the jobs at employer on the floor were repetitive jobs.

Claimant testified that her current condition is that she now drops things, she cannot use a can opener or grip the steering wheel of a car. When she sits she rests her hands on the arms of the chair. She has pain and numbness all the way up her left arm. Her arms get heavy if they are outstreched. Her left foot prevents her from working on a concrete or hardwood floor. She said that she could do the work of a splicer now, but that she could not meet the production requirements of the job. Claimant testified that she had looked for employment but all that she had been able to find was a part-time job as a maid in a hotel.

Steve Roth, production manager, agreed with claimant's description of her job. He testified that claimant produced substantially more than her production goal (Ex. 4). He said that in August of 1986 when production began again at the plant, he recommended that claimant see Dr. Boulden before starting back to work for her own protection. He testified that he never heard from her again.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on October 18, 1985 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

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

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

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

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

Claimant sustained the burden of proof by a preponderance of

the evidence that she sustained an injury on October 18, 1985 which arose out of and in the course of employment with employer. Claimant did not describe a specific incident which caused her condition, but rather only that she developed pain and numbness in her left hand. Dr. Boulden said that she also complained of an irritation over the front of her left foot (Ex. 3, p. 15). The EMG performed by Mr. Bower disclosed mild to moderate carpal tunnel compression of her left hand (Ex. 3,p. 7). Dr. Boulden performed a carpal tunnel release of the left hand on December 13, 1985. Later, on Feburary 11, 1986 Dr. Boulden noted that claimant complained about both hands. So he performed repeat EMGs. The right hand was normal. The left hand was still decreased (Ex. 3, pp, 14 & 19). Dr. Boulden, the only treating physician, stated that the left hand and left foot conditions were tendonitis which are basically stress phenomenons caused by claimant's work activities. He recommended against returning to the same work; otherwise, her symptoms would occur again (Ex. 3, p. 5). Dr. Rooney also stated that claimant's carpal tunnel syndrome was likely secondary to the repetitive nature of her work (Ex. 3, p. 1).

Claimant, also, sustained the burden of proof by a preponderance of the evidence that her left carpal tunnel condition was the cause of temporary disability during a period of recovery from the date of her surgery until she was released to return to work. Even though Dr. Boulden recommended that claimant seek different employment where she would not have to stress her fingers and hands, he nevertheless did however release claimant to return to work on March 3, 1986 (Ex. 3, pp. 9 & 17). Apparently, he felt claimant was medically capable of returning to work, but that it was in her best interest not to do so if she did not want a recurrence of her symptoms [Iowa Code section 85.33(1)].

Claimant therefore, sustained the burden of proof by a preponderance of the evidence that she is entitled to temporary total disability from the date of the surgery on December 13, 1985 until the date that Dr. Boulden released claimant to return to work on March 3, 1986, a period of 11 weeks and three days. Claimant was, however, paid benefits from December 13, 1985 to April 2, 1986, a period of 15 weeks and six days, because of the necessity of defendant to send claimant a 30 day notice before terminating benefits (Iowa Code section 86.13).

The parties stipulated that defendant is entitled to a credit of 15.857 weeks of benefits paid prior to hearing. Therefore, claimant is fully paid for her entitlement to temporary total disability benefits.

Claimant did not sustain the burden of proof by a preponderance of the evidence that the injury was the cause of any permanent disability. Dr. Boulden and Mr. Bower wrote on April 18, 1986 that claimant suffered a slight loss of grip strength in the

left hand, probably due to a lack of use, but that there was no evidence of permanent impairment (Ex. 3, p. 6). The left foot and right hand were not mentioned. Therefore, it is concluded that they were not permanently impaired. Actually, they were only mentioned in passing in the medical evidence. No surgery was performed. No particular treatment was administered (Ex. 3).

Dr. Rooney said on July 23, 1986 that claimant had mild tenosynovitis of the left hand. He did not mention any permanent impairment. The right hand was unremarkable. X-rays of both hands were normal. He found no active synovitis in either foot (Ex. 3, p. 1). Therefore, claimant did not sustain the burden of proof by a preponderance of the evidence of any entitlement to any permanent partial disability benefits for either hand or her feet. No doctor awarded any permanent partial impairment in any degree or even suggested any impairment in any of these limbs.

On July 8, 1986 Dr. Boulden again confirmed that employment was the cause of her injuries but that claimant had not sustained any permanent impairment (Ex. 3, p. 18).

On February 24, 1987 Dr. Boulden examined claimant again. All of his clinical tests were normal. He again refused to award any permanent partial impairment (Ex. 3, p. 4).

Claimant did sustain the burden of proof by a preponderance of the evidence that she is entitled to $67.20 for medical mileage for one round trip to Des Moines to see Dr. Boulden on February 24, 1987 and to see Dr. Rooney on July 23, 1986 (Ex. 2). Claimant is also entitled to payment of the bill from Dr. Rooney at Mercy Arthritis Center for consultation, lab and x-rays on July 23, 1986 in the amount of $169.00 (Ex. 1). Claimant's claim to entitlement to these items was not controverted or disputed by defendants.

With reference to whether claimant sustained an occupational disease which is compensable as an industrial disability, claimant's attorney made the following presentation of claimant's position in his brief.

Prior to July 1, 1973 occupational diseases were specifically enumerated in Section 85A.9, Iowa Code. The enumerated diseases included "bursitis, synovitis or tenosynovitis" and were described as "any process or occupation involving continued or repeated pressure on the parts affected". See attached provision.

In response to the nineteen essential recommendations of the National Commission of State Workmen's Compensation Laws, the legislature extensively

amended the provisions of Chapters 85 and 85A in 1973. One of the essential recommendations was full coverage of work related diseases. In respect to this recommendation for an expansion of occupational diseases, the legislature repealed Section 85A.9 and amended Section 85A.8. The clear intent of the legislature was to expand coverage rather than limit coverage of occupational diseases.

Carpal Tunnel Syndromes clearly fall within the language of "tenosynovitis" and "any process or occupation involving continued or repeated pressure on the parts affected". These conditions occur as a result of the repetitive activities of the hands.

The Nebraska Supreme Court has recognized carpal tunnel syndrome to be an occupational disease. The Industrial Commissioner has previously recognized "rapid and repetitive motions with his right hand and shoulder" as an occupational disease. See attached decisions.

Dr. Boulden specifically stated that claimant's problems were tenosynovitis and were caused by stress phenomenons from her work activities. He recommended that claimant seek different employment where she would not have to stress her fingers and hands.

As a result of an occupational disease, claimant is entitled to have her disability evaluated industrially as provided in Section 85A.4 and interpreted by the Supreme Court in Doerfer Div. of CCA v. Nichol, 359 N.W.2d 428 (Iowa 1984). At page 438, the Supreme Court stated:

> Compensation is not awarded for injury, but for disability. Deaver v. Armstrong Rubber Co., 170 Iowa Code Chapter 85A is determined by a consideration of age, education, qualification, experience and inability, due to injury, to engage in the employment for which the claimant is fitted. McSpadden, 288 N.W.2d at 192. These factors also apply in determining a claimant's capacity to perform his work or earn equal wages in other suitable employment, the standards for determining disability under Iowa Section 85A.4. Id.

Iowa Code section 85A.8 defines occupational disease in the following language.

> Occupational disease 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.

It is true that tenosynovitis has been recognized as an occupational disease in Iowa after the adoption of the current occupational disease law on July 1, 1973 and Industrial Commissioner Robert C. Landess held that when the disability extended to the body as a whole claimant was entitled to have her disability evaluated industrially. Johnson v. Franklin Mfg. Co., thirty-fourth Biennial Report of the Industrial Commissioner 152, 154 (Appeal Decision August 30, 1978) (Appealed to District Court: Affirmed). In the Johnson case there was an injury to the shoulder and it was pointed out that since the condition extended into the trapezius then it was determined that claimant received a disability affecting the body as a whole.

Claimant also cited the case of Cahalan v. Oscar Mayer, Vol. 2, No. 1, State of Iowa Industrial Commissioner Decisions 288 (Filed October 8, 1984) in which Deputy Industrial Commissioner Judith Ann Higgs, in a review-reopening decision, held that a shoulder condition which resulted from repetitive movements was considered to be an occupational disease and was compensated industrially.

Also, in the case of Hall v. Backman Sheet Metal, Vol. 1, No. 3, State of Iowa Industrial Commissioner Decisions 595, 600 (Filed February 25, 1985) Deputy Industrial Commissioner Helen Jean Walleser found that carpal tunnel syndrome of the hands was an occupational disease and found that the injury was a scheduled member injury and awarded scheduled member disability benefits.

In all of these cases, it is noted that the decision follows the mandate of the occupational disease law in Iowa Code section 85A.17 "Compensation payable under this chapter for temporary disability, permanent total disability or permanent partial disability, shall be such amounts as are provided under the

workers' compensation law."

In the Johnson case, the commissioner pointed out that the disability extended to the trapezius and therefore, affected the body as a whole and claimant was rated industrially.

In Cahalen, there was another shoulder injury, it was considered affecting the body as a whole and it was rated industrially.

In Hall, the condition affected scheduled members, the hands, and it was compensated with scheduled member benefits.

In the Doerfer case, cited by claimant, which is an Iowa Supreme Court case, the condition was compensated industrially; but from a reading of the decison it is not possible to determine with certainty whether the injury was only to the arms and legs, which were mentioned in the decision, or whether the disability also extended to other parts of the body, or to the entire body. In any event, the court did not specifically state that all occupational diseases were to be rated and compensated industrially.

A comparison is now made between the facts or this case and the provisions of Iowa Code section 85A.8. As to the first sentence of the statute, there is evidence in this case that claimant's condition arose out of and in the course of employment with employer. Dr. Boulden said that her condition was caused by her employment and Dr. Rooney said her condition was secondary to her employment.

As to the second sentence in the statute, there is evidence that there is a direct causal connection with employment and that the condition followed as a natural incident from injurious exposure occasioned by the nature of the employment. There was evidence of other cases of carpal tunnel syndrome at employer's plant and that Dr. Boulden came to the plant to inspect it and to discuss the matter with employer representatives.

As to the third sentence of the statute, the evidence of other carpal tunnel cases and Dr. Boulden's involvement established that claimant's condition was incidental to the character of the business. However, as to the remaining portion of the third sentence, it cannot be said that claimant's condition was not independent of the employment because claimant testified that she had a right carpal tunnel condition in 1980 or 1981 which was surgically released by Dr. Phil Sullivan before she was ever employed by this employer and when she was employed at home as a mother and homemaker. In addition, Dr. Rooney was puzzled by the fact that claimant continued to have increased discomfort over the dorsal aspect of her hands in September of 1986 after she had been off work for several months. He explained that work-related tendonitis and bursitis get better over time when

the work causing activities are avoided (Ex. 1, p. 1).

Likewise, as to the last sentence in the statute, there is evidence that claimant suffered from a disease to which she was equally exposed outside of her employment. Consequently, the evidence is not sufficient to find that claimant has sustained an occupational disease as defined by Iowa Code section 85A.8.

Moreover, if claimant were entitled to compensation for an occupational disease, and if claimant had received a permanent partial impairment rating for her hand, then from the cases cited above it would appear that claimant's disability would be compensated as a scheduled member condition because it extended to the hands only. Iowa Code section 85A.17, Johnson, thirty-fourth Biennial Report of the Industrial Commissioner 152, Cahalen, Vol. 2, No. 1, State of Iowa Industrial Commissioner Decisions 288, and Hall, Vol. 1, No. 3 State of Iowa Industrial Commissioner Decisions 595, all of which are cited above.

The Nebraska Supreme Court Case cited by claimant, Crosby v. American Stores, 298 N.W.2d 157 (Nebraska 1980), did hold that carpal tunnel syndrome to the hands was compensable as an occupational disease under the Nebraska statute. However, when the Iowa Supreme Court appears to have had the same opportunity, it held that a carpal tunnel type of injury to both wrists were injuries and claimant was compensated for scheduled member injuries rather than awarded industrial disability. Simbro, 332 N.W.2d 886. Industrial disability was not mentioned either directly or as dicta. As a result, the question of whether carpal tunnel syndrome is an occupational disease in the view of the Iowa Supreme Court, is in doubt at the very least.

It should be noted that the Iowa Supreme Court has held that a personal injury, (a stomach perforation), need not arise out of an accident, special incident or unusaul occurrence Almquist v. Shenandoah Nurseries, Inc., 218 Iowa 724, 254 N.W. 35 (1934), but may develop gradually over a period of time, (inhalation of poisonous fumes), and fall within the definition of a personal injury. Black v. Creston Auto Co., 225 Iowa 671, 281 N.W. 189 (1938).

Likewise, the case of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 190 (Iowa 1980) verified that the concepts of injury and occupational disease cannot be used interchangeably.

In addition, Iowa Code section 85A.14 provides that no compensation can be paid for an occupational disease if compensation is recoverable as an injury under the workers' compensation law.

In conclusion, it is determined that claimant did not sustain the burden of proof by a preponderance of the evidence that she sustained an occupational disease as defined by Iowa

Code section 85A.8. Furthermore, claimant did not sustain the burden of proof by a preponderance of the evidence that she sustained any permanent partial impairment to any of her members.

FINDINGS OF FACT

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

That claimant was employed by employer on October 18, 1985 and performed highly repetitive work with her hands as a splicer.

That claimant's work caused a carpal tunnel condition to her left hand which required a carpal tunnel release on December 13, 1985.

That claimant was unable to work as a result of the surgery from December 13, 1985 until March 3, 1986.

That the carpal tunnel syndrome and resulting surgery to the left hand did not result in any permanent partial impairment based upon the medical evidence presented in this case.

That claimant also suffered tendonitis in her left foot that was caused by her employment but that she suffered no impairment from this injury based upon the medical evidence presented in this case.

That claimant complained of pain and numbness in her right hand but failed to prove by the medical evidence that she sustained an injury arising out of and in the course of her employment as to the right hand.

That claimant incurred $67.20 in medical mileage and $169.00 in medical expense at Mercy Hospital.

That claimant also suffered from carpal tunnel syndrome to her right hand which occurred when she was performing duties as a homemaker prior to the time she was employed by employer and that this prior carpal tunnel condition to her right hand required surgery in 1980 or 1981 prior to her employment with employer.

That claimant continued to have increasing tendonitis symptoms on the dorsal aspects of her hands several months after she terminated her employment with employer and was removed from that work environment.

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 the burden of proof by a preponderance of the evidence that she sustained an injury to her left hand and left foot which arose out of and in the course of her employment with employer.

That the injury to the left hand was the cause of temporary total disability from December 13, 1985 until March 3, 1986.

That the injury to the left foot was not the cause of any temporary disability.

That neither the injury to the left hand or the left foot was the cause of any permanent disability.

That claimant is entitled to temporary total disability benefits for the left hand from December 13, 1985 to March 3, 1986.

That claimant is not entitled to any permanent disability benefits.

That claimant is entitled to $67.20 in medical mileage and $169.00 in medical expenses at Mercy Hospital.

That claimant did not sustain the burden of proof by a preponderance of the evidence that she sustained an occupational disease.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to claimant eleven point four two nine (11.429) weeks of temporary total disability benefits at the rate of one hundred fourteen dollars and 38/100 dollars ($114.38) per week in the total amount of one thousand three hundred seven and 25/100 dollars ($1,307.25) commencing on December 13, 1985.

That defendants are entitled to a credit for fifteen point eight five seven (15.857) weeks of temporary total disability already paid to claimant at the rate of one hundred fourteen and 38/100 dollars ($114.38) per week prior to hearing for the period from December 13, 1985 to April 2, 1986 in the total amount of one thousand eight hundred thirteen and 72/100 dollars ($1,813.72).

That since the credit to which the defendants are entitled is greater than claimant's entitlement to benefits, there is no interest due under Iowa Code section 85.30

That defendants pay to claimant sixty-seven and 20/100 dollars ($67.20) in medical mileage and one hundred sixty-nine dollars ($169.00) for the charges at Mercy Hospital.

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

That defendants file claim activity reports as requested by this agency pursuant to Division of Industial Services Rule 3.1.

Signed and filed this 3rd day of February, 1988.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Dennis Hanssen
Attorney at Law
Suite 111
Terrace Center
2700 Grand Avenue
Des Moines, Iowa 50312

Mr. W. C. Hoffmann
Attorney at Law
1000 Des Moines Bldg
Des Moines, Iowa 50309

001427

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAMELA PULJU,	:	
Claimant,	:	File Nos. 804656
vs	:	814502
IBP, INC.,	:	A R B I T R A T I O N
Employer, Self-Insured,	:	D E C I S I O N
and	:	FILED
SECOND INJURY FUND OF IOWA,	:	FEB 09 1988
Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Pamela Pulju, claimant, against IBP, Inc., employer, and Second Injury Fund of Iowa for benefits as the result of an alleged injury to the left hand which occurred on September 1, 1984 and an alleged injury to the right hand which occurred on August 1, 1985. A hearing was held on April 17, 1987 at Storm Lake, Iowa and the case was fully submitted at the close of the hearing. The record consists of claimant's exhibits 1 through 19; employer's exhibits A through D; Second Injury Fund exhibits 1 through 8; and the testimony of Pamela Pulju (claimant), Ilene Hogancamp (claimant's mother) and Clare Petersen (hiring representative). Defendant employer and defendant Second Injury Fund of Iowa supplied a transcript of the hearing to the industrial commissioner's file. All three attorneys filed outstanding briefs.

BRIEFS

All attorneys were directed to file briefs by June 17, 1987. The time could be extended by mutual agreement by all three attorneys. Claimant's brief was filed late on July 30, 1987. Counsel for employer agreed to an extension of time, but counsel for the second injury fund did not. Counsel for the second injury fund objected to the late filing of claimant's brief. Therefore, claimant's brief is excluded and will not be considered in the determination of this case.

PRELIMINARY MATTER

The prehearing report stated that claimant requests payment for an independent medical examination. Employer claims that an independent medical examination was not authorized. The hearing assignment order did not designate that an Iowa Code section 85.39 examination was one of the hearing issues as the result of the prehearing conference. Issues not raised at the time of the prehearing conference and designated as hearing issues on the hearing assignment order are waived. Deputies determine only issues designated on the hearing assignment order. Therefore, the issue of the independent medical examination will not be determined in this decision. Joseph Presswood v. Iowa Beef Processors, Inc., File No.732442 (Appeal Decision November 14, 1986); Rahn v. Sioux Land Towing and Auto Body, File No. 797004 (filed October 20, 1987).

STIPULATIONS

The parties stipulated to the following matters.

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

That claimant has been paid in full for all temporary disability benefits and makes no claim for additional temporary disability benefits.

That the type of permanent disability, if the injury is found to be the cause of permanent disability is scheduled member disability to the left hand and to the right hand.

That the commencement date for permanent partial disability benefits, if such benefits are awarded, is March 4, 1986.

That the rate of compensation in the event of an award of weekly benefits is $180.19 per week for the left hand and $188.67 per week for the right hand.

That no medical benefits are requested and that claimant's entitlement to medical benefits is not an issue in this case at this time.

That defendant employer makes no claim for benefits paid under an employee nonoccupational group plan or any workers' compensation permanent partial disability benefits prior to hearing.

That there are no bifurcated claims.

ISSUES

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

Whether claimant sustained an injury to the left hand on September 1, 1984 and to the right hand on August 1, 1985 which arose out of and in the course of employment with employer.

Whether the alleged injuries are the cause of permanent disability.

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

Whether the Second Injury Fund of Iowa is liable for any permanent disability benefits and, if liable, the amount due.

SUMMARY OF THE EVIDENCE

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

Claimant is 35 years old, married and is the mother of three dependant children. She has lived in Storm Lake most of her life and graduated from high school there in 1969. She received B's and C's in high school, had approximately a 2.75 grade point average and did particularly well in mathematics and bookkeeping. She started to work for an automobile dealership as a secretary and bookkeeper in 1968 while still a student in high school. She continued employment with this employer as a warranty clerk after graduation until 1972. In 1972, claimant started to work for Hygrade, a pork kill plant, which was the predecessor of IBP in Storm Lake. Claimant testified that she was the first female to work in the plant on the kill floor where she did practically all of the jobs, including pushing hogs and lugging hogs, until November of 1978 shortly after her first baby was born (Transcript pages 19 through 26).

On June 10, 1973 claimant was involved in a car-motorcyle accident. The motor vehicle struck her right leg. She was initially treated in Storm Lake by R. R. Hanson, M.D. and K. H. Prescott, M.D., general practitioners, who immediately referred her to K. M. Keane, M.D., an orthopedic surgeon, in Sioux City. Claimant was hospitalized for approximately one month until late July of 1973 for a very severe right knee injury. Claimant rolled up her pant leg and exhibited that her right knee had three scars. One was approximately eight inches long, one was approximately four inches long and one was approximately three inches long. Claimant testified that she also injured her right ankle in the accident and she exhibited a two inch scar on the top of her ankle. Claimant continued to see Dr. Keane regularly for about a year; then she saw him approximately once a year after that (Tran., pp 27-33). She last saw Dr. Keane in August of 1986. Claimant testified that Dr. Keane has suggested an ankle replacement for quite some time (Trans., pp. 36 & 37).

Claimant stated that she is unable to walk flat footed with her right ankle due to a piece of bone that is sticking out. Arthritis bothers her in certain weather conditions. She stated that she could only walk about 50 feet without pain.

Claimant testified that she returned to work at Hygrade in November or December of 1973 as a clerk. She went back on the line on the kill floor in approximately June of 1974 (Trans., pp. 37-41).

Claimant said that she complained to her personal physician Gary Olson, M.D., about her ankle on June 21, 1977, August 5, 1977, August 25, 1977, and November of 1977. She testified that it made her leg and back hurt because one leg was shorter than the other which would tilt her hip off (Trans., pp. 43-47). Claimant testified that she left Hygrade in November of 1978 to raise her children. Her next employment was four years later when she went to work for Methodist Manor in 1982 as a cook (Trans., pp. 43-48). She attended Buena Vista College from January of 1983 to May of 1983 with an accounting major and a computer minor (Trans., p. 48). She applied for work at IBP, the successor of Hygrade, in September of 1983 (Trans., p. 49). While waiting to be employed by IBP she tended bar at the Corner Pocket for two weeks in January of 1984. Her knee gave her trouble tending bar (Trans., pp. 49 and 50). Claimant said that she then worked as a nurse's aide at Methodist Manor in July and August of 1984 for approximately four weeks. She said that she was on her feet a lot and her knee gave her trouble in this employment (Trans., pp. 51 & 52).

Claimant then started to work at IBP on August 16, 1984. She took a preemployment physical examination and the grip strength in her hands was normal (Trans., pp. 52 & 53). Claimant described her jobs as hooking sides, separating viscera and rounding heads (Trans., pp. 57 & 58). On or about September 1, 1984 while rounding heads claimant had an unusual sensation on her left hand which was reported to her supervisor and the nurse (Tran., pp. 61-64). Claimant then worked with chitterlings from September of 1984 until she terminated on January 10, 1986. The plant processed 780 hogs per hour (Trans., pp. 63-67). Claimant testified that all of her jobs required repetitive use of her hands. She stated that she wore gloves. Hog parts were often hard to hang on to and you had to regrab them several times to cut them off or to work with them (Trans., pp. 53-67). Later, her right hand became troublesome also (Trans., p. 70).

She was sent to see W. E. Erps, M.D., for both hands (Trans., pp. 70 and 71). Dr. Erps sent her to see Dr. Isgreen (full name unknown) a neurologist in Sioux City (Trans., pp. 71-74). Ronald A. Dierwechter, M.D., performed outpatient carpal tunnel surgery on her left hand on September 4, 1985 (Trans., pp. 74 & 75) which left a "Z" shaped scar on her left hand (Trans., p. 76).

Claimant had carpal tunnel surgery on her right hand on January 15, 1986 which also left a similar "Z" shaped scar on that hand (Trans., 77). Claimant testified that she still has pain and difficulties in both hands with numbness and weakness (Trans., p. 80).

Dr. Keane's records show claimant was hospitalized from June 10, 1973 to June 27, 1973 for fracture of the right knee, femur, and right ankle injury. She was hospitalized again for the removal of five pins from September 13, 1973 to September 16, 1973. On October 26, 1973 it was noted that x-rays of the right ankle were suggestive of posttraumatic cartilage necrosis which might get progressively worse and eventually require surgery. On February 12, 1974, a form of ankle arthritis was confirmed. On April 30, 1974 Dr. Keane said that prolonged standing all day on the kill floor bothered her ankle but there was no trouble with her knee. On August 12, 1974 the doctor reported that claimant complained of back pain aggravated by standing all day at her job. Claimant testified that Dr. Prescott at Storm Lake repaired the wounds to her right foot and ankle before she was sent to Sioux City to see Dr. Keane. X-rays of the right knee and lumbar spine were normal, but x-rays of the right ankle showed joint narrowing. On October 22, 1982 Dr. Keane recorded that x-rays demonstrate a serious degree of cartilage necorsis with mild anterior tilt and some posttraumatic arthritis (Exhibit 8).

On August 1, 1984 Dr. Keane stated that claimant will have permanent disability to the right knee. Motion was limited and crepitus was present. He summarized claimant's condition as follows:

> She has now degenerative arthritis which I think will get worse over the years. It is difficult to project accurately the disability which will result from this injury but I would anticipate about twenty percent (20%) permanent disability to the leg.
>
> In addition to this she has had symptoms referrable to the ankle over the past many months and x-rays have shown narrowing of the joint space indicative of cartilage necrosis. She had no known fracture or significant injury at the time of her accident but this is apparently a complication of a bruising of the cartilage. I think it is very likely that as a result of this she will have continuing sypmtoms and will likely develop degenerative arthritis which could cause symptoms severe enough over a long period of time that an arthrodesis would be indicated but I cannot say with reasonable medical certainty that such will occur.

(Ex. 6)

On September 19, 1974, Dr. Hansen, her personal family physician, reported as follows:

> This girl was seen in June of 1973 after a rather severe accident with multiple lacerations about the legs and knee. The lacerations were over the right knee and there was also a laceration in the midleg. Then there was also a laceration of the plantar surface of the foot exposing the tendons.
>
> ...
>
> This patient has been working at Hygrade Company and has had to stand a great deal. Because of the weakness of the right leg and also some weakness of the right ankle, she has been putting more weight on the left extremity and this has put a definite strain on her back. We saw the patient on July 16, 1974 and at that time diagnosed muscle strain of the back. Exam revealed no acute tenderness of the muscle but there was some definite muscle spasm. We feel this is due to strain because she does not stand with equal distribution of her weight on both legs.
>
> In all probability she will always have some difficulty with her right knee and there is a possibility of developing arthritis in the ankle which was injured at the same time. This will also cause her to have some back strain if she is standing and working all the time. She will probably do better if she can do most of her work when she is sitting and not put the constant strain on her back.

(Ex. 7)

The records of her personal physician, Gary Olson, M.D., show that claimant frequently complained of her ankle in the fall of 1977 and in early 1978 which claimant attributed to standing at work. Dr. Olson appeared to have believed claimant's complaints; however, he did remark on May 30, 1978 that it was extremely difficult to evaluate these complaints and that he had no way to prove or disprove them (Ex. 9). The clinic records show that claimant also complained about the ankle on September 14, 1982 and November 11, 1982. The same clinic records show many office visits during the period of employment for employer (IBP) from August 16, 1984 to January 10, 1986, but there are no complaints recorded about her right knee or ankle during this period of time (Ex. 9).

The records of Ronald A. Dierwechter, M.D., and other records in evidence, show that claimant received a left carpal tunnel release on September 4, 1985 and a right carpal tunnel release on January 15, 1986 (Ex. 14-17). Dr. Dierwechter completed a workers' compensation medical form dated September 23, 1985 on which he diagnosed bilateral carpal tunnel syndrome At item number six on the form appears this question: "Was the injury or disease caused, aggravated or accelerated by the patient's alleged employment activity?". Dr. Dierwechter checked the box marked "yes". At item number nine on the form he stated that he did not expect any permanent disability, assuming proper healing (Ex. 15, p. 2).

Dr. Dierwechter also completed a surgeon report on February 6, 1986 which stated claimant had bilateral carpal tunnel. Item number eight on the form asks this question: "Was the injury or disease caused, aggravated or accelerated by patient's alleged employment activity?" Dr. Dierwechter checked the block marked "yes". At item number 11 on the form appears this question: "Is permanent disability likely?". Dr. Dierwechter checked the block marked "no". (Fund Ex. 4)

On February 21, 1986 claimant saw Oscar M. Jardon, M.D., at the University of Nebraska Medical Center in Omaha for a impairment rating for her carpal tunnel surgeries. Dr. Jardon reported as follows:

> Pamela was seen in our clinic on February 20, 1986 for a disability rating. This patient is status post carpal tunnel release of both the right and left wrists performed on September 4, 1986. She does complain of minimal stiffness and there is a rather predominant scar. Grip test does show a slight decrease in grip strength bilaterally with the presence of scar bilterally [sic].
>
> It is felt that the patient has a 5% partial permanent disability to each upper extremity. However, I believe that the situation is static and that she has gone through the normal healing period. I do not expect the situation to change.

(Ex. 10)

Claimant saw A. J. Wolbrink, M.D., in Mason City on June 12, 1986 for an impairment rating. Dr. Wolbrink commented that claimant told him that her carpal tunnel became progressively worse with activities, such as the rigor of her work. Otherwise, Dr. Wolbrink did not say the carpal tunnel syndrome was caused by claimant's work as a matter of his own independent professional medical judgment. Dr. Wolbrink concluded as follows:

It is my opinion that Mrs. Pulju has a permanent impairment of 7% of the right hand. This is equivalent to 6% of the right upper extremity. In my opinion she has a permanent impairment of 11% of the left hand. This is equivalent to 10% of the left upper extremity. These values can be extrapolated to whole person impairment to give the combined total permanent impairment of 10% of the whole person.

(Ex. 11)

Claimant saw Keith O. Garner, M.D., at Cherokee for a social security disability examination on November 25, 1986. With respect to her right ankle he found an obvious deformity with three-fourths of an inch of lateral deviation of the foot on the ankle joint and 80 percent reduction in the range of motion of the ankle. He said that her right heel does not touch the ground when she stands on both feet due to the permanent plantar flexion of the right foot. He stated that she had an altered gait secondary to fixation of the right ankle and plantar flexion of the foot. He recorded that she had approximately a 50 percent reduction in the grip strength in both hands (Ex. 13). Dr. Garner made the following conclusions:

Diagnosis: 1. Deformity of the right ankle secondary to fracture. 2. Bilateral carpal tunnel surgery with some reduction in function.

Evaluation: Patient states that she was able to work until she had bilateral carpal tunnel surgery. I have never known a carpal tunnel surgery to be totally disabling. She does have some reduction in strength. She certainly has deformity of the right ankle which prevents her from standing flat on her foot. This would disable her from doing standing manual labor such as her previous job a IBP; however she certainly could work at a job sitting down. She should be easily rehabilitated for some type of sedentary employment. Any further questions I would be glad to answer. Thank you.

(Ex. 13)

On December 15, 1986 Dr. Garner wrote to claimant's counsel and awarded a 10 percent partial impairment of the hand on each side due to her carpal tunnel surgeries. He also awarded a 25 percent permanent partial impairment of the right lower extremity for the right foot and ankle (Ex. 12).

Claimant was examined for defendant, employer, by Peter D. Wirtz, M.D., on August 14, 1986. He ordered an EMG of the upper

extremity which was performed by Alfredo Socarras, M.D., on September 4, 1986. Dr. Socarras found that conduction velocity studies were normal and that the EMG was normal (Ex. B). Dr. Wirtz wrote as follows:

> This patient's examination 8/14/86 and electromyographic study on 9/4/86 reveal that her condition is one of postoperative bilateral carpal tunnel release without permanent nerve injury. This patient has full range of motion and no neurological and will not have any impairment based on the surgical procedures to either wrist.

(Ex. A)

For some unexplained reason Dr. Wirtz' report is unsigned, but it does appear on his letterhead stationary and appears to be dictated by him in his practice as a physician.

Claimant was terminated from employer on January 10, 1986 for excessive absenteeism which she felt was unjustified because she missed work while being treated for gall bladder problems. Claimant acknowledged that she also filed a civil suit against employer for damages for lost wages and that the longer she is only able to work part time the more this increases her claim for damages in that law suit (Trans., p. 98). She conceded that she had not looked one day for full-time work (Trans., p. 100). She granted that she was not and had never been under any doctors restrictions of any kind (Trans., pp. 100, 103 & 104). Claimant indicated that she had been checking the want ads in the paper every week. Counsel for the Second Injury Fund demonstrated that she was not aware of several jobs that were in the local newspapers in the last two weeks that he contended she could do (Trans., p. 101; Fund Ex. 8). Claimant admitted that she was not terminated on January 10, 1986 due to her right knee injury (Trans., p. 104). She was able to return to Hygrade and did her old job after the motorcycle accident until she voluntarily quit to raise her children. The motorcycle injury did not keep her from looking for any other work (Trans., pp. 104 & 105). Claimant granted that she was a cook at Methodist Manor, she stood all of the time, from July 12, 1982 until May 14, 1983, several hours a day, but she could sit down for a few minutes if she needed to. Claimant also agreed that she did not see a doctor for her right leg during this period of time (Trans., pp. 105-109).

Claimant admitted that when she applied for the job at Methodist Manor as a cook she signed a statement that she did not know of any disabilities, previous injury or illness which would restrict her from performing the normal tasks of the position for which she was employed (Trans., pp. 108 & 109; Fund Ex. 1, p. 11). Also, Dr. Prescott, her personal physician,

signed a statement that he found no indication of any condition which might represent a possible hazard to the health of patients, the applicant or employee or other employees in the institution (Ex. 1, p. 11). Claimant agreed that she did not give up this job due to her right leg or knee (Trans., p. 110).

Claimant also admitted that when she worked at the tavern for a couple of weeks that she lost no work and did not leave the job due to her right leg or knee (Trans., p. 111). Claimant acknowleged that when she worked at Methodist Manor again in July and August of 1984 as a nurse's aide, for four weeks, that she and Dr. Prescott again verified that there were no conditions that would restrict her from doing this job (Tran., p. 114; Ex. 1, p. 10). Claimant testified that before she started with employer, IBP, on August 16, 1984 she took a physical examination and went right to work on the production line eight or ten hours a day, six days a week. She acknowledged that she never missed one day of work and did not see her treating physician at anytime due to her right leg or knee while working at IBP (Trans., p. 116 & 117). Claimant agreed that when she left IBP on January 10, 1986 it was not due to her right leg or knee. She conceded that she had not lost any job opportunity due to her right leg or knee (Trans., p. 118).

Claimant testified that she had not tried to find full-time work because she knew that there was none to be found due to the depressed economy, but that she did not decline to look for employment due to her right knee or leg (Trans., p. 119). Claimant said that she mentioned her right leg complaints at work to her supervisor and the nurse, but, she did not know if they made a record of it after she talked to them (Trans., p. 121). Claimant testified that she looked for a number of jobs after termination by IBP (Ex. 19).

Claimant testified that she did not get a job at Aalfs making blue jeans because she did not pass a dexterity test (Trans., pp. 123-127; Fund Ex. 7, question 14). Clare Petersen, secretary at Aalfs, testified that she interviewed claimant twice. In the first part of 1984 claimant took a dexterity test and passed it satisfactorily. Petersen testified that she saw claimant again in early 1986, possibly January or February, and that she assumed that claimant passed the dexterity test because claimant went to the next step of being interviewed by the supervisor. If they fail the dexterity test they do not go on to the next interview (Trans., pp. 156-159, 164, 167 & 168). The witness conceded that she did not know for a fact whether claimant actually took a dexterity test or not in early 1986 (Trans., p. 162).

Claimant took a preemployment physical examination before starting her current job as a part-time school bus driver. Mark Schultz, M.D., her personal physician at that time, completed a

report on August 15, 1986. Under the heading of limbs/members appears this question: "Does this person possess full use of all limbs?". The handwritten answer to this question is "yes". (Fund Ex. 3, p. 3, reverse side). Claimant conceded that her personal physician made no mention of any impairment to her right leg or knee, left wrist or right wrist (Trans., pp. 130 & 131). Claimant conceded again that she had not lost any work due to her right leg or knee and that she had not attempted to find any full-time employment since her termination on January 10, 1986 (Trans., pp. 131 & 132).

Counsel for employer brought out that claimant filed a claim and was paid lost wages for a trip to Des Moines on August 14, 1986 to see Dr. Wirtz. Claimant admitted that she was not actually working yet on that date (Trans., pp. 135 & 136). Claimant also filed a claim for eight hours of lost wages for the trip to see Dr. Socarras on September 4, 1986 for the EMG. She admitted that she did not actually lose eight hours or work but only possibly six hours at the most on that date (Trans., pp. 137 & 138). Claimant also answered that when she protested her termination by employer for excessive absenteeism, which she felt was justified by her gall bladder disease, that she did not make any mention of any problems with her right knee or either wrist (Trans., pp. 140-143). Claimant testified that she did not complain of her physical problems at work because (1) she was not a complainer, (2) she would be ignored if she did complain, and (3) she believed that she might be punished somehow if she complained (Trans., pp. 149-151).

Ilene Hogancamp testified that she is claimant's mother. She felt claimant's leg was getting worse. She testified that her daughter uses a cane when it is raining. She averred that her daughter takes aspirin and tylenol for pain. She stated that claimant could not put the heel of her right foot on the floor. Claimant walks on her toes. Two years ago claimant could walk two miles with her. Now claimant can only walk approximately five blocks. The witness testified that claimant rubs her hands most of the time (Trans., pp. 168-172).

APPLICABLE LAW AND ANALYSIS

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

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on September 1, 1984 and August 1, 1985 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The claimant has the burden of proving by a preponderance of the evidence that the injuries of September 1, 1984 and August 1, 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).

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 the burden of proof by a preponderance of the evidence that her right and left carpal tunnel conditions are injuries arising out of and in the course of her employment

with employer. Claimant testified, and it is reasonable to believe, that all of her jobs on the production line involved highly repetitive use of both hands most of the time. The surgeon who performed both carpal tunnel surgeries, Dr. Dierwechter, stated that both carpal tunnel conditions were caused by claimant's employment (Ex. 15, p. 2; Fund Ex. 4). None of the other doctors who examined and rated claimant specifically made a finding that these two carpal tunnel conditions were directly caused by claimant's employment. At the same time, all of these doctors knew that they were rating claimant for an alleged work-related injury. None of the doctors offered any evidence or suggestions that the condition was not caused by her employment. None of the doctors indicated that the carpal tunnel conditions were caused by something other than her employment. The only evidence on the point of causal connection is from Dr. Dierwechter, and the sole evidence of causal connection is that the work caused the carpal tunnel conditions (Ex. 9-15, & Ex. A). Consequently, it is determined that claimant did sustain the burden of proof by a preponderence of the evidence that she did sustain a carpal tunnel injury on September 1, 1984 to her left wrist and a carpal tunnel injury on August 1, 1985 to her right wrist, both of which arose out of and in the course of her employment with employer.

In awarding impairment ratings for alleged work injuries, doctors of necessity imply that the injury was the cause of the impairment which they find present (Ex. 10-15). Therefore, it is determined that both carpal tunnel injuries are found to be the cause of some disability.

Entitlement is determined as follows:

With respect to the left hand Dr. Dierwechter, the performing surgeon, found no impairment. Dr. Jardon, the university professor, found five percent impairment of the right upper extremity which converts to five percent of the hand (Ex. 10) Guides to the Evaluation of Permanent Impairment, second edition, table nine, page 10. Dr. Wolbrink, an evaluating physician for claimant, awarded 11 percent of the left hand (Ex. 11). Dr. Garner, another evaluating physician for claimant, awarded 10 percent of the left hand (Ex. 12). Dr. Wirtz, an evaluating physician for the employer, stated that claimant did not have any impairment in the left hand (Ex. A). No doctor issued any restrictions on claimant's activities with her left hand. Claimant, however, complained of numbness and weakness in her hand. Claimant's mother testified that she rubs her hands much of the time. Claimant may have passed the second dexterity test at Aalfs since she went on to the interview for the job. Claimant has been able to drive the school bus. Dr. Schultz, a personal physician, stated that claimant had full use of all limbs and members on August 15, 1986 (Fund Ex. 3, p. 3, reverse side).

Based upon the foregoing evidence and agency expertise [Iowa Administrative Procedure Act 17A.14(5)] it is detemined that claimant has sustained a five percent permanent partial impairment to the left hand with deference going to the award of Dr. Jardon, whose opinion appears to be the most reasonable, detached, disinterested and objective (Ex. 10).

The injury to the left hand in this case is the second injury. The first injury occurred on June 10, 1973, when claimant was severely physically injured when she was struck by a car in the right leg while riding a motorcycle. On August 1, 1984 Dr. Keane said that it was difficult to project a rating at that time. He anticipated a 20 percent permanent partial impairment of the leg (right lower extremity). He predicted degenerative arthritis and a possible arthrodesis. The arthrodesis has never been performed, but claimant has developed degenerative arthritis. Dr. Keane did not place any restrictions on claimant's working activities. The only other impairment rating for the right leg was made by Dr. Garner on December 15, 1986 when he awarded a 25 percent permanent partial impairment rating of the right lower extremity (Ex. 12). Dr. Garner's rating is accepted as the most accurate rating because it is the most current rating. The Second Injury Fund saw fit not to request it's own independent medical evaluation but chose instead to rely on the ones summarized above which were obtained and introduced by claimant.

It is also well established that claimant has a three-fourths inch lateral deviation of the right foot on the ankle joint and permanent plantar flexion of the right foot so that her right heel does not touch the ground when she is standing on both feet (Ex. 13). Claimant testified that standing long periods of time hurts her leg and her back. This would appear to be very credible in view of the objective physical condition of her right foot and ankle and the degenerative arthritis. Although the evidence varied as to how far claimant is able to walk without pain, it is established that her walking ability is impaired in some substantial degree.

Claimant sustained a third scheduled member injury on August 1, 1985 to the right hand. Claimant's entitlement to benefits and the liability of the employer is determined as follows.

With respect to the employer's liability for the right hand the various physicians awarded the following ratings: Dr. Dierwechter 0%: Dr. Jardon 5%: Dr. Wolbrink 7%: Dr. Garner 10%: and Dr. Wirtz 0%. Again, Dr. Jardon is selected as the best rating for the reasons set forth with respect to the left hand above.

Employer, then is liable for 9.5 weeks of permanent partial disability benefits based upon a five percent impairment of the right hand due to the injury of August 1, 1985 (190 x .05) Iowa

Code section 85.34(2)l.

Even though claimant has established a rather severe physical injury it cannot be said that her disability is great because she has performed as if she had practically no disability at all due to her right foot and ankle. After the motorcycle injury she returned to work at Hygrade and performed production line work full time from approximately June of 1974 until she resigned to raise her children in November of 1978. She then worked at Methodist Manor on her feet most of the time as a cook in 1982 and again in July and August of 1984 as a nurse's aide. She then worked at IBP from August 16, 1984 to January 10, 1986 full time, eight to ten hours a day, six days a week on the production line. When she applied for all of these jobs she indicated that she had no physical limitations that would prohibit her from doing them. Her personal physicians also stated that she was fully capable of doing these jobs.

Claimant testified that she did the work with difficulty and with pain. Nevertheless, except for 1977 and 1978, she was not making any complaints to her personal physicians or to her employers that she was having any difficulty doing these jobs. She never quit a job and she was never terminated from a job due to her leg or wrist injuries. She never lost any time from work at IBP due to her right leg injury. She was never turned down by an employer for any job that she ever wanted due to her leg injury. Since her termination by employer on January 10, 1986 she has not wanted or sought full-time work. While claimant was working for employer, from August 16, 1984 to January 10, 1986, she was fully able to do all of the work that was assigned to her or that she was requested to do.

In summary, we have what claimant's counsel described as a courageous person with a rather severe physical impairment which has not appreciably reduced her earning capacity. Nevertheless, certain job opportunities are foreclosed to claimant. Michael v. Harrison County, 34 Biennial Report of the Industrial Commissioner, 218, 219 (1979). Claimant cannot do work which requires substantial walking or walking long distances. She is more impaired than a normal person to perform work that requires standing for long periods of time because of the arthritis in her ankle which causes pain in her right leg and the shortened right leg which causes pain in her back. She has residual limitations from carpal tunnel syndrome.

Claimant's relatively young age, her reasonably good education, her good school record, adapability, background as a secretary, bookkeeper, accountant, cook, nurse's aide, production worker and her experience as a truck driver and school bus driver leave many employment opportunities that claimant can perform. Accordingly, based on all of the foregoing evidence it is determined that as a result of the first injury to her right leg

on July 10, 1973 and the second injury to her left wrist on September 1, 1984, and the third injury to the right wrist on August 1, 1985, that claimant has sustained an industrial disability of 25 percent of the body as a whole. Industrial disability need not exceed functional impairment. Birmingham v. Firestone Tire & Rubber Co., II Iowa Industrial Commissioner Report 39 (1981). Industrial disability can be equal to, less than or greater than functional impairment. Lawyer & Higgs, Iowa Workers' Compensation -- Law & Practice, section 13-5, p. 116 and 1987 supplement p. 20. This provides an entitlement of 125 weeks of benefits.

Claimant's entitlement and the employer's liability for the injury to each hand is 9.5 weeks (190 x .05) based on Iowa Code section 85.34(2)1 for a total of 19 weeks. The 25% left leg impairment provides a compensable value of 55 weeks. The total is 74 weeks.

Claimant's entitlement to Second Injury Fund benefits and the liability of the Second Injury Fund is determined as follows when the second injury is a scheduled member injury: from the industrial disability resulting from the combined effects of both the first and second injury is subtracted the impairment value of the first injury and the impairment value of the second injury. Iowa Code section 85.64, Fulton v. Jimmy Dean Meat Co., (file No. 755039, Appeal Decision July 23, 1986). Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300 (Iowa 1979).

The Second Injury Fund is liable for the industrial disability caused by the combined effects of both the first and second injury minus the impairment value of the first injury and minus the impairment value of the second injury.

The industrial disability of the combined effects of all these injuries in this particular case is determined to be 125 weeks (500 x 25%) Iowa Code section 85.34(2)u.

The impairment value of the first injury is 55 weeks (220 x 25%) Iowa Code section 85.34(2)o.

The impairment value of the left hand is 9.5 weeks (190 x .05, [Iowa Code section 85.34(2)], and a like impairment exists for the right hand for a total of 19 weeks.

Claimant's entitlement, to Second Injury Fund benefits and the liability of the Second Injury Fund to claimant is 125 weeks, minus 74 weeks which equals 51 weeks.

The parties stipulated that the proper rate of compensation. At the time of the left hand injury on September 1, 1984 is $180.19 per week, for the right hand it is $188.67.

The industrial disability following the left hand injury is determined to have been 20 percent of the body as a whole. Claimant's entitlement at that point, prior to the right hand injury, would have been 100 weeks. Deducting 64.5 weeks for the compensable value of the right leg and left hand results in 35.5 weeks payable by the Second Injury Fund at the rate of $180.19 commencing 9.5 weeks after October 5, 1985, namely, December 10, 1985. It was stipulated that the healing period ended October 5, 1985. The remaining 15.5 weeks of the entire 51 weeks awarded are to be paid at the rate of $188.67 payable commencing 9.5 weeks after the employer's permanent partial disability payments commenced on March 4, 1986, as stipulated, namely May 8, 1986.

FINDINGS OF FACT

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

That claimant sustained a carpal tunnel injury to her left hand on September 1, 1984 which arose out of and in the course of her employment with employer.

That claimant sustained a carpal tunnel injury to her right hand on August 1, 1985 which arose out of and in the course of her employment with employer.

That Dr. Dierwechter, the surgeon for both of the carpal tunnel surgeries, stated that the carpal tunnel injuries were caused by claimant's employment.

That claimant performed several repetitive jobs with her hands while working for employer.

That the carpal tunnel injuries were the cause of a permanent partial impairment of five percent to each hand based upon the evaluation of Dr. Jardon.

That claimant sustained a severe injury to her right leg on June 10, 1973 in a motorcycle accident.

That claimant sustained permanent partial impairment of 25 percent of her right leg due to this injury of June 10, 1973 based on the most current evaluation made by Dr. Garner.

That claimant has no medical restrictions due to any of these injuries.

That claimant is 35 years old, has a high school education, is bright, and has experience as a secretary, bookkeeper, accountant, cook, nurse's aide, bartender, production line worker and has experience driving a truck over the road and a

school bus.

That claimant has performed many jobs after the June 10, 1973 motorcycle accident; has never missed work or lost a job as a result of this injury; and has never been turned down for employment as a result of this injury.

That claimant is limited on how far she can walk and that she suffers pain in her back and in her right leg after prolonged standing.

That claimant has sustained an industrial disability of 25 percent of the body as a whole as a result of the right leg injury on June 10, 1973 and the left hand injury on September 1, 1984 and the right hand injury of August 1, 1985.

That claimant's industrial disability following the left hand injury of September 1, 1984 was 20 percent.

CONCLUSIONS OF LAW

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

That claimant sustained an injury on September 1, 1984 and another injury on August 1, 1985 which arose out of and in the course of employment with employer.

That both injuries were the cause of permanent disability.

That claimant is entitled to 9.5 weeks of permanent partial disability caused by the injury to the left hand on September 1, 1984 and 9.5 weeks of permanent partial disability caused by the injury to the right hand on August 1, 1985.

That the overall industrial disability caused by the injuries of June 10, 1973, September 1, 1984 and August 1, 1985 is equal to 125 weeks. Prior to the August 1, 1985 injury it was 100 weeks.

That the compensable value of the permanent injury of June 10, 1973 is 55 weeks.

That the compensable value of the second permanent injury on September 1, 1984 is 9.5 weeks.

That the compensable value of the injury to the right hand on August 1, 1985 is 9.5 weeks.

That the obligation of the Second Injury Fund is 51 weeks of permanent partial disability benefits, 35.5 at the rate of $180.19 and 15.5 weeks at the rate of $188.67.

That claimant's entitlement to healing period compensation has been fully paid.

ORDER

WHEREFORE, IT IS ORDERED:

That defendant employer pay to claimant nine point five (9.5) weeks of permanent partial disability benefits at the rate of one hundred eighty and 19/100 dollars ($180.19) per week for the injury of September 1, 1984 in the total amount of one thousand seven hundred eleven and 81/100 dollars ($1,711.81) commencing on October 6, 1984, at the end of the healing period.

That defendant employer pay to claimant nine point five (9.5) weeks of permanent partial disability benefits at the rate of one hundred eighty-eight and 67/100 dollars ($188.67) per week for the injury of August 1, 1985 in the total amount of one thousand seven hundred ninty-two and 37/100 dollars ($1,792.37) commencing March 4, 1986, as stipulated.

That defendant Second Injury Fund pay to claimant thirty-five point five (35.5) weeks of permanent partial disability benefits at the rate of one hundred eighty and 19/100 dollars ($180.19) per week in the total amount of six thousand three hundred ninety-six and 75/100 dollars ($6,396.75) commencing December 10, 1985 and an additional fifteen point five (15.5) weeks of permanent partial disability benefits at the rate of one hundred eighty-eight and 67/100 dollars ($188.67) per week commencing May 8, 1986 in the total amount of two thousand nine hundred twenty-four and 38/100 dollars ($2,924.38).

That all accrued benefits are to be paid in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30

That the costs of this action are to be paid by both defendants with employer and Second Injury Fund equally sharing these costs pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 9th day of February, 1988.

Walter R. McManus Jr.

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

001446

Copies To:

Mr. Steven Hamilton
Attorney at Law
606 Ontario St.
Storm Lake, Iowa 50588

Mr. Harry Dahl
Attorney at Law
974 - 73rd St. STE 16
Des Moines, Iowa 50312

Mr. Robert D. Wilson
Assistant Attorney General
Hoover State Office Bldg
Des Moines, Iowa 50319

001447

FILED

APR 29 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DIANE RENDER,	:	
Claimant,	:	
vs.	:	
IOWA DEPARTMENT OF HUMAN SERVICES,	:	File No. 765147
Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
STATE OF IOWA,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Diane Render against the Iowa Department of Human Services, her former employer, and the State of Iowa, insurance carrier. The case was heard and fully submitted on October 6, 1987 at Des Moines, Iowa. The record in the proceeding consists of testimony from Diane Render, Carl W. Northwall, M.D., Curtis Rich, M.S.W., Michael L.
Hopkins, Robert E. Smith, M.D., and Sally Jagnanden. The record also contains claimant's exhibits 1, 2 and 3 and defendants' exhibits A, B, C, D and E.

ISSUES

Claimant alleges that she sustained a psychiatric injury which arose out of and in the course of her employment and that she is permanently and totally disabled as a result of that injury. The issues presented by the parties for determination are whether claimant sustained an injury which arose out of and in the course of her employment; whether any alleged injury is a proximate cause of any disability which she has experienced; determination of claimant's entitlement to compensation for temporary total disability or healing period; and, determination of claimant's entitlement to compensation for permanent partial or permanent total disability. Defendants assert that claimant failed to give notice of injury as required by Iowa Code section 85.23. Defendants seek credit under the provisions of Code section 85.38(2) for group plan payments which have been paid. By stipulation of the parties, any issues with regard to claimant's entitlement to benefits under section 85.27 of The Code were bifurcated pending a determination of the employer's liability for the alleged injury.

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.

Diane Render is a 44-year-old lady who is a graduate of a private, Omaha, Nebraska high school. After high school, she attended one year of pre-nursing training in Ottumwa, Iowa, one semester of nursing at the University of Iowa and then obtained a degree in general science from the University of Iowa in June, 1966.

After a brief period of employment in a factory, she became employed by what is now known as the Iowa Department of Human Services on January 17, 1967. Claimant remained continuously employed by the state of Iowa thereafter until November, 1983 when she resigned.

Render has held a variety of positions. Initially, she was a social worker and performed general duties, including processing A.D.C. applications and family counseling. In 1969, she became a social worker II and her duties included involvement in child abuse, foster care and juvenile court proceedings. In 1972, claimant became a full-time intake screener and carried a full case load. In 1976, Render became a resource manager, where she assisted general relief recipients in handling money. For approximately two months, she worked with the mental health division. In 1977, Render moved to the district office and was assigned to work with the United Way, where she helped compile a resource book used to direct needy people to appropriate service sources.

In 1979, claimant began working in the ACES program. Initially, she was assigned to assist the director and felt that she did well in that position. In October, 1981, she became a case manager. Claimant stated that she was able to work as a case manager. In early 1982, claimant was hospitalized for what she described as headaches, stomach, arm and shoulder problems. She also recalled experiencing skin problems. Claimant felt that she was doing well in her case manager position until July, 1982, when Mike Hopkins, a co-employee, changed positions. Claimant related that her supervisor, Donna Meyer, suggested that claimant cease obtaining treatment from Richard E. Preston, M.D., the psychiatrist with whom she had treated for several years. Claimant commenced counseling with Curt Rich.

Claimant testified that Meyer also became critical of

claimant's work. Claimant became frustrated, nervous and anxious about working as a case manager.

Claimant denied expressing threats towards any of the staff, but did not deny making statements about driving dangerously. She stated that she was angry when Mike Hopkins visited her.

Involuntary commitment proceedings resulted in claimant being placed in Broadlawns Medical Center on September 3, 1982, where she remained until September 8, 1982. Claimant was evaluated and treated for job stress and a dysthymic disorder (exhibit A, tab 3A).

After being off work for several months, claimant returned to a job working in the WIN program in approximately February, 1983. Claimant stated that her duties included individual training plans. Claimant testified that she was immediately assigned a high case load. Claimant ultimately resigned from the position in November, 1983.

Render testified that her primary problem is with interpersonal relationships and that she becomes anxious. She is presently treating with Curt Rich and with Dr. Olson. She feels that she is improving.

Claimant currently receives social security disability benefits in the amount of $704.00 per month and long-term disability from Bankers Life in the amount of $354.00 per month. Claimant felt that she would have difficulty being employed. She has not been gainfully employed since November, 1983. She expressed reluctance to perform menial jobs which did not utilize her education.

Render has a long history of emotional problems. The record, as summarized in defendants' brief, shows seven hospitalizations for emotional problems prior to the hospitalization that occurred on September 3, 1982. Tab 2E of exhibit A shows that claimant was admitted to Iowa Methodist Medical Center on March 7, 1982 with diagnoses that included borderline syndrome and depression (exhibit A, page 384). The same diagnoses appeared upon discharge. It was also noted that claimant had a long history of serious mental problems, intrapsychic conflicts, adjustment difficulties and severe depression. Her prognosis was characterized as "guarded" (exhibit A, page 408).

When hospitalized on September 3, 1982, claimant related the problems to having her 15-year-old nephew staying with her, to her friend, Mike Hopkins, having moved to a different position and to criticism of her job performance (exhibit A, page 511).

Claimant testified that there were stresses in her life, other than from her employment. Claimant stated that her nephew

came to stay with her in January, 1982 and that it was intended to be permanent, but that he left in June. She felt that she had failed him. Claimant did not feel that the nephew unduly interfered with her work.

Curtis Rich, a clinical social worker, began counseling with claimant in July, 1982. He stated that claimant was decompensating and that he diagnosed her as having a borderline personality disorder. He indicated that her history was one of a number of psychiatric disorders. Rich stated that, in view of claimant's underlying disorder, he was bewildered at how she could have worked for as many years as she did. He was unable to explain how she could have performed as a social worker. Rich stated that claimant was decompensating in July, 1982, when he initially began treating her. He indicated that oral presentations are something a social worker customarily performs.

Rich identified a number of sources of stress that appeared to be affecting Render. He declined to express an opinion as to the cause of her symptomatology.

Michael Hopkins, a practicing psychologist, testified that he had worked with claimant in the ACES program and that, initially, he had observed no problem with claimant's work and no unusual behavior from her. Hopkins testified that he left the program in the spring of 1982 in order to go back to school. He stated that claimant's job as a case manager involved incorporating a number of reports into one report and that she had expressed anxiety about her ability to perform it adequately.

Hopkins testified that, when he came back to the office, he found claimant to be much more anxious and that, in conversing with her, he became concerned about her mental health. He later telephoned her, at which time she expressed a desire to injure another staff member. Hopkins stated that he participated in the commitment proceedings. Hopkins related that, in the spring of 1982 when Dr. Meyers became the director, claimant's job duties changed significantly and they were understaffed in relation to their work load.

Sally Jagnandan testified that she was the director of the Des Moines district WIN program. Jagnandan testified that Render was assigned to the unit in February, 1983 to work as a social worker responsible for identifying family barriers to employment and also for individual training programs. Jagnandan stated that, when claimant first moved into the position, she was monitored closely and given a lot of positive feedback, but that, in late July, 1983, things began to deteriorate. Jagnandan related that claimant had difficulty using the computer from the beginning and that she also had communication problems with co-workers. Claimant had expressed a dislike for the job and asked why she had not been fired.

On approximately September 20, the WIN program changed and claimant received new job duties. These included making group presentations. During the second week of October, claimant was given a written reprimand for failing to prepare a training program promptly. Claimant was also warned about using headphones in the workplace. Jagnandan testified that claimant voluntarily resigned from her position after a physician had provided a statement which indicated that claimant would be absent from work intermittently. Jagnandan stated that claimant was not performing satisfactorily at the time she resigned.

Carl W. Northwall, M.D., and Robert E. Smith, M.D., board-certified psychiatrists, testified at the hearing. Dr. Northwall expressed the opinion that claimant's employment had aggravated a preexisting, borderline personality disorder and caused her to become symptomatic. He did not, however, have knowledge of her actual employment duties or of any changes in the employment setting (partial transcript, pages 9 and 10). Dr. Northwall last saw claimant in spring, 1985 and felt that she was still quite symptomatic and incapable of being employed (partial transcript, page 18).

Dr. Smith explained that borderline personality disorder is a quite significant illness and is characterized by tremendous emotional instability and interpersonal difficulties. He described it as a chronic, lifelong condition that typically starts when a person is a teenager and sometimes begins to wane after age 40. Dr. Smith related that an affected person can appear to be symptom-free when things are very harmonious, but that they are more vulnerable and reactive to stress than a normal person and that symptoms correlate to stress, regardless of whether it is real or perceived (partial transcript, pages 40-46).

Dr. Smith was questioned about the relationship between claimant's work and her illness:

> Q. Do you think that in Diane's case, that her environment or work environment aggravated her disorder, or did it merely provide the stage for the symptomatology to appear?
>
> A. Well, the work environment has had stressors, but I think we should also remember that the nonwork environment at any point in time also has stressors. And I think in anyone's life, both are going on at the same time. The work environment is the stage which we're focusing on here, but I think that that maybe is more of a perceived focus than a real focus.

If we could go back and dissect out all the

vents that were ongoing, all the relationships that were ongoing in '82, or in '83, we would find that there would be significant difficulties in the work setting and there probably would be significant difficulties in the nonwork setting. That's my overview of what was going on. But I do not--I would not quarrel with the concept that the work was serving as a stage in which we are looking at the dysfunction and the illness.

Q. Would a person of normal sensibilities have reacted in the manner in which Diane reacted to her work environment?

A. No.

Q. Would you explain that?

A. Well, I think the easiest--best place to start is the fact that we know certain behavioral characteristics appear with borderline personality disorders. And if you don't look at the specifics, but if you look at patients with this syndrome, with this illness, and start to generalize what is happening to them in their lives, both at home, not at home and in the work setting, you find repeated patterns of behavior. And the pattern of behavior that occurred in the work setting that we're talking about today is classic of what we see in a borderline personality disorder. So it occurs in this individual, but it has occurred in most individuals with borderline personality disorder by our definition of the illness. It's part of the illness description.

Q. Doctor, do you feel that her work environment--this may be somewhat redundant, but is it related to her illness? What is the relationship between the work environment and the borderline personality disorder?

A. Well, the illness feeds into changes that are occurring in the work environment that are both positive and negative. Given time, I think the negative effects start to culminate so that the illness is affecting the work environment. When the work environment starts to be negative, i.e., abandonment, i.e., rejection, i.e., "We're going to fire you," then that starts to become an added stress that feeds into the illness and then you've got a vicious circle going.

Q. Doctor, would a person of normal sensibilities have become dysfunctional or disabled in the face

of the work environment that confronted Diane Render?

A. I believe not.

Q. Doctor, could you explain how you view the commitment proceedings in September of 1982, and the evolution up to that in the whole picture of Diane Render?

A. Okay. I'm piecing together a puzzle, and we have to remember that a lot of the information comes from an individual's perceived situation and story of that situation and bits of information from people's interpretation of what people were perceiving, so it's not the same as being there. But I think if you look at the events in the context of the illness, things make sense.

I sense that in the months before the commitment being filed, there were perceived situations on Diane's part that she was not doing a good job. There were concerns that her supervisor or someone in a position of authority might feel that she's inadequate for the position and indeed may need to be released or terminated, and then obviously there was a component of added stresses by the new job description, in which she was doing poorly.

So we have an individual that was doing poorly, was perceiving that people were recognizing her as doing poorly, confronting her on that and saying--we don't know what they were saying, but I think what some of Diane's perceptions were, "You need to be fired" or "You're going to be fired," and then the vicious circle got going. The more she ruminated on that, the more anxious and distraught she became, and was feeling rejected, was feeling abandoned. When borderline people start to feel rejection and abandonment, they want to go back to the old styles, an area that they worked in the past that they could control. So one thing they commonly do is slip into the suicide ideation.

Most people, when they talk about suicide, they stop stressing them and start nurturing them, and that led to the switching into the suicidal ideation. This anger that was being projected, that people were projecting, got to where she was verbalizing the harm, and these were again being given to control the environment. "Back off. I don't like the stressors I am under." So she was trying to

control.

> The people hearing these comments I think acted appropriately. When someone talks of killing themselves, when someone talks of potentially harming someone or wishing someone ill, when someone talks of driving a car into a mall and potentially injuring pedestrians, you can't ignore that, you have to intervene. And the intervention that was chosen, maybe the only thing, was to seek commitment or evaluation and care. That's the scenario in which I see that occur. So when the vicious circle got going, it just kept going on itself.

(Partial transcript, pages 51-55)

Dr. Smith felt that claimant's history of long-term, continuous employment demonstrated a nurturing, supportive employment relationship, rather than years of excellent work performance (partial transcript, page 64). Dr. Northwall agreed that claimant had apparently been employed in a protective position (partial transcript, pages 14 and 15).

Dr. Smith indicated that, at the time he examined claimant, she was employable in a position with a level of stress that was appropriate to her disorder (partial transcript, page 69).

Claimant's exhibit 1 indicates that, on August 7, 1986, a report was issued by Donald J. Heywood, A.C.S.W. The first statement in the report states, "Informant for this history is the patient's mother. I fear that, relative to the history of the file, the mother's information is, at best, marginal and at worst, slanted." The summary states that the informant would have characterized claimant as being extremely well adjusted until 1982.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received injuries on September 3, 1982 and November 16, 1983 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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 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 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).

"Arising out of" is essentially the issue of proximate cause. Claimant must prove, by a preponderance of the evidence, the causal connection between the employment incident or activity and the injury upon which the claim is based. A possibility is insufficient; a probability is necessary. Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974). Whether a disability has a direct causal connection with the claimant's employment is essentially within the domain of expert testimony. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867, 870 (1965); Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

This case deals with a claim of psychological injury resulting from emotional trauma and stress that was not accompanied by physical trauma. The Iowa Supreme Court has not yet determined whether mental stimulus causing nervous injury is compensable. In a recent case, the Court specifically declined to accept or reject any of the three categories of nervous condition cases which are defined in Larson Workmen's Compensation Law, section 42.20. Newman v. John Deere Ottumwa Works of Deere & Co., 372 N.W.2d 199 (1985). In Newman, the Court reversed the commissioner's award of benefits. The commissioner's award, in essence, was that the mere inhaling of welding fumes was sufficient to aggravate Newman's preexisting psychological condition and was the proximate cause of the disability upon which the claim was based. In Newman, the Court stated that if physical trauma is imaginary, it can form no basis for recovery because such is the product of the individual's mental condition and not of his work. The Court stated, "We find no cases which permit recovery when employment merely provided a stage for the nervous injury." In a footnote, the Iowa Court also referred to cases from other jurisdictions, including Szymanski v. Halle's Department Store, 63 Ohio S.T.2d 195, 198, 407 N.E.2d 502, 505 (1980), for the proposition that mental stress, which can be traced to the nature of the employee, cannot be considered a risk arising from

the employee's work. The Court also cited the case School District #1 v. Dept. of Industry, Labor and Human Relations, 62 Wisc.2d 370, 377, 215 N.W.2d 373, 377 (1974), which stated that non-traumatic mental injury, in order to be compensable, must result from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience. This is sometimes referred to as the Wisconsin Test which is the preferable standard according to Larson, section 42.23(b). This agency has followed the Wisconsin rule frequently as it is defined in the case Swiss Colony, Inc. v. Department of Industry, Labor and Human Relations, 72 Wisc. 46, 240 N.W.2d 128 (1976). The standard is similar to the one that is applied to heart attacks, strokes and idiopathic conditions.

From the record made in this case, it is clear that claimant's emotional disorder was symptomatic when she was hospitalized in March, 1982. She had been under treatment for it continuously thereafter and it cannot be fairly concluded that she ever actually recovered from the March, 1982 flare-up of her underlying condition. The condition, as explained by Dr. Smith, is one in which the onset of symptoms would be likely to produce disharmony between the person and other individuals in general. This would be expected to occur at her place of employment or at any other place where she associated with other individuals. The fact that she had difficulties in both the ACES and WIN programs is not unexpected. It appears to be a classic manifestation of the symptoms of the disorder.

The only evidence in the record of this case of stress being placed upon claimant in her employment is that which comes from claimant herself. The record is conspicuously devoid of evidence regarding stress levels prior to the March, 1982 hospitalization. The physician who made that discharge summary appears to have been correct when it was indicated that claimant's future prognosis was "guarded." The evidence from Dr. Smith is accepted as being correct in this case, rather than that from Dr. Northwall, even though Dr. Northwall did treat claimant. Dr. Northwall did not have a good grasp or understanding of what was actually occurring in claimant's employment. She was his only source of information in that regard. The vicious circle described by Dr. Smith appears to be an accurate assessment of what occurred in this case.

It is therefore found and concluded that claimant has failed to prove, by a preponderance of the evidence, that stress in her employment was a substantial factor in bringing about any emotional or psychological disability which she has experienced.

FINDINGS OF FACT

1. During 1982 and 1983, Diane Render was a resident of the state of Iowa, employed by the Iowa Department of Human Services

within the state of Iowa.

2. Render has a long history of psychological problems dating at least as far back as 1974. She was hospitalized at least six different times for emotional problems prior to the commencement of calendar year 1982.

3. Render was hospitalized for an emotional disturbance in March, 1982, where she was diagnosed as having depression and as having a borderline personality disorder.

4. The March, 1982 hospitalization occurred at a time when claimant's employment was relatively harmonious and free from stress.

5. Render did not completely recover from the March, 1982 episode.

6. The nature of claimant's preexisting, underlying psychological disorder is that it can become symptomatic, based upon stress, regardless of whether the stress is real or perceived.

7. When claimant's underlying psychological disorder becomes symptomatic, she has difficulty with interpersonal relationships.

8. The problems and stress that Diane Render encountered in her employment in 1982 and 1983 were a result of the manifestation of the symptoms of her underlying psychological disorder.

9. The evidence in the case fails to establish, by a preponderance of the evidence, that stress in claimant's employment was a substantial factor in bringing about the psychological disability which affected her commencing in 1982 and continuing up to the present time.

10. The evidence in the case fails to establish, by a preponderance of the evidence, that the stress to which Render was subjected in her employment was unusual or was out of the ordinary when compared with the day-to-day stresses which are inherent in being gainfully employed.

11. Claimant's employment merely provided the setting in which claimant's psychological disabilities manifested themselves.

12. The assessment of this case made by Dr. Smith is correct.

CONCLUSIONS OF LAW

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

2. Diane Render has failed to prove, by a preponderance of the evidence, that she sustained an injury which arose out of and in the course of her employment with the Iowa Department of Human Services.

3. Claimant has failed to prove, by a preponderance of the evidence, that stress to which she was subjected in her employment with the Iowa Department of Human Services was a proximate cause of any emotional or psychological disability with which she has been afflicted during the time period commencing with January of 1982 and running up to the present time.

4. Claimant has failed to introduce evidence showing that stress in her employment aggravated her preexisting condition.

ORDER

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

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against defendants pursuant to Division of Industrial Services Rule 343-4.33.

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

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Patrick Brick
Attorney at Law
550 39th Street, Suite 200
Des Moines, Iowa 50312

Mr. Luis Herrera
Attorney at Law
840 Fifth Avenue
Des Moines, Iowa 50309

Mr. Robert W. Pratt
Attorney at Law
1913 Ingersoll Avenue
Des Moines, Iowa 50309

Mr. Greg Knoploh
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319

001459

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD RICKETT,	:	
Claimant,	:	
vs.	:	File No. 739306
HAWKEYE BUILDING SUPPLY CO.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
U. S. INSURANCE GROUP,	:	
Insurance Carrier, Defendants.	:	

FILED

JUN 28 1988

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a partial commutation decision and a rehearing decision allowing $9,000.50 of claimant's requested $43,750.14 partial commutation. The deputy denied the portion as to attorney's fees of claimant's requested partial commutation holding that it would not be in claimant's best interest to grant a partial commutation to pay attorney's fees.

The record on appeal consists of the transcript of the partial commutation hearing; claimant's exhibits 3 and 4; and affidavits filed by the parties for the rehearing. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

1. Whether as a condition precedent to the granting of a partial commutation for payment of attorney fees it is encumbent upon Claimant's attorneys to enter into a contractual obligation to provide Claimant with future legal services in connection with his claim for compensation benefits.

2. Whether the contingent attorney fee contract entered into between the Claimant and his attorneys is void as against public policy and therefore unenforceable.

3. Whether the attorney fee which Claimant seeks to pay with his commuted funds is a reasonable fee.

4. Whether Claimant's Petition For Partial Commutation of future payments of compensation to obtain a lump sum of money with which to pay his attorney fees should be granted as being in Claimant's best interests.

REVIEW OF THE EVIDENCE

The partial commutation and rehearing decisions adequately and accurately reflect the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

The citations of law in the partial commutation and rehearing decisions are appropriate to the issues and evidence.

ANALYSIS

The deputy's analysis in conjunction with the issues and evidence presented is adopted. Claimant has established by the greater weight of evidence that it is in his best interest to grant a partial commutation for him to pay his taxes, to pay his noninjury related medical expenses and to buy a new automobile. For the reasons articulated in the partial commutation and rehearing decisions, a partial commutation to pay claimant's attorney's fees is not found to be in claimant's best interests. The amount of weekly benefits must be modified to take into account the time which has elapsed since the deputy's decision.

FINDINGS OF FACT

1. Claimant is 50 years old, permanently and totally disabled, and his life expectancy is 1,357 weeks.

2. Claimant seeks a partial commutation to pay attorney fees, taxes, medical expenses, and to purchase reliable transportation.

3. It would be in claimant's best interest to grant a partial commutation equal to $9,000.50 to pay taxes, medical expenses, and to purchase reliable transportation.

4. Under the facts presented in this case the contingent fee agreement entered into between claimant and his attorney is void as a matter of public policy.

5. A partial commutation to pay the attorney's fees requested pursuant to the contingent fee agreement in this case would not be in claimant's best interest.

6. Claimant's rate of compensation is $256.78; a commutation of $18.69 per week will provide claimant with a commuted sum of $9,000.50; and, it is in claimant's best interest to commute on this basis.

7. The uncommuted value of claimant's benefits is $238.09 per week.

CONCLUSIONS OF LAW

Claimant has proven by a preponderance of the evidence that it is in his best interest to grant a partial commutation of each weekly benefit equal to eighteen and 69/100 dollars ($18.69) for a total of nine thousand and 50/100 dollars ($9,000.50) for payment of taxes, medical expenses, and to purchase transportation; claimant has failed to prove by a preponderance of the evidence that a partial commutation for payment of attorney's fees pursuant to the contingent fee agreement in this case is in his best interest.

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

ORDER

THEREFORE, it is ordered:

That defendants pay claimant nine thousand and 50/100 dollars ($9,000.50) representing a commutation of eighteen and 69/100 dollars ($18.69) of each of his weekly benefits. Defendants shall pay unto claimant his remaining benefits at the adjusted rate of two hundred thirty-eight and 09/100 dollars ($238.09) in accordance with the arbitration decision of May 15, 1986.

That claimant shall pay the costs of the appeal including the cost of the transcription of the hearing proceeding. Each party shall pay the costs incurred by them in the proceedings before the deputy.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Gary L. Johansen
Attorney at Law
508 Davidson Building
Sioux City, Iowa 51101

Mr. Melvin C. Hansen
Attorney at Law
800 Exchange Building
1905 Harney Street
Omaha, Nebraska 68102

Mr. Scott H. Hughes
Attorney at Law
403 First Federal Savings & Loan Bldg.
Council Bluffs, Iowa 51501

001463

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBRA K. RISIUS,

Claimant,

vs.

TODD CORPORATION,

Employer,
Self-Insured,
Defendant.

FILE NO. 738729

A R B I T R A T I O N

D E C I S I O N

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Debra K. Risius, claimant, against Todd Corporation, employer (hereinafter referred to as Todd), for workers' compensation benefits as a result of an alleged injury on June 9, 1983. On March 15, 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. 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 June 9, 1983, claimant received an injury which arose out of and in the course of employment with Todd;

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $118.94 per week;

3. Claimant last worked for Todd on August 11, 1983;

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

ISSUES

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

1. Whether there is a causal relationship between the work injury and the claimed disability; and,

2. 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 Todd on two occasions from 1977 through 1979 and from 1980 until August 11, 1983 as a pant hanger, steamer, folder and sorter. Todd is engaged in industrial laundry business. Claimant stated at hearing that she was terminated by Todd for being absent without a doctor's excuse while she was recovering from a work injury. According to written evidence, Todd's position was that upon receipt of a medical evaluation of claimant's ability to return to work, claimant never contacted them for three days in violation of their absenteeism policy for unexcused absences. The evidence indicates that claimant was warned in writing on at least two occasions about unexcused absences from work prior to her termination. Claimant responds that Dr. Fitzgerald, her treating physician at the time, had provided the necessary medical excuses.

The facts surrounding the work injury are not in real dispute. Claimant testified that on June 9, 1983, while pushing a cart up a ramp weighing 500 to 700 pounds loaded with clothing, she slipped and the cart rolled backwards pinning her between the cart she was pushing and another cart behind her. Claimant said that she was struck in the middle of her back causing pain in both the mid to lower back areas. Claimant did not seek immediate treatment, but after two days she sought out and received chiropractic treatments from S. M. Fitzgerald, D.C., consisting of adjustments twice a week for approximately two months. During this time claimant stated to physicians involved in this case that the pain began to radiate into her hips and buttocks and she developed headaches. Claimant then returned to work for a couple of days but she states that she again experience a recurrence of pain and returned to Dr. Fitzgerald. According

to claimant, the doctor excused her from work for another two weeks.

Claimant was then told to submit to medical evaluation at the Medical Occupational Evaluation Center at Mercy Hospital in Des Moines, Iowa. After their evaluation of claimant, the physical therapist stated that claimant could return to work but should receive physical therapy such as theraputic swimming, Williams exercises and instruction in proper body mechanics. The therapist also stated that until she regains full recuperation she should avoid twisting, bending, reaching overhead and heavy lifting. Claimant said that she performed this type of activity at Todd. The orthopedic surgeon at Mercy Center, Bernard Hillyer, M.D., stated in his report that claimant does not have functional impairment and that she could return to work. However, he added that such a return to work should coincide with physical therapy and possible use of anti-inflammatory medication. A functional capabilities report was prepared by Dr. Hillyer which indicates that although claimant can work an eight hour job, she can only bend, stoop, squat, crawl or climb frequently as opposed to continuously and can only occasionally lift over 50 pounds and should never lift over 75 pounds. According to a transferable skills report from the Center: "If job change does become a serious consideration for Debra, it would appear to be in her best interest to prepare herself for a less physically demanding occupation in order to prevent the reoccurrence of her problems." Claimant was then terminated by Todd for the reasons listed above.

Claimant did not seek further evaluation or treatment of her condition after her termination. Claimant also did not seek employment for a period of two to three years. Claimant, however, testified she continues to have pain and to experience difficulties in her work as a housewife and mother after her termination at Todd. She explained that she did not realize that she was eligible to receive further treatment or workers' compensation benefits until she was informed of this fact by her current attorney when she testified at a hearing dealing with a sex discrimination complaint filed by one of her acquaintance.

Claimant then, with the help of her attorney, was evaluated at defendant's expense, by Thomas A. Carlstrom, M.D., a neuro-surgeon in September, 1986, with complaints of continuous pain since the injury which is gradually worsening. At hearing claimant testified that she was having difficulties getting out of bed in the morning due to low back and hip pain. She also complained of headaches and dizziness. Dr. Carlstrom found no obvious neurological defects but after his examination and tests he said that claimant seems to have: "...persistent low-back pain from a mild to moderate injury." Dr. Carlstrom did not recommend surgery and doubted that any specific treatment would be beneficial to claimant. He stated that claimant probably

reacned maximum healing in September or October of 1983. If claimant returns to work, the doctor felt that claimant should have a 35 pound lifting restriction. He finally opined that claimant "probably has suffered a small permanent impairment and would rate that at about 2-3 percent of the body as a whole."

Claimant was then examined by Robert Walker, M.D., an orthopedic surgeon, in July, 1987. According to Dr. Walker, claimant complained of trouble sleeping, difficulty getting out of bed, difficulty driving a car, radiating low back pain and hip pain, inability to sit or walk for prolonged periods and headaches once a week since the accident. Dr. Walker diagnosed a severe sprain of the lumbosacral joint and entrapment of the right S-1 nerve root and adhesions around the nerve root. Dr. Walker rates claimant's impairment after suitable treatment as 18 percent or "possibly less."

In October, 1987, Dr. Carlstrom reports that he saw claimant again in April, 1987, for complaints of worsening pain since his last evaluation. Dr. Carlstrom also specifically disagreed with Dr. Walker's rating given his own findings and reiterated his own rating. Also, on October 30, 1987, Dr. Carlstrom states that if claimant's symptoms have worsened since leaving Todd: "...that some intervening cause should be considered the cause of her deterioration."

Claimant testified that she had no prior back injuries but admitted to receiving treatment from a Dr. Garcia (first name unknown) in February, 1981, for low back pain and radiating pain in both legs after heavy "tugging" at Todd.

Claimant testified in her deposition in April, 1987, that she had not looked for work at that time but stated that since her deposition she has applied for over 100 jobs without success. Currently, she is still restricted by Dr. Carlstrom from lifting over 35 pounds. Claimant now is helping out in a kitchen at a senior citizens center for no pay because the county is helping her pay her fuel bills.

Claimant's life situation has changed since her deposition causing her to be more interested in returning to work. At the time of the deposition, claimant and her children were totally supported by her husband. Although she continues at the present time to receive support, she has petitioned for a divorced and her husband is no longer living with her and the children. Claimant stated that she wants to work and is planning on attending vocational rehabilitation classes available as soon as they can be scheduled by her rehablitation counselor, Terry Donahue.

Claimant testified that her past employment consists of light work as a packager of "running boards", a clerk at Younkers

and as a bench press operator. She also has worked for a year and a half as a driver of a soda pop vending truck. This vending job involved carrying the cases of pop to and from the truck. According to the vocational rehabilitation consultant, Clark Williams, claimant's earnings in these jobs were approximately minimum wage from $3.35 to $3.50 per hour. According to Williams, claimant is employable outside of her home if claimant is "diligent in job seeking and in learning appropriate job seeking skills." Williams did not identify the jobs available or their potential earnings as compared to her earnings at the time of the work injury in this case.

Claimant stated at the hearing that she is 30 years of age and has a high school education. She is the sole head of household and must have available daycare to be employed.

Claimant's appearance and demeanor at the hearing indicate that she was 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 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 clearly establishes that claimant has a significant degree of permanent impairment. The only dispute between Dr. Carlstrom and Dr. Walker is the extent of her disability. The fighting issue in this case is the causal connection of claimant's current condition to the work injury of June, 1983.

As pointed out by defendants in their brief, Dr. Walker did not give a specific causal connection opinion. However, a reading of Dr. Walker's report clearly leaves this deputy commissioner with the impression that he believes that his functional impairment rating is attributable to the work injury in this case. Dr. Walker simply states no history of injury or other injurous activity other than the original work injury. The views of Dr. Carlstrom are somewhat confusing as he originally gave a two to three percent rating which he clearly felt stemmed from the original work injury and later on stated that if claimant's condition deteriorated after she left work it was due to other factors. His later opinion was given after he had seen claimant for a second time with additional complaints of a worsened condition. The undersigned believes that a logical interpretation of Dr. Carlstrom's opinions is that he rated claimant's impairment after the 1983 injury as a two to three percent impairment but does not believe that claimant's additional complaints since September, 1985, are work related. With reference to the opinions of the only medical doctor to examine claimant in 1983, Dr. Hillyer opined that claimant did not suffer permanent impairment. This opinion is obviously based on the views of both himself and his therapist that claimant's back condition would improve with treatment. As claimant did not receive the treatment he recommended, it is unknown what his views today would be. Dr. Walker, quite frankly, has a much similar view as he himself is unable to precisely rate claimant's impairment without knowing the success of treatment. Claimant simply has not received much in the line of treatment since she was terminated in 1983.

Therefore, the greater weight of the evidence demonstrates that claimant has suffered at least a two to three percent permanent partial impairment as a result of the June, 1983

injury. The evidence of prior back problems in February, 1981, is simply too isolated to demonstrate a prior permanent impairment or prior disability. Claimant has not shown by the greater weight of evidence that all of her current problems are attributable to the June, 1983, incident given the views of Dr. Carlstrom. Obviously, there will be considerable dispute in the future as to what extent, if any, the original injury is causing claimant's current problems. However, this situation is unavoidable given the evidence in this case. It is apparent that the original work injury is playing some role in her current medical problems but the medical experts will have to iron out this question in the future when it comes to assessing the cost of future medical care.

It should be noted that even if no permanent partial impairment were found in this case, claimant would be entitled to permanent disability benefits under the theory of Blacksmith v. All-American, Inc.. It is apparent from the evidence that claimant was terminated due to her work injury. Todd's interpretation of the Mercy Hospital report as a release to return to work is not reasonable. Dr. Hillyer and his physical therapist only gave a conditional release if claimant were given physical therapy and medication and then the release was only to restricted duty. None of this treatment was offered and claimant was simply terminated for what appeared to this deputy commissioner as a rather weak excuse to terminate an injured worker.

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

After examination of all the factors, it is found as a matter of fact that claimant has suffered a 20 percent loss of her earning capacity from her 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 she returns to work; until she is medically capable of returning to substantially similar work to the work she was performing at the time of the injury; or until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first.

According to Dr. Carlstrom, claimant did not reach maximum healing until September or October of 1983. Claimant was terminated on August 11, 1983. Therefore, healing period benefits will be reinstated from August 11, 1983 until October 31, 1983. Permanent partial disability benefits will then begin as of November 1, 1983.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. The work injury of June 9, 1983 was a cause of a period of disability from work beginning on August 11, 1983 and ending on October 31, 1983, at which time claimant reached maximum healing.

3. The work injury of June 9, 1983, was a cause of a two to three percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no heavy physical work and no lifting over 35 pounds. Claimant has not shown that the worsening of her condition since September, 1985, is work related.

The work injury of June 9, 1983, and the resulting permanent partial impairment and work restriction was a cause of a 20 percent loss of earning capacity. Claimant was terminated by Todd solely on the basis of her absences from work due to work injury. Claimant is unable to return to work that she was performing at Todd at the time of the work injury due to work restrictions imposed by physicians as a result of the work injury. Claimant's past work history consists of work she can no longer perform. Claimant's work history also demonstrates work that she can perform given her restrictions. Claimant is employable given continued diligence on her part in looking for work. Claimant is 30 years of age and is a high school graduate.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence entitlement to permanent partial disability benefits and healing period benefits awarded below.

ORDER

1. Defendant shall pay to claimant one hundred (100) weeks of permanent partial disability benefits at the rate of one hundred eighteen and 94/100 dollars ($118.94) per week from November 1, 1983.

2. Defendant shall pay to claimant healing period benefits from August 11, 1983 thrugh October 31, 1983 at the rate of one hundred eighteen and 94/100 dollars ($118.94) per week.

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

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

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

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

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

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Stephen D. Lombardi
Attorney at Law
8230 Hickman Road, Suite G
Des Moines, Iowa 50322

Mr. E. J. Kelly
Attorney at Law
Suite 111, Terrace Center
2700 Grand Avenue
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

001473

Debra Risius

Claimant,

vs.

Todd Corp.

Employer,

and

Insurance Carrier,
Defendants.

File No. 738729

RULING

ON

Order Nunc Pro Tunc

FILED

MAY 26 1988

IOWA INDUSTRIAL COMMISSIONER

The decision of 5/20/88 is modified to correct typographical errors as requested by dependants in the motion of 5/24/88.

Signed and filed this 26 day of May, 1988.

DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Phyllis Lombardi
Attorney(s) at Law

E. J. Kelly
Attorney(s) at Law

230-0088
6/85

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY ROACH, Claimant, vs. FIRESTONE TIRE & RUBBER COMPANY: Employer, and CIGNA INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	FILE NO. 806034 A R B I T R A T I O N D E C I S I O N FILED APR 22 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Gary Roach, claimant, against Firestone Tire & Rubber Company, employer (hereinafter referred to as Firestone), and Cigna Insurance Companies, insurance carrier, for workers' compensation benefits as a result of an alleged injury in December, 1983. On February 23, 1988, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted 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, 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 $398.34 per week.

2. Claimant is seeking temporary total disability or healing period benefits from April 8, 1986 through August 25, 1986 in this proceeding and defendants agree that if they are held liable for a work injury as alleged, claimant would be entitled to healing period benefits for this period of time.

3. If permanent disability benefits are awarded herein, such benefits shall begin on November 21, 1986.

ISSUES

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

I. Whether claimant received an injury arising out of and in the course of his employment;

II. Whether there is a causal relationship between the work injury and the claimed disability; and,

III. The extent of 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 testified that he has worked for Firestone since October, 1976. Claimant was initially hired as a wire machine operator but for approximately seven years prior to the alleged work injury, claimant was a tire builder. Claimant said that except for the last year and a half before December, 1983, he was building passenger tires. Such work involved taking of a carcass off a rack and building the tire using a tire building machine. This involves the attachment of various layers or piles of materials onto the carcass. Claimant stated that the work was heavy and involved extensive use of the arms to lift and pull materials. Claimant testified that he was a top tire builder at Firestone at the time of the alleged work injury making approximately $123.00 per day in a piece work type of pay system. Claimant earned $20,000.00 per year at the time of the alleged work injury.

Claimant testified that in December, 1983, while attempting to pull a 20 pound tire carcass from a pin rack which failed to easily "come off", he experienced a sudden onset of severe pain in the form of a burning or throbbing sting behind his left shoulder blade. Claimant stated that this particular area of the shoulder had been unusually tired or fatigued during the week before the incident but that he did not experience these type of symptoms before the pulling incident. Company records

show that claimant reported on December 14, 1983, that he "hurt his back pulling on a carcass." Claimant then sought treatment from the company doctor on December 16, 1983, John Gustafson, M.D., who placed claimant on light duty until January 3, 1984. Dr. Gustafson treated claimant's symptoms with anti-inflammatory and pain medications. Claimant testified that he then returned to passenger tire building but continued to experience these same symptoms and in addition a "knot" in his left shoulder area which "never worked out." Claimant testified that his pain would subside on weekends but flare up again during the week.

In November, 1984, claimant said that his condition worsened in that the pain would not subside during the weekends. Claimant returned to Dr. Gustafson and he was again placed on light duty at Firestone. Claimant was then referred to an orthopedic surgeon, Scott Neff, D.O., in February, 1985. Claimant underwent physical therapy according to the therapist causing claimant's pain in the shoulder and arm to worsen. According to Dr. Neff's records, an EMG test at that time was normal.

With some improvement in his symptoms following therapy Dr. Neff returned claimant to full duty at Firestone with the recommendation of a continuation of exercises and pain medication. Dr. Neff did not believe that claimant had suffered any permanent impairment from the injury. Claimant objected to the views of Dr. Neff and desired another physician. Claimant was then referred by Firestone to S. Misal, M.D., another orthopedic surgeon. According to his records, Dr. Misal suspected an injury to the long thoracic nerve of the left shoulder and prescribed medications and inactivity of the shoulder. Dr. Misal, however, saw no surgical option or other treatment option to improve claimant's condition.

In March, 1985, Dr. Misal stated as follows:

> I explained to Mr. Roach that this condition is self-limiting that no surgical treatment is advised and to support my advice, did show him a page of Seddon's book, a copy of which is enclosed.
>
> It is my belief that the patient could continue to work, that it would be desirable that he avoid the particular movement, that is trying to bring the shoulder down with the arm stretched against heavy resistance. I do not believe they will be in the long term any permanent partial physical impairment.

As a result of this report, claimant was returned to tire building by Firestone but due to a change in the tire market, claimant was transferred to the truck tire department. Claimant testified that only after a couple of days he soon developed a recurrence of his symptoms. Claimant then failed to make the

required 15 tires per day to qualify for the job and he was laid off. Claimant said that he simply was physically unable to perform this work. Claimant was off work for a period of six months. Claimant has not returned to tire building since this lay off from the truck tire department.

Upon the request of claimant when he was on layoff for some sort of treatment to improve his condition, Dr. Misal referred claimant for evaluation to the Neurology and Orthopedic Departments of the University of Iowa Hospitals and Clinics in June, 1985. The Neurology Department opined that claimant was suffering from a probable long thoracic nerve injury as a result of the incident in December, 1983. The Orthopedics Department had no other diagnoses and felt that there was a possibility of a long thoracic nerve injury.

In December, 1985, claimant was examined by a neurosurgeon, Robert C. Jones, M.D. Dr. Jones also felt that claimant had some degree of neuropathy involving the long thoracic nerve. He stated at the time that claimant's prognosis was difficult for him to assess.

Dr. Misal continued to see claimant until November, 1986. At that time Dr. Misal stated as follows:

> Follow up of this patient that has been diagnosed by several examiners as probably having long thoracic nerve irritation or stretching or neuropraxia. He is here now to get a rating on the amount of possible physical impairment.
>
> He was laid off for about five months because of the restrictions on the job imposed by clinical difficulties and then he started to work, he figures about 12/15/86 with a 60 lb. restriction. The symptoms are about the same as they were and I will not be repetitious on that.
>
> For the purposes of trying to determine the amount of physical impairment, I have consulted the appropriate AMA tables for peripheral nerves, Table #4 and the amount of impairment to the extremity is 15%.

Dr. Misal describes claimant's future activity restrictions as a result of his condition as follows:

> He still has some winging of the scapula but in my opinion is less than has been in the past and apparently an effort has been made by the Firestone people so this man does not have to use that extremity in strenuous manner.

I did tell Mr. Roach that his future, if they get laid off at Firestone, would depend on his training, that in general, any job where he does not have to use this arm for heavy pulling or lifting mostly if the arm is in a forward elevation would be all right.

On August 25, 1986, claimant's physical restrictions were raised and he returned to work "laying tires" not tire building. Claimant testified that this was also heavy piece work and he had trouble handling the big tires. Claimant said that he was able to use a hoist but that the work still aggravated his shoulder and arm. Claimant testified that Dr. Jones prescribed a heavy dosage of Motrine during this time and that the medication help prevent the onset of severe pain. In July, 1987, Dr. Jones rated claimant's disability as constituting a five percent permanent partial impairment under AMA Guidelines. Dr. Jones did not find any limitation of motions in claimant's neck or shoulder.

In November, 1986, claimant sought and obtained a special light duty "recorder" job at Firestone apparently only available with persons with disabilities. This job has few physical requirements and involves identifying, counting and labeling of new tires and entering information into computer terminals. Claimant currently is performing this job at Firestone. Claimant testified that he could be bumped out of this job at any time by higher seniority persons with physical difficulties. Last year claimant earned approximately $37,000.00 in this recorder job. Claimant testified that despite his current income he would make more money as a tire builder if he were physically able to return to that type of work. Claimant said that good tire builders at Firestone earn from $140.00 to $200.00 per day over a six day week. Claimant worked seven days per week in his job.

Claimant testified that he had no chronic shoulder or arm difficulties prior to December, 1983. Claimant's employment records at Firestone indicate that claimant reported the following prior injuries to his foremans at Firestone since 1976:

August 1977 ----- left ribs hurt
November 1979 --- right shoulder began hurting after pulling tire carcass at work
August 1981 ----- hurt back pulling turnup piles on tires
July 1985 ------- hurt lower and mid back picking up a bucket

Each period of injury listed above was followed by a return to full duty at work and only involved very brief periods of recuperation. Claimant's medical records at Firestone demonstrated a clear and consistent pattern of left shoulder complaints and disability including treatment beginning on December 14, 1983.

Claimant is 39 years of age and has a high school education. Claimant worked as a bag machine operator performing light to medium work for a brief period after high school. From 1967 to 1974 claimant worked for a manufacturer of heating and air conditioning equipment. In this job, claimant, for the majority of this time, operated a sheet metal press break or shear. Claimant was required to manhandle varying sizes of sheet metal materials in this job which routinely involved heavy work. Claimant said that he did not experience physical difficulties in performing such work. Claimant testified that he left this job shortly before the plant shut down when severance pay was offered to him. Claimant then for approximately two years worked for Goodyear Retread working in the Curing Department. Claimant said that this work was very heavy and involved the pushing and carrying of molds but that he still was physically able to handle such work.

Claimant did not discuss what efforts he may have made to secure work outside of Firestone. Claimant testified that future availability at work at Firestone is uncertain. Firestone employment for him has traditionally been unstable. Claimant has been laid off five or six times over the last 10 years. Claimant also is concerned about the fact that he could be bumped out of his current job at any time by a higher seniority person who may develop disabilities.

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.

Claimant has clearly shown by the greater weight of the evidence that he has suffered a work injury on December 14, 1983. Claimant's testimony concerning the facts surrounding the incident are uncontroverted and are consistent with the medical records and with histories provided to all physicians involved in this case.

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 has suffered disability as a result of a work injury due to permanent impairment to the body as a whole. First, the preponderance of the evidence shows a permanent injury or impairment. The views of Dr. Misal and Dr. Roberts are the most convincing as they are consistent with claimant's well documented testimony and a history of chronic left shoulder problems beginning on December 14, 1983. Dr. Misal pointed out that despite a normal EMG test he did not feel that it was possible to test for a long thoracic nerve injury. Therefore, a negative EMG test is not convincing in this matter.

Second, the evidence demonstrates that the injury and permanent impairment is not confined to the arm. Most of claimant's physicians indicate that the injury involved permanent damage to claimant's long thoracic nerve located in the left shoulder and mid back area. Admittedly, there is a conceptual problem in determining whether a disability should be measured functionally or industrially when a major body joint such as the shoulder is involved. However, a shoulder injury can be a loss of a arm or a loss of a body as a whole and the determination depends upon the extent of injury. However, it is well settled that it is the anatomical situs of the injury, not the situs of the disability caused by the injury which determines whether or not to apply the schedules in Iowa Code section 85.34(2)(a-t). Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Finally, it is well settled in Iowa that a shoulder injury is an injury to the body as a whole and not to be a scheduled member injury simply because of the functions of those joints' impact upon a scheduled member. Lauhoff, 395 N.W.2d 834 (Iowa 1986); Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (1982); Godwin v. Hicklin G.M. Power, II Iowa Industrial Commissioner Report, 170 (1981).

Third, the greater weight of evidence shows the requisite causal connection between the work injury and the permanent impairment. It is well documented that claimant had a history of problems stemming from the December, 1983, injury. There simply is no history of chronic serious left shoulder problems before December, 1983.

III. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As the claimant has shown that the work injury was a cause of a permanent physical impairment or limitation upon activity involving the body as a whole, the degree of permanent disability must be measured pursuant to Iowa Code section 85.34(2)(u). However, unlike scheduled member disabilities, the degree of disability under this provision is not measured solely by the extent of a functional impairment or loss of use of a body member. A disability to the body as a whole or an "industrial disability" is a loss of earning capacity resulting from the work injury. Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). A physical impairment or restriction on work activity may or may not result in such a loss of earning capacity. The extent to which a work injury and a resulting medical condition has resulted in an industrial disability is determined from examination of several factors. These factors include the employee's medical condition prior to the injury, immediately after the injury and presently; the

situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Olson, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

Claimant's medical condition before the work injury in this case was excellent. He had no functional impairments or assertainable difficulties. Claimant was able to fully perform physical tasks involving heavy lifting and repetitve use of his hands.

Most of claimant's physicians in this case have given claimant a significant permanent impairment rating to the body as a whole. The exact percentage figure as to the body as a whole is unknown as claimant's physicians incorrectly rated the disability as a percentage of the arm rather than as to the body as a whole. However, a precise rating is unnecessary to award permanent disability benefits as the extent of claimant's physical restrictions are a much more informative in assessing industrial disability or loss of earning capacity then a specific percentage of permanency.

Claimant's physicians have restricted claimant's work activities by prohibiting tasks such as heavy and repetitive pulling and lifting with his hands. Claimant credibly testified that he is unable to return to tire building or any other work which would involve strenuous activity of his left shoulder or arm. Claimant's medical condition prevents him from returning to his former work at Firestone and any other work that he has held in the past to which he is best suited.

Claimant is currently working and earning a substantial income. However, despite his current employment claimant has suffered a significant permanent loss of earning capacity. Claimant's current earnings are only one factor in assessing industrial disability. See Michael v. Harrison County, Thirty-Fourth Biennial Report of the Iowa Industrial Commissioner 218, 220 (1979). Also, claimant has demonstrated, as pointed out in his brief, that his loss of actual earnings range from 27 to 53 percent when you compare claimant's actual current earnings of $567.00 per week with earnings that he would make as a top tire builder at the rate of $140.00 to $200.00 per day over a six day week. Claimant's testimony in this regard is uncontroverted in the record.

It was further shown in this case that Firestone is a volatile company and highly unstable. It was also shown that claimant is in a precarious situation in that he cannot return to tire building or any other heavy labor but can be bumped out of his job at any time by a person with higher seniority. Although it is admirable that Firestone has such a light duty job available at Firestone, this aspect alone should not be utilized by Firestone to escape liability for a substantial industrial disability. Certainly, if he were not working, the potential liability would far exceed what will be awarded herein.

Claimant is 39 years of age and should be in the most productive years of his life. His disability is more severe than would be the case for a younger or older individual.

Claimant has shown considerable motivation to remain employed despite experiencing considerable pain from attempting to remain as a tire builder prior to becoming "recorder."

Claimant has a high school education and exhibited average intelligence at the hearing. However, little was shown to indicate claimant's potential for vocational rehabilitation.

After examination of all the factors, it is found as a matter of fact that claimant has suffered a 35 percent loss of his earning capacity from his work injury. Based upon such a finding, claimant is entitled as a matter of law to 175 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 35 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

Given the parties' stipulation, claimant is entitled to an award for healing period benefits from April 8, 1986 through August 25, 1986.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. On December 14, 1983, claimant suffered an injury to his left shoulder and mid back consisting of an injury to the long thoracic nerve which arose out of and in the course of employment at Firestone.

3. The work injury of December 14, 1983, was a cause of a significant permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no heavy pushing or pulling with his left arm or shoulder.

4. The work injury of December 14, 1983, and the resulting permanent partial impairment was a cause of a 35 percent loss of

earning capacity. Claimant is unable to return to tire building or most other work he has performed in the past which consists mostly of heavy manual labor in a manufacturing environment. Claimant has suffered a loss of actual earnings from 27 percent to 53 percent from his inability to return to tire building. Claimant's current job at Firestone is a special light duty job and he could be removed from this job at any time by an employee with higher seniority. Claimant's current employer, Firestone Rubber & Tire Company, is a highly volatile employer and employment in the company is highly uncertain. Therefore, despite claimant's relatively high income of $37,000 per year which appears to be suitable at the present time, such employment is not stable. Claimant is 39 years of age and is a high school graduate. Claimant has no work history or experience in sedentary or white collar employment. Claimant's only work history has been in heavy manual labor, the type of work claimant can no longer perform.

CONCLUSIONS OF LAW

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

ORDER

1. Defendants shall pay to claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the rate of three hundred ninety-eight and 24/100 dollars ($398.24) per week from November 21, 1986.

2. Defendants shall pay to claimant healing period benefits from April 8, 1986 through August 25, 1986 at the rate of three hundred ninety-eight and 24/100 dollars ($398.24) 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 the cost 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 22nd day of April, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. David D. Drake
Attorney at Law
West Towers Office Complex
1200 35th Street, Suite 500
West Des Moines, Iowa 50265

Mr. Frank T. Harrison
Attorney at Law
Suite 111, Terrace Center
2700 Grand Avenue
Des Moines, Iowa 50312

001486

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PEGGY ROBINSON, Claimant, vs. MEREDITH CORPORATION, Employer, and CIGNA, Insurance Carrier, Defendants.	:	File No. 708497 A P P E A L D E C I S I O N

FILED
APR 25 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying further permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 25, 27 through 35, and 37 through 61; and defendants' exhibits 1, 1A, A-1, A-2, B through Z, 2, 3, 4, 5 and 9. There were no briefs on appeal as claimant failed to timely file her brief.

ISSUES

Pursuant to the commissioner's ruling filed March 8, 1988, this appeal will be considered generally without specified errors.

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

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

ANALYSIS

The record as a whole is considered generally without

specified errors. The deputy's analysis of the evidence in conjunction with the law is adopted. The record shows that claimant is not entitled to further compensation for her right knee. The record also shows a lack of medical evidence to establish that claimant suffers a permanent lower back injury or injury to her right foot, or that any such injury is caused by her treatment to her knee. Claimant has failed to carry her burden to show a causal relationship between her claimed disability involving her back and right foot and the treatment stemming from her right knee injury.

FINDINGS OF FACT

1. Claimant was employed by the employer on July 13, 1982 when she injured her right knee.

2. Claimant was paid healing period benefits for the right knee injury.

3. Dr. Grant assessed a 12 percent impairment of the lower right extremity and Dr. Neff assessed a 16 percent impairment of the lower right extremity.

4. Claimant was paid 35 2/7 weeks of permanent partial disability benefits for this injury based on a 16 percent impairment of the right lower extremity.

5. Claimant alleged that she injured her back, right leg and right foot while performing exercises on an orthotron machine in the course of her physical therapy treatments on January 14, 1983.

6. Claimant failed to clearly report such an injury as an injury to the physical therapist at the time of the alleged injury.

7. Claimant failed to report this injury to either one of the treating orthopedic surgeons, Dr. Grant or Dr. Neff, at the time of the injury or the next time she saw them or within a reasonable time after the alleged injury.

8. Claimant saw her own personal physician, Dr. Odland, the same day for low back pain after taking physical therapy treatments but did not report an injury, as such, or a pull or a pop in her back as she testified to at the hearing.

9. Claimant did not seek any additional treatments for her back with her own personal physician, Dr. Odland, for over a year after January 14, 1983 until March 28, 1984.

10. Claimant did not report this injury to therapist Bower according to his records when she saw him on February 7, 1983.

11. Claimant did not seek medical treatment for the alleged back injury through the employer until September of 1983 which was approximately nine months after the injury allegedly occurred.

12. Dr. Neff testified that there was no causal relationship between the orthotron machine exercises and the claimant's lower back, right leg and right foot complaints.

13. The alleged injury to the back was never reported to Dr. Grant and, therefore, could not and did not give an opinion on causal connection.

14. Dr. Young, Dr. Friedgood, Dr. Stein, Dr. Daube and Dr. Emerson did not give a professional medical opinion on causation between the orthotron machine exercises and the claimant's lower back, right leg and right foot complaints.

15. Dr. Carlstrom and Dr. Hefty acknowledged that it was possible for the lower back, right leg and right foot complaints to have occurred as the claimant described but that neither one of them gave a professional medical opinion that it was probable that these complaints occurred in that manner or actually occurred in that manner.

16. Dr. Moore was the only doctor who expressed a definite opinion on the cause of the lower back, right leg and right foot complaints and he stated that her pain syndrome was secondary to childhood and marital problems.

17. That none of the many medical doctors, general practitioners, orthopedic surgeons or neurologists could explain the claimant's symptoms of pain in her lower back, right leg and right foot and could not find an organic or physical cause for it after numerous diagnostic tests.

CONCLUSIONS OF LAW

Claimant failed to prove by a preponderance of the evidence that she is entitled to additional permanent partial disability benefits for the injury to her right knee on July 13, 1982.

Claimant failed to prove by a preponderance of the evidence that her lower back condition or her right foot condition are causally connected to her injury to her right knee on January 14, 1983, or to the subsequent treatment for that injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That no additional permanent partial disability, temporary total disability, or medical benefits are due claimant.

That costs of the appeal including the transcription of the hearing proceeding are charged to claimant.

That defendants file any reports that may be required by Division of Industrial Services Rule 343-3.1.

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

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Patrick B. Chambers
Attorney at Law
P.O. Box 516
718 Des Moines Street
Webster City, Iowa 50595

Mr. Marvin E. Duckworth
Attorney at Law
Terrace Center, Suite 111
2700 Grand Avenue
Des Moines, Iowa 50312

denies he was attempting to look in the ladies fitting room which was near the security tower and near the area in which claimant fell. Claimant admits that Vicki Ostrander, personnel manager, warned him about climbing onto the ceiling tiles in the china stockroom, but he opines that the ceiling in the area where he fell is different.

John G. Garland testified that he is director of loss prevention for all Brandeis stores and that he is in charge of security for all Brandeis stores. Garland stated that he worked with claimant about five or six times. Garland testified that he instructed claimant to stay within the area of the security tower because the ceiling would not support someone of claimant's weight.

Vicki R. Ostrander testified that she is personnel director and operations manager for the Brandeis store where claimant was employed. Ostrander stated that she told claimant to stay out of the ceilings because they would not support someone of his weight. Ostrander also disclosed that she made this warning to claimant on numerous occasions.

APPLICABLE LAW

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

ANALYSIS

Garland's and Ostrander's testimony establishes that claimant had been warned to stay out of the ceiling while observing shoplifters. Moreover, Ostrander disclosed that she had made this warning to claimant on numerous occasions. Claimant admits that Ostrander warned him about climbing on the false ceiling on at least one occasion. It is uncontroverted that claimant was injured when he fell through the ceiling outside the security tower.

The greater weight of evidence establishes that claimant had been warned to stay within the security tower while observing shoplifters and that claimant was injured when he fell through the ceiling outside the security tower. Therefore, claimant was performing a prohibited act in stepping outside the structural area of the security tower.

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

FINDINGS OF FACT

1. Claimant was employed as a security guard at J. L. Brandeis & Sons on March 8, 1986.

2. Claimant fell from the false ceiling of the store on March 8, 1986.

3. Claimant fell in the customer area of the store from an area in the vicinity of the store security tower.

4. The security tower was used by security guards to observe shoplifters in the store.

5. Claimant was expressly instructed to stay within the structural area of the tower while observing from the tower.

6. Claimant had climbed into the store's false ceiling on other occasions and had been expressly instructed to not continue to do so.

7. Claimant violated the above instructions in entering the area outside the structural area of the tower.

8. In stepping outside the structural area of the tower, claimant was doing a prohibited act.

CONCLUSION OF LAW

Claimant has not established an injury of March 8, 1986 which arose out of and in the course of his employment.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That all costs including the cost of the transcription of the hearing are charged to claimant.

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

DAVID E. VINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Sheldon M. Gallner
Attorney at Law
P.O. Box 1588
803 3rd Avenue
Council Bluffs, Iowa 51502

Mr. Theodore J. Stouffer
Mr. David A. Blagg
Attorneys at Law
8805 Indian Hills Drive, Suite 300
Omaha, Nebraska 68114

001494

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOAN SANDVEN,

Claimant,

vs.

HEINZ, USA,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 793104

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding benefits based on 15% permanent partial impairment of the right leg and awarding medical benefits.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 26. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

I

That the Deputy Industrial Commissioner erred in failing to apportion Claimant's permanent impairment between her work injury and a degenerative condition existing prior to the work incident.

II

That the Deputy Industrial Commissioner erred in failing to find that Claimant's treatment with Dr. Naden and all charges arising therefrom constitute unauthorized medical treatment and should not be reimbursed.

REVIEW OF THE EVIDENCE

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

Claimant stated that while she was mopping steps for defendant employer on May 31, 1984 she twisted her right knee. Claimant indicated that she reported this injury to the company nurse and that the nurse gave her aspirin. Claimant opined that she recovered from this injury without further treatment. Claimant stated she once again injured her right knee on September 11, 1984 while mopping. Claimant described the incident by saying that her right knee, "popped just like a gunshot, and it hurt me so bad I stooped and grabbed my knee and stood there for a few minutes. I even got almost nauseous because it hurt so bad." (Transcript, page 12, lines 11-15) Claimant stated that she also reported this injury to the company nurse and was given aspirin and ice packs for her knee. Claimant testified that after waiting a week to see if the swelling would subside, she was referred by the nurse to William Catalona, M.D. Claimant stated that Dr. Catalona recommended surgery.

Joint exhibit 8 is a copy of Dr. Catalona's surgical report which indicates that an "[a]rthroscopy and arthroscopic shaving, medial femoral condyle and medial meniscus" was performed on claimant on October 8, 1984. Dr. Catalona's post-operative diagnosis was "[d]egenerated and torn medial meniscus, right knee...plus chondromalacia of medial femoral condyle."

Claimant stated that after this surgery, her right knee did not improve and that it continued to hurt. Claimant testified that she did not undergo any physical therapy after the arthroscopic surgery.

Dr. Catalona's notes concerning his treatment of claimant following the arthroscopic surgery state:

> 10/12/84 Having no pain. Walking w/crutches. Has no swell. of knee. Rx: encour. in motion but contin. protective wt. bear. N/C(c) 10/17/84 Sat. prog. N/C(c) Missed appt 10-30-84 11/1/84 Imprv. Would be able to ret. to work 11/12/84. Rx: encour. to increase activ. N/C(c) 11/15/84 Ret. to rept. reported for work 11/12/84. as laid off. Intends to start litigation for "compensation". C/O rt. knee still hurts & swells. Exam: has 1+ effus. Motion from 0 to 130 deg. where hurts. Rx: told she can expect chronic discomfort this knee because of DJD. Encour. to contin. use &.SLR exerc. will follow. OC: N/C(c) 11/29/84 Status quo. Still on lay off. Willing to ret. to sedentary work. Slip given. OC: N/C(c)

12/17/84 Comes to tell me that since last visit she consult. Dr. Naden who told her she had a fx. in her rt. knee & that he had operated her knee to correct the deform. She appears very distraught & feels I sent her back to work too early. Requests I admit that I sent her back to work too early so that she can collect compensation benefits. N/C(c)

(Joint exhibit 12, p. 1)

Claimant testified concerning her conversations with Carol Shepard, formerly the supervisor of the health services department, to obtain alternate medical care:

Q. After you went back to work at Heinz, did you have any conversations with Carol Shepard?

A. Yes.

Q. Can you tell me who she is?

A. Yes. She's the nurse. She was the head nurse in charge of--

Q. What was the situation that you happened to talk to Carol Shepard?

A. Well, she was concerned with my limping, and she told me that she noticed that I was still limping, and asked if my knee was getting better, and I said no.

Q. Where did you happen to see her and have this conversation?

A. It was in the front office, what they call the front office. It was right when you come in the doors of Heinz. And I was cleaning there and I was pushing the vacuum cleaner, and she stopped and talked to me there.

Q. When you had a conversation with Carol Shepard out in the front office, can you remember what was said?

A. I can remember very well. I remember her coming in the door, and she had a red sweater on that day, and she said that she was very concerned about my limping, and that she thought that I should see a doctor. And I said, "I'm afraid to go back to Catalona." And she said, "Why?" And I said, "Because he laughed at me the last time I was

there. I was in pain, and I just don't want to go back."

And I said, "I've even thought about maybe going to a chiropractor," and she said, "Well, they can do different things for different injuries or whatever." And I said, "Well, what do you think?" And she said, "Well, I don't know. I can't tell you what to do." And I said, "Well, can I go to another doctor?" And she said, "Yes, by all means, go to a different doctor."

Q. Did you ever tell Carol Shepard that you had gone to a chiropractor?

A. No. We just discussed the fact that I was interested if they could do something for me.

Q. And she did tell you that you could go to another doctor?

A. Yes, ma'am.

Q. Did Carol Shepard ever tell you that you needed some kind of slip from her to go see another doctor?

A. No. Nothing was ever mentioned.

Q. Did Carol Shepard ever tell you that if you went to another doctor for treatment, that you would not be covered by worker's [sic] compensation?

A. No. She never told me anything.

Q. If Carol had told you that your medical treatment wouldn't be covered by worker's [sic] compensation without some authorization from her or some kind of a slip from her, what would you have done?

A. I'd have probably gone back to Catalona.

(Tr., pp. 17 - 19)

Carol Shepard testified concerning her recollection of this conversation:

Q. Okay. What is your recollection of that conversation?

A. I recollect the conversation that she was not —. happy with Dr. Catalona. She had even said that she had gone to a chiropractor, and we discussed

the fact that she could go to any doctor she chose because it was her body, but she was also advised that it was not of a certainty that the company would pay for that kind of thing.

To go to another doctor with company authorization, she would have to have a slip from me stating that she had my permission to go to that doctor.

(Shepard Deposition, p. 5, ll. 11-23).

Shepard stated that employees were familiar with this policy through the company bulletin boards and the monthly newspaper. Shepard related that claimant was "limping quite a bit" and had some swelling after her return to work, but Shepard opined that swelling is reasonable after arthroscopy. Shepard also stated that claimant was complaining of pain and was given ice packs and limited duties. Shepard testified that she spoke to Ron Albright, personnel assistant, about claimant's reluctance to return to Dr. Catalona and that Mr. Albright said claimant would have to stay with Dr. Catalona.

Ron Albright stated that a newsletter is sent to employees once very two months and that: "It's generated by the medical department. It deals with everything from changes in the operation, deals with births, anniversaries, anything newsworthy of our employees, rules, regulations, things such as that." (Tr., p. 42)

Claimant denied that she ever received the monthly newsletter or saw the rule requiring a slip from Shepard to obtain alternate care posted on the bulletin board. Claimant's daughter, Kathy Henderson, testified that she did not know of the rule requiring employees to obtain a slip from Shepard before seeing a doctor. Henderson admitted that she does not always read the company newsletters.

Claimant stated she did go see another doctor, David C. Naden, M.D., at the suggestion of a friend but after her conversation with Shepard. In his clinical notes for December 6, 1984 Dr. Naden states the following diagnosis and disposition concerning claimant's knee condition:

Diag: Chip fracture involving the medial tibial plateau, rt. tibia. Degenerative arthritis of the medial compartment of the rt. knee.

Disp: This woman is sort of in a dilemma but basically she's not going to get back to work until she has something done to correct the narrowing of the medial jointline surface of that knee. She needs to have a high tibial osteotomy and put her

in a valgus position so she can get back to work. I really think the original diagnosis was wrong and I think the pop she had in there and the subsequent problems are due to the chip fracture of the osteophyte in that area. Advised about care and activity. DN:ch.

(Joint Exhibit 17)

Dr. Naden subsequently admitted claimant to the hospital for surgery. The surgery was performed by Dr. Naden on December 10, 1984. The surgical report describes the surgical procedure as a "[c]losing valgus wedge osteotomy, upper right tibia and casting." (Joint exhibit 14) Dr. Naden released claimant for return to work on March 11, 1985.

Claimant opined that after the December 1984 surgery by Dr. Naden, she felt much better. Claimant stated that she went back to work for defendant employer after she was released by Dr. Naden, but that she only worked for seven and one-half hours because the job she was given required her to stand in one spot. Claimant indicated that she has worked at other jobs since leaving defendant employer. Claimant described this work as sweeping a mall and cleaning restrooms. Claimant stated that at this job she was allowed to sit when she got tired. Claimant opined that her knee is not 100%, that she cannot walk up stairs like she used to, that she cannot go on long hiking trips, that she cannot play with her grandchildren like she used to, and that she cannot get down on her knees.

Claimant denied on cross-examination that she was laid off by defendant employer after she returned to work in March 1985. Claimant stated that she did not request lighter work from defendant employer because "there is no sit-down jobs at Heinz." (Tr., p. 32) On redirect, claimant testified that she felt that when Carol Shepard told her she could go to any doctor, she understood that Ms. Shepard was giving her authorization to go to another doctor.

In a letter dated November 4, 1985 to claimant's attorney, Dr. Naden opined:

The above-named patient does have a permanency with her right knee. As a result of this affliction and the surgery she has had in the past, I would award her a 14-15% PPD rating of the right lower extremity. This woman's knee does have arthritis in it, and it's going to become progressively worse.

Converted to the whole body this would be about—, a 6% rating.

(Joint Ex. 20)

In reply to this request by defendants' attorney: "Would you be so kind as to provide me with a breakdown of your disability rating as to how much of it is related to work vs. the natural degenerative process and/or the pre-existing degenerative arthritis?" Dr. Naden opined in a January 28, 1986 letter: "In arriving at her whole 14% to 15% permanency rating, I would attribute 50% to be related to her work and 50% due to the natural degenerative processes on her right lower extremity." (Joint Exhibit 22).

In a February 11, 1986 letter to claimant's attorney, Dr. Naden opines:

> I feel that this woman had degenerative arthritis in the medial compartment of her knee in spite of the fact that she really did not complain of any problems in that knee prior to May, 1984. Now, historywise, I find out that this woman did provoke her right knee with a twisting injury in May, 1984. However, I believe that she was treated for this on a symptomatic basis and it did "recover." She has another injury--twice--in September, 1984 which did this knee in. She does have evidence of degenerative arthritis, and I think a good amount of this was present prior to this injury. However, I think she has an excellent history of reinjuring this knee with a twisting, rotatory-type of motion which "left" her with a disruption of some of the cartilage in the knee area, and also a chip fracture of this medial tibial plateau. At that time I felt that she had probably about a 17 ½% physical impairment of her right knee, and I would attribute 60% of it to a previous condition, and 40% to her injury in September, 1984. I think she has improved since her closing valgus wedge osteotomy and at the present time, I would state that she has about a 15% PPD rating of her right lower extremity as a result of the afflictions with her knee and her post-operative status. I do believe that her arthritis in that knee will progress, and I feel that she will end up needing additional surgery on that right knee--probably a right total knee replacement.

(Joint Ex. 23)

Claimant stated that she has never had difficulty with her knee before May 1984, and that she has not injured her knee other than on May 31, 1984 and September 11, 1984.

APPLICABLE LAW

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

Iowa Code section 85.27, unnumbered paragraph 4 (1983) states:

> 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.

ANALYSIS

Defendants argue on appeal that claimant's permanent disability to her right lower extremity should be apportioned between her degenerative arthritis condition and her knee surgeries. This argument was rejected by the deputy. In Varied Enterprises v. Sumner, 353 N.W.2d 407, 410-11 (Iowa 1984), the supreme court discussed when apportionment is proper:

> A clear and helpful discussion of the precise problem which is presented is contained in 2 A. Larson, The Law of Workmen's Compensation § 59.22, at 10-365 (1981) where the author states:
>
> Apart from special statute, apportionable "disability" does not include a prior nondisabling defect or disease that contributes to the end result. Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable....
>
> The essential distinction at stake here is

> between a pre-existing disability that independently produces all or part of the final disability, and the pre-existing condition that in some way combines with or is acted upon by the industrial injury....
>
> To be apportionable, then, an impairment must have been independently producing some degree of disability before the accident....

(Emphasis added.)

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

(Id. at 411).

Contrary to the deputy's finding, claimant did have an ascertainable disability prior to her work injury and subsequent surgeries. Dr. Naden and Dr. Catalona were in agreement that claimant suffered from degenerative arthritis prior to her injury. Dr. Naden opined that claimant has a 15% impairment of the right lower extremity; 50% of which he attributes to the arthritis. The greater weight of evidence supports a finding that claimant suffered from degenerative arthritis prior to her injury and that the degenerative arthritis produces 50% of claimant's current 15% impairment to the right lower extremity. Based on these findings, it is concluded that defendants are liable for permanent partial disability benefits based upon a 7.5% impairment of the right lower extremity.

The next issue on appeal is the charges for medical treatment claimant obtained from Dr. Naden. The record reveals that the company physician, Dr. Catalona, continued to treat claimant up to the time when claimant went to Dr. Naden, but Dr. Catalona failed to diagnose the chip fracture of claimant's right knee. Dr. Naden opined that claimant's problems were due to the chip fracture and performed surgery on December 10, 1984. After this surgery, Dr. Naden opined that claimant's knee condition improved. See Joint Exhibit 23, page 2. Claimant also stated that she felt much better after surgry by Dr. Naden.

In Rittgers v. United Parcel Service, II Iowa Industrial Commissioner Report 210, 213 (Appeal Decision 1982), the industrial commissioner stated:

It is remembered that the treatment provided by Dr. Johnson was previously found to be unauthorized. As of that time, there was no evidence to suggest that Dr. Johnson had performed services more effectively than the medical care that had been provided by the defendants. However, the evidence now in the record reveals that claimant's condition continues to improve because of the surgery performed by Dr. Johnson. Such an improvement in claimant's condition not only helps the claimant, but also provides the possibility that defendants' ultimate liability may be mitigated. Although defendants are entitled to choose the claimant's medical care provider, it appears questionable that the claimant's condition would have improved as it did had defendants continued control of claimant's care. Defendants had ceased providing care for the claimant subsequent to the first proceeding. Examination by doctors of defendants' choice currently concurs with the care provided by Dr. Johnson. The care provided to claimant by Dr. Johnson proved to be reasonable and necessary for the treatment of claimant's employment related injuries as contemplated by Iowa Code section 85.27. The expenses involved in the services of Dr. Johnson and the surgery of March 3, 1981 should properly be paid for by the defendants.

See also Butcher v. Valley Sheet Metal, IV Industrial Commissioner Report 49 (Appeal Decision 1983). Hutchinson v. American Freight Sys. Inc., I-1 State of Iowa Industrial Commissioner Decisions 94 (Appeal Decision 1984).

Authorized or not, defendants cannot deny that the improvement in claimant's condition, benefits them by reducing claimant's impairment and healing period. Therefore claimant is entitled to payment of charges for medical treatment obtained from Dr. Naden, Muscatine General Hospital and Dr. Patel.

FINDINGS OF FACT

1. Claimant sustained a chip fracture to her right knee on May 31, 1984 and on September 11, 1984 while mopping and sweeping steps for defendant employer.

2. As a result of the injury on September 11, 1984, claimant underwent surgery on October 8, 1984 and December 10, 1984.

3. Claimant has degenerative arthritis in her right knee which existed prior to her work injuries.

4. As a result of the degenerative arthritis, work injuries and knee surgeries, claimant suffers a 15% permanent impairment

to the right lower extremity.

5. Fifty percent of claimant's 15% permanent impairment to her right lower extremity is the result of her degenerative arthritis.

6. Claimant's knee condition improved after the surgery by Dr. Naden on December 10, 1984.

7. Claimant's rate of compensation is $227.14 per week.

8. Claimant's healing period ended on March 11, 1985.

CONCLUSIONS OF LAW

Claimant sustained an injury to her right knee on September 11, 1984 arising out of and in the course of employment.

Claimant has established a causal connection between her work injury and a 7.5% permanent disability to her right lower extremity.

Claimant is entitled to the payment of the medical bills of Dr. Naden, Dr. Patel and Muscatine General Hospital.

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

ORDER

THEREFORE, it is ordered:

That defendants pay claimant healing period benefits from October 8, 1984 through March 11, 1985 at the rate of two hundred twenty-seven and 14/100 dollars ($227.14) per week.

That defendants pay claimant sixteen point five (16.5) weeks of permanent partial disability benefits at the rate of two hundred twenty-seven and 14/100 dollars ($227.14) per week commencing March 12, 1985.

That defendants pay the charges for medical treatment obtained from Dr. Naden, Muscatine General Hospital and Dr. Patel as set out in Joint Exhibits 2, 25, and 26 ($4,652.45).

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

That defendants be given credit for benefits already paid.

That defendants pay all costs including the cost of the transcription of the hearing proceeding.

001505

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 22nd day of February, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Ms. Linda L. Allison
Attorney at Law
115 East Second Street
P.O. Box 496
Muscatine, Iowa 52761

Mr. Greg A. Egbers
Attorney at Law
600 Union Arcade Building
111 East Third Street
Davenport, Iowa 52801-1550

001506

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEORGE SAWYER,

Claimant,

vs.

NATIONAL TRANSPORTATION CO.,

Employer,

and

GREAT WEST CASUALTY CO.,

Insurance Carrier,
Defendants.

File No. 789205

A P P E A L

D E C I S I O N

FILED

MAR 11 1988

IOWA INDUSTRIAL COMMISSIONER

Defendants appeal from an arbitration decision awarding permanent partial disability benefits based on an industrial disability of 40 percent and healing period benefits.

The record on appeal consists of the transcript of the hearing; claimant's exhibits 1 through 4; and defendants' exhibits 1 through 18.

ISSUES

Defendants raise several issues on appeal. One of those issues is dispositive of this matter and that issue is whether claimant's claim is barred by the statute of limitations.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein. Additional pertinent facts necessary for disposition of this proceeding will also be described.

On January 14, 1981 the truck claimant was driving for defendant employer failed to negotiate a curve on U.S. Highway 20, five miles east of Ackley, Iowa. In the resulting accident claimant was initially knocked unconscious. After a farmer helped him from the truck, he was taken to a hospital in Iowa Falls for about three days and was then transferred to Omaha where he was hospitalized. Claimant testified that as a result of the accident he had neck and shoulder pain and headaches. He was treated by William H. Johnson, M.D. Pursuant to a temporary

release by Dr. Johnson on May 22, 1981, claimant attempted to return to the job of driving a truck for another employer and worked for only four days. Claimant experienced the same symptoms and Dr. Johnson advised him to discontinue working.

In a letter dated August 28, 1981, Dr. Johnson stated that the symptoms would probably be permanent and in a letter dated February 28, 1982 he opined, "It is my medical opinion that as of his last examination that he is totally disabled and that this represents 10% with reference to his body as a whole because of his persistent cervical sprain." In a letter dated June 15, 1982 the doctor imposed a lifting restriction of not over 20 to 25 pounds and opined that claimant would be limited to less than one to two hour periods in which he would be able to sit in his usual position for driving. In a letter dated May 16, 1983 the doctor gave claimant a 15 percent rating of "disability" of the body. In a letter dated May 26, 1982, Joseph F. Gross, M.D., stated that a neurological examination failed to reveal evidence of any abnormality. Dr. Gross opined that claimant had reached his maximum recovery and estimated the permanent "disability" as ten percent loss of the use of the body as a whole.

An application for approval of Final Lump Sum Settlement in the matter of George Sawyer v. National Transportation, Inc. and Great West Casualty Company was filed as approved on August 6, 1984 in the District Court of Douglas County, Nebraska (hereinafter referred to as the Settlement). The Settlement provided in relevant part:

> That upon the making by them of the payments stated in this application, the defendants and each of them, their officers, agents, employees, administrators, executors, successors and assigns be fully released and forever discharged of and from any and all liability claims and demands of every nature and description which said plaintiff has had and now has or which the heirs, dependents, administrators, executors or assigns of the plaintiff hereafter may have or claim to have under or by virtue of the Workmen's Compensation Laws of Nebraska or any other state, otherwise, for any and all injuries, temporary and permanent disabilities, benefits, losses, expenses and damages of any kind, past, present and future, known and unknown, developed and undeveloped, arising from or in any way connected with the accident and injuries alleged by the plaintiff;
>
> ....

BENEFITS PAID TO OR ON BEHALF OF THE PLAINTIFF

To plaintiff for temporary total disability from 1/15/81 to 5/19/81 and 6/3/81 to 5/25/82, inclusive, a total of 69 weeks at $180.00 per week	$12,420.00
To plaintiff for temporary total disability while engaged in a vocational rehabilitation program from 6/7/83 to 7/4/84, inclusive, a total of 56 weeks at $180.00 per week	$10,080.00
To plaintiff for permanent partial disability from 5/26/82 to 7/5/84, inclusive, a total of 110 weeks at $25.28 per week	$ 2,780.80
Medical, hospital and surgical expense	$ 6,163.61

BENEFITS PAYABLE BY WAY OF LUMP SUM SETTLEMENT

To plaintiff for temporary total disability for vocational rehabilitation from 7/5/84 to 1/2/85, inclusive, a total of 26 weeks at $180.00 per week	$ 4,680.00
To plaintiff for a 10% permanent partial disability of the body as a whole: 10% x 66 2/3% x $379.25 = $25.28 per week for the balance of 39 weeks (300-69-56-110-26)	$ 985.92
Additional consideration	$ 1,834.08
TOTAL	$ 7,500.00

The Settlement indicated that it was under the jurisdiction of the District Court of Douglas County, Nebraska and that defendants agreed to pay benefits under the Nebraska Workmen's Compensation Law. A Satisfaction of Award filed in the Nebraska Workmen's Compensation Court on August 20, 1984 was signed by claimant and dated August 14, 1984. In this instrument claimant acknowledged receipt of the $7,500 payment.

Claimant's original notice and petition was labeled an arbitration proceeding and was filed March 11, 1985. No memorandum of agreement was filed. No notice of voluntary payments was filed.

APPLICABLE LAW

Iowa Code section 85.26 (1981) provides in relevant part:

> 1. No original proceedings for benefits under this chapter or chapter 85A, 85B or 86, shall be maintained in any contested case unless such proceedings shall be commenced within two years from the date of the occurrence of the injury for which benefits are claimed except as provided by section 86.20.
>
> 2. Any award for payments or agreement for settlement provided by section 86.13 for benefits under the workers' compensation or occupational disease law or the Iowa occupational hearing loss Act [chapter 85B] may, where the amount has not been commuted, be reviewed upon commencement of reopening proceedings by the employer or the employee within three years from the date of the last payment of weekly benefits made under such award or agreement. Once an award for payments or agreement for settlement as provided by section 86.13 for benefits under the workers' compensation or occupational disease law or the Iowa occupational hearing loss Act [chapter 85B] has been made where the amount has not been commuted, the commissioner may at any time upon proper application make a determination and appropriate order concerning the entitlement of an employee to benefits provided for in section 85.27.

(Emphasis added.)

Iowa Code section 86.13 (1981) provides in relevant part:

> Any failure on the part of the employer or insurance carrier to file such memorandum of agreement with the industrial commissioner within thirty days after the payment of weekly compensation is begun shall stop the running of section 85.26 as of the date of the first such payment.

ANALYSIS

The issue is whether claimant's claim is barred by the statute of limitations found in section 85.26, supra. Defendants argue on appeal that this action is barred by subsection 85.26(1). They also argue that stopping the running of the statute of limitations as provided in section 86.13 contemplates payments

of Iowa workers' compensation. It should be noted that the statutory language which defendants cite in their appeal brief is not the 1981 Iowa Code which controls in this matter but their argument is appropriate. Claimant argues in response that defendants' failure to file a memorandum of agreement has the effect of stopping the running of the statute of limitations.

Claimant's injury was January 14, 1981 and the original petition in this proceeding was filed on March 11, 1985. Subsection 85.26(1) clearly bars the filing of an original proceeding because it was not brought within two years of the date of the injury.

No memorandum of agreement had been filed under Iowa law nor had a prior award for workers' compensation been filed in Iowa. Defendants' argument is persuasive that the statute of limitations found in subsection 85.26(2) contemplates an award for Iowa workers' compensation benefits. The benefits paid in the Settlement under Nebraska law were not an award for Iowa benefits. Defendants paid workers' compensation benefits pursuant to Nebraska statutes (see the Settlement). Such payments were obviously not made pursuant to or in contemplation of the Iowa statutes. The payments were not payments contemplated under subsection 85.26(2). The provisions of subsection 85.26(2) are not controlling and therefore the provisions of section 86.13 cited above are not applicable.

If claimant's argument were accepted it would result in an unlimited period of time to commence an action in Iowa when a claimant has been paid compensation in another state pursuant to a decision or settlement. That situation would be an absurd results and contrary to orderly resolution of workers' compensation claims.

Claimant's action is barred by subsection 85.26(1) which is applicable. The deputy erred in concluding otherwise.

FINDINGS OF FACT

1. On January 14, 1981 claimant was injured in Iowa when he lost control of the truck he was driving for employer.

2. Claimant was paid workers' compensation benefits under Nebraska law.

3. The last payment for Nebraska workers' compensation benefits was made August 14, 1984.

4. No Iowa workers' compensation benefits were paid and no memorandum of agreement was filed in Iowa.

5. The original petition in this matter was filed March 11, 1985.

CONCLUSIONS OF LAW

This case is an original proceeding governed by Iowa Code section 85.26(1).

Claimant's claim is barred because the original petition was filed more than two years after the date of injury.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That claimant pay the costs of this action including costs of the appeal and costs of the transcript of the hearing pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 11th day of March, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Channing L. Dutton
Attorney at Law
2141 Grand Avenue
P.O. Box 367
Des Moines, Iowa 50302

Mr. R. Jeffrey Lewis
Attorney at Law
2600 Ruan Center
Des Moines, Iowa 50309

001512

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH L. SCHMITZ, Claimant, vs. AHRENS CONSTRUCTION COMPANY, Employer, and FIREMAN'S FUND INSURANCE COS., Insurance Carrier, Defendants.	:	FILE NO. 834034 A R B I T R A T I O N D E C I S I O N FILED MAY 12 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Kenneth L. Schmitz, claimant, against Ahrens Construction Company, employer (hereinafter referred to as Ahrens), and Fireman's Fund Insurance Companies, insurance carrier, for workers' compensation benefits as a result of an alleged injury on October 20, 1986. On February 29, 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 October 20, 1986, claimant received an injury which arose out of and in the course of his employment with Ahrens.

2. The injury was a cause of temporary total disability from October 21, 1986 through April 30, 1987 and now permanent disability.

3. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $124.14 per week.

4. The type of disability is a scheduled member disability to the leg.

5. If permanent disability benefits are awarded herein they shall begin as of May 1, 1987.

6. The medical provider would testify that the fees charged in the two medical bills submitted by claimant in the prehearing report were fair and reasonable. It is also stipulated that these bills are causally connected to the medical condition upon which the claim is based but their causal connection to any work injury and whether or not this constitutes reasonable treatment of the work injury remains an issue to be decided.

ISSUES

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

I. The extent of claimant's entitlement to weekly benefits for permanent disability; and,

II. The extent of claimant's entitlement to additional 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.

The circumstances surrounding the injury and subsequent treatment of the injury are not in dispute. On October 20, 1986, while working as a laborer with Ahrens, claimant attempted to jump into an excavation and he twisted his right knee at a construction site in the State of Missouri. Claimant was initially examined by a physician in Missouri but was soon referred to an orthopedic surgeon, Rouben Mirbegian, M.D., for further treatment. Conservative treatment failed to improve claimant's condition and upon a diagnosis of a torn cartilage in the knee, claimant underwent arthroscopy exploration of his right knee meniscus on December 2, 1986 and upon a final diagnosis of a torn medial meniscus, claimant's medial meniscus was removed in an arthrotomy surgery immediately after the arthroscopy.

Claimant then underwent a long period of post-operative care consisting of pain and anti-inflammatory medication, exercises and recommendations of weight loss. On April 13, 1987, claimant was eventually released for work on May 2, 1987. In his deposition, Dr. Mirbegian stated that claimant may continue to experience problems after the surgery. One of the problems the doctor identitied was a feeling of "giving out" of the knee, with occasional pain and swelling and the possibility of developing arthritis in the knee in the future. Dr. Mirbegian finally concluded that due to the loss of the medial meniscus, claimant has a 10 percent permanent partial impairment to the leg.

The issue as to the probability of claimant's developing arthritis within three to five years was a subject of considerable dispute among the parties. In his deposition, Dr. Mirbegian stated that there was a 50/50 chance of claimant developing arthritis which would increase his impairment rating to 20 percent. However, Dr. Mirbegian later stated as follows in his deposition:

> Q But we're talking about there's -- what -- 50-50 chance that he will develop arthritis?
>
> A Yes. The reason is that's one side of the knee is the inside. The outside is another 50 percent. So if he had the two cartilage removed -- the medial side and lateral side -- then he has higher than 50 percent chance of getting arthritis.
>
> Q If I understand, he had the medial meniscus removed?
>
> A He got the one on median side, got one on lateral side. So he has quite good chance of getting that arthritis in that side of his knee.

The operative report of the arthrotomy states that only claimant's medial meniscus was removed. According to this report observations of the lateral meniscus during arthroscopy shows no signs of any tear or abnormality.

Claimant testified that his knee continues to give out once in a while and swells and throbs especially in cold weather and strenuous activity. These episodes last two to three days. Claimant states that he is not able to lift or use his left leg as before. Claimant states that he has attempted to lose weight but has been unable to do so.

Claimant testified that he reinjured his right knee in August, 1987, in a part-time job which required a return visit to Dr. Mirbegian on August 10, 1987 and again on August 24, 1987. Claimant delivered applicances such as washers and dryers in this job. Claimant testified that he had assistance with this work.

Claimant's appearance and demeanor at the hearing indicated he was testifying truthfully.

APPLICABLE LAW AND ANALYSIS

I. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

From the evidence submitted it is found as a matter of fact that the work injury is a cause of a 10 percent loss of use of the right leg. Claimant in his breif argues that Dr. Mirbegian testified that if both the medial and lateral aspects of the meniscus were removed this would change the rating to 20 percent due to the fact that there would be a greater than a 50/50 chance of developing arthritis. The problem is that this deputy has not been shown by the evidence that both the medial and lateral aspects were removed. The deposition testimony of Dr. Mirbegian is confusing. The surgical report shows only the medial aspect was involved. Had both parts of the meniscus been removed, claimant would be correct in that the greater weight of the evidence would show a probability of a greater impairment than 10 percent. In other words, it would be more likely than not. However, this has not been shown.

Based upon a finding of a 10 percent permanent partial impairment, claimant is entitled as a matter of law to 22 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(o) which is 10 percent of 220 weeks, the maximum allowable number of weeks for an injury to a leg in that subsection. The extent of claimant's entitlement to healing period benefits were stipulated to. Therefore, claimant is entitled to a total of 49 3/7 weeks for both healing period and permanent disability benefits. It was stipulated that claimant has

already been paid 52 2/7 weeks. This is more than his entitlement. Therefore, claimant shall not be awarded additional benefits.

II. 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) decision filed March 16, 1988.

Although the bills in August, 1987, submitted by claimant in the prehearing report are the result of a reinjury to the knee while working for another employer, Dr. Mirbegian stated that claimant will be occasionally having these episodes of his knee going out. Therefore, claimant has shown that the work injury in this case was at least a significant contributing factor to this reinjury and the need for treatment in August of 1987. Therefore, claimant will be awarded medical benefits for the sums requested.

Claimant's request for penalty benefits under Iowa Code section 86.13 is a moot issue as no additional weekly benefits were awarded

FINDINGS OF FACT

1. Claimant was a credible witness.

2. The work injury of October 20, 1986, was a cause of a 10 percent permanent partial impairment to the leg and of occasional episodes of swelling and throbbing such as a feeling that the knee "is giving out" and of a 50/50 chance of developing arthritis in the future.

3. The medical expenses listed in the prehearing report are fair and reasonable and were incurred by claimant for reasonable and necessary treatment of his work injury as a result of his work injury on October 20, 1986.

CONCLUSIONS OF LAW

Claimant has not established by a preponderance of the evidence entitlement to additional weekly benefits but has established entitlement to the medical benefits awarded below.

ORDER

1. Defendants shall pay directly to Dr. Mirbegian the bill submitted in the prehearing report totaling seventy-five and no/100 dollars ($75.00).

2. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 and specifically the deposition fee of Dr. Mirbegian in the amount of one hundred and no/100 dollars ($100.00).

3. Defendants shall filed 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 12th day of May, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. James P. Hoffman
Attorney at Law
Middle Road
Keokuk, Iowa 52632

Ms. Dorothy L. Kelley
Attorney at Law
1000 Des Moines Bldg.
Des Moines, Iowa 50309

001518

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIE W. SCHROEDER, Claimant, vs. EBASCO SERVICE, INC., Employer, and U. S. F. & G., Insurance Carrier, Defendants.	:	File NO. 519296 A P P E A L D E C I S I O N

FILED

APR 25 1988

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision denying additional benefits based on an increase in disability.

The record on appeal consists of the transcript of the review-reopening hearing; claimant's exhibits 1 through 43; and defendants' exhibit A. Both parties filed briefs on appeal.

ISSUES

Claimant states the issues on appeal are whether the deputy erroneously relitigated issues and facts made res judicata by prior decisions which were not appealed and whether the deputy erroneously found there was no causal connection between claimant's injury of August 11, 1978 and claimant's current disability which claimant asserts is 100 percent industrial disability.

REVIEW OF THE EVIDENCE

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

On August 11, 1978 claimant sustained an injury to his right arm and shoulder while employed by defendant employer. He was released to return to work on October 23, 1978 but there was no work available with defendant employer. He then obtained work with a second employer and developed cervical problems and left that job. In an arbitration and review-reopening decision dated

January 30, 1981, a deputy found a causal relationship between his August 11, 1978 injury and his disability. The deputy further concluded that claimant had sustained a 20 percent industrial disability and that the claim against the second employer should be dismissed because of claimant's failure to give the employer timely notice of the injury.

Claimant underwent cervical fusion surgery at the C5 through C7 levels on March 10, 1981. He also had more complaints regarding his lumbar spine. A second review-reopening case was heard on July 14, 1982 and the decision was filed on December 15, 1982 in which claimant was awarded 40 percent industrial disability. In making the award the deputy relied upon a letter from Maurice P. Margules, M.D., dated April 26, 1982 which states in part "[a]s far as the low back problem, this would constitute an aggravation of a pre-existing condition and, for this, the patient would be rated at a partial permanent physical disablity of 5% of the body as a whole." A letter from Horst G. Blume, M.D., dated March 23, 1982 indicated his opinion that claimant's low back pain was not related to the accident of August 11, 1978. Neither the first nor the second review-reopening decision was appealed.

On May 24, 1983 "the patient underwent a semihemilaminectomy L3/4, L4/5, L5/S1 with decompression of the nerve roots L4, L5, and S1, unroofing of the nerve root canals, removing of the facets, removing the ruptured discs L3/4, L4/5 and L5/S1, followed by a posterior lateral fusion." (Claimant's Exhibit 33) In a letter dated October 24, 1983 Dr. Blume stated that "the patient has been totally disabled for any gainful employment since his cervical disc and fusion surgery in March of 1981." In a letter dated November 1, 1985, Dr. Blume stated:

> The patient has a permanent partial disability to the body as a whole with 15% on the neck and shoulder for a total of 30% to the body as a whole of functional disability. I do think that the patient is unable to go back to any gainful emloyment. We are just happy that the patient can exist with the least amount of pain by not doing any particular activity except the usual amounts of walking, standing and sitting.
>
> His problems since December 1982 continue to relate to his original on the job injury with Ebasco.

(Cl. Ex. 42)

In a letter dated February 26, 1986 Dr. Margules stated:

> After reviewing the patient's entire past

history and present complaint, it is our opinion that the patient sustained two separate injuries. On August 11, 1978 the patient sustained an injury as described in my previous letter of April 26, 1982, and as the result of this the patient sustained a sprain of the cervical spine and a contusion of the Right [sic] elbow.

The patient then made a satisfactory recovery and returned to work as an Insulator for the Klinger-Holtz Company following which he complained of severe pain at the level of the cervical spine and was treated by Dr. Horst Blume and underwent fusion at the level of the C4-C5 and C5-C6 interspace by the anterior approach.

It is our opinion that the disc herniations at those two levels as treated by Dr. Blume were the result of the injury sustained while the patient was at work for the Klinger-Holtz Company working as an Insulator.

(Defendants' Ex. A)

Claimant testified that the last time he worked for the union or had done any construction of any sort was March of 1981.

APPLICABLE LAW

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

ANALYSIS

The claimant argues that the deputy erroneously relitigated issues and facts made res judicata by the prior review-reopening decision. The petition that initiated the prior decision sought an increase from an award of 20 percent industrial disability. The prior decision resulted in an award of 40 percent industrial disability. Claimant now seeks an award of 100 percent industrial disability. In the instant proceeding the deputy considered whether the claimant was entitled to an increase in disability greater than the prior decision. The prior award which appeared to be based in part on the shoulder condition and in part on the low back was left undisturbed. Claimant's argument seems to be somewhat inconsistent. On the one hand it is argued that the rating of disability should be increased but on the other hand it is argued that the prior decision should be res judicata. The deputy did not err in determining whether there was a causal connection between the work injury and the claimed disability in this proceeding.

The deputy found that there was no causal connection between the claimed disability and the original injury. The prior decision is only res judicata regarding the prior aggravation of the preexisting condition of claimant's lower back. Claimant must still prove a causal connection between the original injury and the current claimed disability. Claimant has not proved that his current condition relates to the prior aggravation instead of his preexisting condition. A finding of a causal connection between an aggravation of a preexisting condition and a work injury does not mean that all future changes of impairment of the preexisting condition are the result of the work injury.

The second issue to be considered is whether the deputy erroneously found there was no causal connection between claimant's injury of August 11, 1978 and claimant's current disability which claimant asserts is 100 percent. Most of the medical evidence predates this proceeding and would have been used as a basis for the prior review-reopening decision which claimant did not appeal. The medical evidence that is more current than the prior decision is in conflict. Dr. Margules' most recent report (February 26, 1986) does not address the issues of the cause of claimant's low back injury and the alleged increase in disability. That report indicates that he was of the opinion that there were two separate injuries and one of those was while claimant was employed by another employer. Dr. Blume's most recent report dated November 1, 1985 states his opinion that claimant's problems since 1982 relate to his original injury while employed for defendant employer. This appears to be a direct conflict with his opinion in a report dated March 23, 1982. There is no explanation of this apparent change of opinion. Also, in the report dated October 24, 1983 Dr. Blume expressed the opinion that claimant has been totally disabled since March of 1981. Even though Dr. Blume gave a rating of disability in his letter dated November 1, 1985 there is no rating of disability to compare it to determine whether Dr. Blume is of the opinion that the disability increased between the more recent review-reopening decision and the instant proceeding. It should also be noted that Dr. Blume is qualified to rate impairment but not qualified to rate disability which takes into account an employee's age, education, qualifications, experience and inability, because of the injury, to engage in employment for which he is fitted. Claimant has not provided evidence that there has been an increase in disability since the last review-reopening decision. The deputy was correct in concluding that claimant had failed to prove a causal connection between his injury of August 11, 1978 and the increase in disability he now claims.

FINDINGS OF FACT

1. There has been a change in the condition of claimant's lumbar spine since the prior review-reopening decision in this case.

2. The injury of August 11, 1978 has not been shown to be the cause of the change of condition of claimant's lumbar spine.

CONCLUSIONS OF LAW

Claimant has failed to prove by the greater weight of evidence that there is a causal relationship between the injury of August 11, 1978 and an increase in disability since the more recent review-reopening decision.

Defendants are not responsible for payment of any additional compensation for the condition of claimant's low back and are not responsible for payment of any additional expenses incurred in the treatment of claimant's low back.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay the costs of this appeal proceeding including the costs of transcription of the review-reopening hearing.

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

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Harry H. Smith
Attorney at Law
632-640 Badgerow Bldg.
P.O. Box 1194
Sioux City, Iowa 51102

Mr. P. D. Furlong
Attorney at Law
401 Commerce Bldg.
P.O. Box 3005
Sioux City, Iowa 51102-3005

001523

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEE A. SCHROMEN,	:	
Claimant,	:	
vs	:	File No. 747055
C. F. CARR CONSTRUCTION, INC.,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
WEST BEND MUTUAL,	:	FILED
Insurance Carrier, Defendants.	:	JUN 28 1988

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Lee A. Schromen, claimant, against C. F. Carr Construction, Inc., employer and West Bend Mutual, insurance carrier, defendants for benefits as a result of an injury that occurred on October 10, 1983. A hearing was held in Dubuque, Iowa on May 12, 1988 and the case was fully submitted at the close of the hearing. The record consists of the testimony of Lee A. Schromen (claimant), claimant's exhibits 1 through 10 and defendants' exhibits A through I. Both parties submitted excellent briefs. There was extensive unnecessary duplication of exhibits. Many of the documents appeared as many as three times. The parties did not comply with paragraph 10(2) of the hearing assignment order that directs that every reasonable effort should be made to avoid duplication of exhibits.

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 October 10, 1983 to his right knee which arose out of and in the course of employment with employer;

That the injury to the right knee was the cause of some temporary and some permanent disability;

That claimant is entitled to healing period benefits from October 11, 1983 to March 10, 1984 for the injury to the right knee and that claimant has already been paid healing period benefits for this period of time;

That the rate of compensation, in the event of an award, is $161.09 per week;

That the fees charged for medical services and supplies are fair and reasonable;

That defendants claim no credit under Iowa Code section 85.38(2) for benefits paid prior to hearing under an employee nonoccupational group health plan;

That defendants are entitled to a credit for the actual workers' compensation benefits paid prior to hearing. Defendants claim they paid 46 weeks of permanent partial disability benefits. Claimant contended that he only received 42 weeks of permanent partial disability benefits; and

That there are no bifurcated claims.

ISSUES

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

Whether the injury of October 10, 1983 was the cause of a second surgery to the right knee on September 13, 1984 and whether the injury of October 10, 1983 was a cause of a back injury in October of 1985;

Whether either the second right knee surgery or the alleged back injury was the cause of either temporary or permanent disability;

Whether claimant is entitled to temporary disability benefits as a result of the second right knee surgery from September 13, 1984 to January 14, 1985;

Whether claimant is entitled to temporary disability benefits as a result of the alleged back injury;

Whether claimant is entitled to permanent disability benefits as a result of the second knee surgery and the alleged back injury; and

Whether claimant is entitled to medical benefits as a result of the second right knee surgery and the alleged back injury.

SUMMARY OF THE EVIDENCE

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

Claimant fell off a ladder and twisted his right knee on October 10, 1983 (defendants' exhibit 1, pages 1-6). Julian G. Nemmers, M.D., performed surgery on October 12, 1983 (Ex. F, pp. 33-39; Ex. I, pp. 29-32 and p. 38). Claimant was off work from October 10, 1983 to March 10, 1984. Claimant was paid healing period benefits for this period of time. Employer had no work that claimant could do when the healing period ended. Claimant, therefore, drew unemployment compensation between approximately March 10, 1984 and April 10, 1984. Then from approximately April of 1984 to June of 1984, claimant worked in Oklahoma framing houses and finishing cement for two different contractors. In June of 1984, claimant returned to Dubuque and worked for a former employer by the name of Adams Company. Claimant then had a second surgery on his right knee performed by Dr. Nemmers on September 13, 1984 (Ex. 1, pp. 11-13; Ex. 2, pp. 2 & 3; Ex. F, pp. 40-42; Ex. I, pp. 50-52). Claimant was off work as a result of the second right knee surgery from September 13, 1984 to January 14, 1985. Claimant testified that the workers' compensation carrier paid for the surgery but did not pay him healing period benefits for the period of recovery. Claimant testified that in May of 1985 his right knee would pop out when he was framing houses and finishing concrete but he did not make a workers' compensation claim against either one of those employers.

As to the second right knee surgery, Dr. Nemmers stated on September 17, 1984:

> Lee Schromen returned to my office on September 7, 1984, complaining of continuing pain in the right knee. X-rays again showed the patellar malalignment, grade II to III. It is my opinion that he has an aggravation of the patellar malalignment due to the injury of October 10, 1983. He has had patellar symptoms throughout the course of his treatment and has elected at this time to proceed with surgery. This was carried out on September 13, 1984, consisting of an arthroscopic debridement of the right knee and lateral retinacular release. It is my opinion that he will be disabled for a period of no less than 6-8 weeks following this surgery.

(Ex. 1, p. 14; Ex. E, p. 7)

Dr. Nemmers further clarified the situation for the insurance carrier on October 8, 1984 in the following words:

> As I stated in my letter of September 17, 1984, Lee Schromen has suffered from symptoms of chondromalacia

throughout his course of treatment for the injury to his right knee sustained October 10, 1983. I became aware of his pain at his visit of November 18, 1983, when he complained of patellar pain with doing his knee exercises. It was my opinion at that time that he had traumatic chondromalacia of the patella due to his injury of October 10, 1983. Grade II to III patellar malalignment was present also throughout the course of his treatment and I felt that he had aggravated the malalignment with the injury of October 10, 1983.

The arthroscopic debridement of the knee was performed because of the traumatic chondromalacia of the patella. The lateral release was performed because of the patellar malalignment. I do not believe the chondromalacia was present prior to his injury. The malalignment of the patella was a pre-existing condition to the best of my estimation, but I do not believe he was having problems with this until the injury and resultant traumatization to that area.

(Ex. 1, p. 15; Ex. E, p. 8)

Dr. Nemmers awarded a 20 percent permanent functional impairment rating as a result of both right knee surgeries and described claimant's condition as follows on May 2, 1985:

Lee Schromen was evaluated by me for permanent impairment on April 26, 1985. X-rays on that date show changes of traumatic arthritis developing on the medial joint line of the right knee. He has also started to develop a spur off the medial edge of the medial femoral condyle of the right knee.

It is my opinion that he has a permanent impairment of 20% of the right lower extremity as a result of the injury to his right knee and subsequent surgical treatment. I do not foresee further medical treatment in the next few years. However, I do believe that the degree of traumatic arthritis will gradually get worse and this man might need knee replacement surgery when he is 50 years old. If not knee relacement surgery, he may need a change in occupations. I believe he has reached maximal rehabilitation at this time.

(Ex. 1, p. 19; Ex. E, p. 12)

Claimant then returned to Oklahoma to work again as a carpenter from January of 1985 to May of 1985. He returned to

Dubuque and worked for his brother from May of 1985 to October of 1986 driving a truck and as a heavy equipment operator. Claimant contended in his testimony that he began having back pains in April of 1985. He sought chiropractic adjustments in October of 1985 (Ex. 8). Dr. Nemmers did not record any back complaints until April 25, 1986 when he stated that claimant was experiencing pain behind his right knee which goes up into his hip (Ex. F, p. 1). Claimant testified that he had a lumbar laminectomy in October of 1986 at L5 but he stated that this surgery was not an issue in this claim. Claimant testified that he made no workers' compensation claim for this surgery. He stated that it was paid for by his wife's health insurance.

Claimant conceded to defendants' counsel that it was approximately one and one-half years from the time of the right knee injury, on October 10, 1983, until he first experienced back pain in April of 1985. He further acknowledged that it was approximately two and one-half years from the time of the right knee injury, on October 10, 1983, until Dr. Nemmers first made a medical record on April 25, 1986 of a pain that began behind the right knee and ran up to the hip. Claimant further acknowledged that he worked for several employers after the right knee injury on October 10, 1983. He had framed houses, finished concrete, worked as a carpenter, driven a truck, operated heavy equipment and had worked as a machinist for the Adams Company. Claimant conceded that no doctor had related his back pain to the knee surgery on October 10, 1983.

Claimant testified that he did not know if the knee injury of October 10, 1983 was the cause of his back pain, but he believed that the pain behind his knee, that ran up to his hip, developed into the back condition that Dr. Nemmers mentioned on April 25, 1986 (Ex. 2, p. 4; Ex. F, p. 1) and for which he began chiropractic treatments in October of 1985 (Ex. 8).

On October 25, 1986, Dr. Nemmers sent claimant to see Charles R. Clark, M.D., at the University of Iowa Hospitals and Clinics, Department of Orthopedic Surgery, for the pain that ran up to the hip from behind the right knee. Dr. Clark saw claimant on June 3, 1986. He reported on August 17, 1986 (1) that claimant complained of his back with some mild nerve root impingement; (2) that he (Dr. Clark) declined to rate the back because he was treated by Dr. Nemmers after the injury of October 10, 1983 and (3) that claimant made no mention of a back problem in Dr. Nemmers notes until 1986. Dr. Clark refused to rate the back and deferred to Dr. Nemmers opinion since Dr. Nemmers had treated the claimant from the time of the initial injury on October 10, 1983.

Dr. Nemmers had previously stated on February 17, 1986, that there was no causal connection between the right knee injury of October 10, 1983 and any back problem claimant might be having.

This is what Dr. Nemmers said:

> I have extensively reviewed my record and, in my opinion, there is no causal relationship between the injury of October 10, 1983, and any back problem of which Mr. Schromen might be having at the present time. In other words, all injuries experienced in the fall of October 10, 1983, are restricted to and limited to the right lower extremity. I find no mention of back problems in my prior records.

(Ex. E., p. 16)

There is no subsequent evidence that Dr. Nemmers ever changed this definitive opinion.

There was evidence that claimant injured his right knee in a car accident on August 4, 1979. This was a minor injury and described as a contusion and abrasion. X-rays were negative (Ex. B; Ex. F, p. 7). Claimant had forgotten about this incident when he was interrogated by defendants' counsel. There was no evidence of any residual effect from this earlier injury.

Claimant also strained his back by pulling a carload of parts at the Adams Company on January 3, 1980. This was treated conservatively. Claimant received nine physical therapy treatments (Ex. C & D). Claimant said that he had no residual effect from this earlier back injury.

Claimant's past medical records show two motor vehicle accidents, two motorcycle accidents and a number of other injuries. The old records do show that claimant had some preexisting chondromalacia in his right knee and soreness in both knees prior to the injury of October 10, 1983. The chondromalacia is reported on January 5, 1981 in both knees (Ex. F, p. 10).

APPLICABLE LAW AND ANALYSIS

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 he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection.

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

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

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Claimant did sustain the burden of proof by a preponderance of the evidence that the injury of October 10, 1983 was the cause of the second right knee surgery on September 13, 1984. Dr. Nemmers, his treating physician, and the only physician to address this issue, made it clear on September 17, 1984 and October 8, 1984, that even though the claimant had a patellar malalignment prior to the injury of October 10, 1983, nevertheless, the injury of October 10, 1983 aggravated the malalignment and necessitated the second surgery to the right knee (Ex. E, pp. 7 & 8). The parties agreed in the prehearing report that claimant was off work as the result of this surgery from September 13, 1984 to January 14, 1985. Dr. Nemmers released claimant to return to work on January 14, 1985 (Ex. 1, p. 18). Therefore, claimant is entitled to the costs of the second surgery on September 13, 1984, which the parties agreed and the record indicates had already been paid (Ex. 10). Claimant is also entitled to healing period benefits for this period of time from September 13, 1984 to January 14, 1985 which the parties agreed had not been paid.

The permanent functional impairment rating of 20 percent of the right lower extremity, determined by Dr. Nemmers on May 2, 1985, included both surgeries to the right knee. Claimant has

already been paid permanent partial disability for a 20 percent impairment of the right lower extremity under Iowa Code section 85.34(2)(o). The parties agreed that claimant had been paid permanent partial disability for the permanent functional impairment to the right lower extremity. Claimant's entitlement was 44 weeks of benefits. Defendants maintain they over paid claimant two weeks by paying him 46 weeks of permanent partial disability. Claimant contended that he had only received 42 weeks permanent partial disability benefits.

Claimant did not sustain the burden of proof by a preponderance of the evidence that the injury of October 10, 1983, was the cause of a back problem. Dr. Clark deferred to Dr. Nemmers. Dr. Nemmers said there was no causal connection between the right knee injury of October 10, 1983 and any back complaints that claimant might be having (Ex. E, p. 16). Claimant admitted that no doctor told him that there was a causal connection between his initial right knee injury and the back injury. Claimant expressed the belief that the pain behind his right knee, that went up to his hip, developed into the back condition which subsequently required treatment by a chiropractor. Claimant's opinion, however, is not sufficient to sustain the burden of proof by a preponderance of the evidence. It is not the greater weight of the evidence. This is an area where medical evidence predominates. Furthermore, as defense counsel pointed out, claimant had no back complaints according to his own testimony until one and one-half years after the injury on October 10, 1983. Dr. Nemmers made no record of any back complaints until two and one-half years after the injury of October 10, 1983. Then, he mentions only a pain that went from behind the right knee up to the hip. As defendants pointed out, claimant had performed a number of strenuous jobs for a number of employers during this interim period. Consequently, it is determined that claimant did not sustain the burden of proof by a preponderance of the evidence that the right knee injury of October 10, 1983 was the cause of any back problems. Dr. Nemmers said there was no causal connection. Consequently, it is determined that claimant is not entitled to any permanent partial disability benefits or medical benefits for the alleged back condition. Accordingly, no award can be made for the medical bills for the treatment of the back which appear in claimant's exhibits 4 through 9.

FINDINGS OF FACT

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

That Dr. Nemmers stated the right knee injury of October 10, 1983 did aggravate the preexisting malalignment of claimant's right knee and caused the second surgery that was performed on the right knee on September 13, 1984;

That claimant was off work from September 13, 1984 to January 14, 1985 as a result of the surgery;

That Dr. Nemmers stated that claimant sustained a 20 percent permanent functional impairment of the right lower extremity as a result of both right knee surgeries;

That all of the medical bills for the second right knee surgery by Dr. Nemmers are marked as paid by workers' compensation on exhibit 10; and

That Dr. Nemmers indicated that claimant's back problems were not connected to the right knee injury of October 10, 1983.

CONCLUSIONS OF LAW

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

That the right knee injury of October 10, 1983 did cause the second right knee surgery on September 13, 1984;

That claimant is entitled to healing period benefits from September 13, 1984 to January 14, 1985.

That claimant is entitled to medical expenses for the second right knee surgery of September 13, 1984;

That claimant is entitled to 44 weeks of permanent partial disability benefits for the right knee injury; and

That claimant did not sustain the burden of proof by a preponderance of the evidence that the injury of October 10, 1983, to his right knee was the cause of an injury to his back.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to claimant seventeen point seven one four (17.714) weeks of healing period benefits for the period from September 13, 1984 to January 14, 1985 at the rate of one hundred sixty-one and 09/100 dollars ($161.09) per week in the total amount of two thousand eight hundred fifty-three and 55/100 dollars ($2,853.55);

That defendants pay to claimant forty-four (44) weeks of permanent partial disability benefits at the rate of one hundred sixty-one and 09/100 dollars ($161.09) per week in the total amount of seven thousand eighty-seven and 96/100 dollars ($7,087.96) commencing on January 14, 1985;

That defendants are entitled to a credit for all workers' compensation weekly benefits paid prior to hearing;

That defendants are liable for the expenses of the second knee surgery, but the parties agreed and the evidence shows that defendants have already paid these medical expenses;

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

That interest will accrue under Iowa Code section 85.30;

That defendants pay the costs of this proceeding pursuant to Division of Industrial Services Rule 343-4.33; and

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

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

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. David A. Lemanski
Attorney at Law
200 Security Bldg
Dubuque, Iowa 52001

Mr. John M. Bickel
Mr. Kevin Collins
Attorneys at Law
PO Box 2107
Cedar Rapids, Iowa 52406

001533

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD J. SEYDEL, Claimant, vs. U OF I PHYSICAL PLANT, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	FILE NO. 818849 A R B I T R A T I O N D E C I S I O N FILED FEB 26 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Donald J. Seydel, claimant, against the University of Iowa Physical Plant, an agency of the State of Iowa, employer (hereinafter referred to as the State), for workers' compensation benefits as a result of an alleged injury on July 14, 1985. On January 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 John William Joyner. 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. If defendants are held liable for the alleged work injury, claimant is entitled to temporary total disability benefits from November 27, 1985 through January 12, 1986. Claimant is not seeking permanent disability benefits in this proceeding.

2. In determining the rate of weekly compensation under the Iowa Industrial Commissioner's Benefit Schedule for this injury, claimant is entitled to marital status and two exemptions under the schedule. Claimant's rate of gross weekly compensation was in dispute.

3. The medical bills submitted by claimant at hearing were fair and reasonable and causally connected to the hernia condition upon which the claim herein is based, but that the issue of the causal connection of the hernia to any work injury remained an issue to be decided herein.

ISSUES

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

I. Whether claimant received an injury arising out of and in the course of his employment at the University of Iowa;

II. Whether claimant has complied with the notice provisions of Iowa Code section 85.23;

III. Whether there is a causal relationship between the work injury and the claimed disability;

IV. The rate of compensation to which claimant is entitled;

V. The extent of claimant's entitlement to medical benefits under Iowa Code section 85.27; and,

VI. The extent of claimant's entitlement to any additional benefits under Iowa Code section 86.13 for an unreasonable delay in denying or paying benefits.

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 had been working for the University of Iowa Physical Plant for approximately two years at the time of the alleged injury. Claimant was a custodian who performed duties consisting of vacuuming floors and general cleaning. According to exhibit 6, at the time of the alleged injury, claimant was earning an annual gross "budget" salary of $11,200 or $215.38 per week. According to exhibit 8 and claimant's testimony, claimant worked overtime and received a shift differential in addition to his budget salary. Despite his variable earnings, no evidence was offered as to claimant's actual earnings in the 13 week period prior to the alleged injury.

The facts surrounding the work injury are in dispute. Claimant testified that at the time of the alleged injury he, along with two other custodians, was asked to perform a special project consisting of refinishing the basketball court in the Carver-Hawkeye Arena at the University of Iowa. This work involved stripping off of old finish using modified buffing machines containing a rotating abrasive disc. These machines were hand held and required considerable effort to move them about the basketball floor using upper extremities and the upper body torso. After working on this refinishing project approximately one and a half hours during the morning of July 14, 1985, claimant said that he felt a sharp pain in the left side of his abdomen which lasted approximately two minutes. At that time claimant said that he stopped his machine. After inquiry by his supervisor as to why he stopped working, claimant said that he informed his supervisor of the pain and was told to take a cigarette break. After a few minutes of break time, claimant stated that the pain went away and he resumed working. Claimant said that he experienced no other problems the rest of that morning and most of the afternoon but the pain reoccurred following the afternoon break. Again, claimant said that he stopped working and was told by his supervisor to take another break. Claimant said that the pain again ended during his break and he resumed his work. Claimant was on overtime while performing the refinishing work and he testified that he then completed his regular shift on the day of the injury without incident.

Claimant testified that he continued to experience problems after June 14, 1985, while performing his regular work as a custodian. These problems involved pain in the lower left abdomen area. Claimant denied having any similar type of pain prior to July 14, 1985. Claimant said that emptying trash bins weighing anywhere from 20 to 200 pounds and carrying his vacuum cleaner when the elevator broke down caused him particular problems. Claimant said that the pain gradually worsened but that he did not seek medical attention as it was not a constant pain and he was unsure as to the cause. Finally in September, 1985, claimant was given a routine occupational health screening evaluation by a University of Iowa physician due to claimant's handling of chemicals in his job. During this screening process claimant was asked to blow into an inhaler device but experienced difficulty with this test due to abdominal pain. The University of Iowa physician advised claimant that he may have a hernia and referred him to his family physician. Claimant then sought an evaluation from C. S. Shimp, D.O., on October 28, 1985. Dr. Shimp felt that claimant did have a hernia which required a repair. Claimant had reported to Dr. Shimp at that time that he had abdominal pains for the last six months. Claimant was then referred by Dr. Shimp to Dr. Tung, M.D., (first name unknown), for surgery following a second opinion from Dr. Anderson (first name unknown), which confirmed the presence of claimant's hernia. Dr. Tung performed a hernia repair in November, 1985, and

claimant was off work recovering from this surgery until January, 1986.

Claimant's supervisor, John Joyner, testified that he was not aware of any workers' compensation claim for the hernia or any injury on July 14, 1985 until November, 1985. Claimant testified that two or three days after the incident, he was given an accident report form by Joyner which he completed and returned to Joyner, exhibit 5, which contains his signature and indicates a date of injury of July 14, 1985. Joyner testified in response that he did not feel that this exhibit was submitted by claimant to him or to anyone at the University of Iowa until after his surgery in November, 1985, although he admitted it was the same type of form that he requests workers to fill out when they report a claim. Joyner testified that he had a phone call in November of 1985, from Al Young who has some personnel responsibilities at the University. This Al Young reported to Joyner that claimant had been in the office after this surgery inquiring as to why the medical expenses for the hernia repair were not paid. Joyner denied any recollection of the events as described by claimant on July 14, 1985 and denies furnishing or receiving any sort of written notice of the accident report. Joyner verified that claimant was performing the refinishing work in July, 1985. Claimant testified that when he notified Joyner that he was having hernia surgery, he also informed Joyner that Dr. Tung had stated that the hernia was work related. Again, Joyner denies being told such information.

It should be noted that there was no evidence, other than the testimony of Joyner, as to the specific reasons why the claim was denied by the State before litigation was pursued by claimant. Exhibit 12 indicates that Joyner is not the person who decides whether or not to pay a workers' compensation claim. The person or persons who make such decisions did not testify or otherwise provide evidence as to the reasons, if any, for the denial.

According to an affidavit from a Tom Hart, a union steward, Hart found exhibit 5 in claimant's personnel file on August 8, 1986 and stated that he was unaware of the reasons why claimant's claim was being denied for a failure to file timely notice of his injury.

The only causal connection opinion in the record of this case is from Dr. Tung who states that from the history provided to him by claimant of the July 14, 1985 incident and from claimant's description of the work he performed at the University of Iowa, it was his opinion that the incident and claimant's work either caused or aggravated the hernia condition which he repaired in November, 1985.

Claimant's appearance and demeanor at the hearing indicated he was testifying in a candid and truthful manner. From his demeanor and mannerisms while testifying at hearing, the supervisor, Joyner, did not appear to be a credible witness.

APPLICABLE LAW AND ANALYSIS

I. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960) and cases cited therein.

Claimant's credible testimony and the existence of exhibit 5, the written notice, clearly establishes that he suffered a work injury on July 14, 1985. As there was no benefits claimed or loss time at the time of this incident, it is certainly not unusual for claimant's supervisor to forget that the incident happened.

II. Iowa Code section 85.23 requires that claimants must report their injuries within 90 days to be compensable. Little need be said as to this issue as claimant's credible testimony and exhibit 5 rather clearly shows that claimant complied with this notice requirement.

III. 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 established the truthfulness of the history he provided to Dr. Tung and Dr. Tung's causal connection opinion is uncontroverted. Therefore, claimant has clearly established that his hernia condition was the result of the incident on July 14, 1985. Given this finding, claimant will be awarded the temporary total disability for the period of time stipulated in the prehearing report.

IV. With reference to the rate of compensation, claimant's customary gross weekly earnings consisted of his annual salary divided by 52 or $215.38 per week. Although claimant may have earned more than this amount due to shift differentials and overtime work, insufficient evidence was submitted to arrive at any accurate findings of earnings in excess of claimant's customary earnings. Therefore, pursuant to Iowa Code section 85.36, it will be found that claimant's gross weekly rate of compensation is $215.38 per week. Based upon the benefit schedule published by the Iowa Industrial Commissioner for an injury on July 14, 1985, claimant is entitled as a matter of law to a rate of compensation in the amount of $143.12 per week.

V. With reference to claimant's entitlement to medical benefits, given the parties' stipulations, the finding that the hernia condition was causally connected to a work injury resolves the medical benefits entitlement issue and the sums listed in the prehearing report will be awarded to claimant.

VI. Claimant finally seeks additional workers' compensation benefits under Iowa Code section 86.13 for a delay in commencement

of benefits without reasonable or probable cause or excuse. Research of the matter indicates that the precise legal tests to be utilized in applying the statutory language of Iowa Code section 86.13 is the matter of first impression to this agency. Although the case at bar is an administrative proceeding for statutory benefits, guidance can be gleaned from Iowa Supreme Court decisions in similar matters involving actions against insurance carriers for a "bad faith" denial of an insurance claim in the law of torts. Pirkl v. Northwest Mutual Insurance Association, 348 N.W.2d 633 (Iowa 1984); Higgins v. Blue Cross, 319 N.W.2d 232, 236 (Iowa 1984); M-Z Enterprises, Inc. v. Hawkeye-Security Insurance Company, 318 N.W.2d 408, 414-15 (Iowa 1982). In Higgins, although the Iowa Supreme Court denied the opportunity to create a separate cause of action in this state for bad faith denial of a claim, the court stated that in those states which recognized such a cause of action, in order to prevail, the insured must show the absence of a reasonable basis for denying benefits of the policy and the insurer's knowledge or reckless disregard of the lack of reasonable basis for denying the claim. "When the claim is 'fairly debatable' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." Id at 415.

Application of the bad faith theory in an administrative environment involving workers' compensation benefits was recently dealt with by the Wisconsin Supreme Court who does recognize a cause of action for bad faith in the law of torts and who instructed their Wisconsin hearing officers as follows in applying its own statutory bad faith provisions in their workers' compensation statute:

> As we read sec. 102.18(1)(bp), Stats., the issue of bad faith is reached only after a final award has been made to the claimant. A hearing examiner then examines the record to determine if there was any credible evidence which would demonstrate that the claim was fairly debatable. If the examiner finds that there is no credible evidence which the employer or insurer could rely upon to conclude that the claim was fairly debatable, the examiner then determines if the employer's or insurer's actions in denying payment were reasonable. This test is an objective one from the standpoint of the employer or insurer. Would a reasonable employer or insurer under like or similar circumstances have denied or delayed payment on the claim.
>
> When deciding whether the employer's actions were reasonable, it is necessary to determine if the claim was properly investigated and if the results of the investigation were subject to a reasonable evaluation and review. Anderson, 85 Wis.2d

> at 692, 271 N.W.2d at 377. The examiner must base the decision on the information or data that the employer or insurer had in its possession at the time the claim for benefits was denied and how that information was used.

This deputy commissioner believes that the Wisconsin rule as set forth above is a very useful, objective and logical approach to identifying unreasonable conduct and such an approach will be applied in this case. Furthermore, because we are dealing with a self-insured in this case, this deputy commissioner is of the opinion that the State, as well as other self-insureds, should conform to the same standard of conduct that is expected of private insurance carriers in their claims practices. Therefore, Iowa Code section 507B.4(9) which contains a list of unfair claims insurance practices is a helpful additional tool in assessing the reasonableness of the claim activity in this case.

The first question, under the Wisconsin approach, is whether there is any credible evidence which would demonstrate that the claim is fairly debatable. In the opinion of this deputy, a medical opinion becomes fairly debatable when countered by another medical opinion. Likewise, an account of an occurrence of an injury can be fairly disputed by a conflicting description by an eye witness or circumstantial evidence. In the case sub judice, no legal or factual issue has been shown to be fairly debatable. The only medical opinion offered into the evidence supports the claimant's causal connection contentions. The only contrary evidence of claimant's account of the events of July 14, 1985, was Joyner's incredible lack of recollection which was directly refuted by the state's own written personnel records.

The next question is whether the State acted reasonably from an objective standpoint. It does not appear that there was an attempt to properly investigate this claim. Although the supervisor denied in writing any recollection of the injury or a report of injury, blind acceptance of this account in the face of claimant's written notice of injury on file in the State's own personnel records is rather clear evidence that the State did not perform a simple, basic, first step in investigating this claim i.e., an examination of its records. Furthermore, the claim that this notice was somehow not authentic or in some fashion improperly or surreptitiously placed into the file by claimant after his surgery is mere speculation on the part of state officials without a shred of supportive evidence.

Given the relatively small amount of the claim, the State's position in this case is even more untenable. Also, it would appear that at no time before claimant was compelled to initiate litigation did he ever receive a reasonably prompt explanation of the specific reasons, if any, for denying the claim. Claimant was apparently forced to guess, as was this deputy commissioner,

as to the reasons for the denial before litigation by those charged with that responsibility. Finally, the State's actions in this matter would constitute several unfair claims practices under Iowa Code section 507B.4(9) with reference to its unreasonable investigation; failure to promptly communicate the denial of coverage, failure to provide a reasonable basis for denial of the claim before litigation was instituted and a failure to settle this matter after liability for the claim became reasonably clear.

Therefore, the uncontroverted medical opinion of Dr. Tung; the existence of a timely report of injury in defendants' own records; the State's shoddy investigation; the State's position with reference to its own records; and, the failure of the State to promptly provide a reasonable explanation for denying the claim and the relative minor nature of the claim establishes by a preponderance of the evidence the State's reckless disregard of claimant's statutory rights to workers' compensation benefits.

Given the amounts involved, the maximum penalty consisting of 50 percent of claimant's entitlement to weekly compensation benefits is reasonable for this case. Penalty benefits cannot be awarded under Iowa Code section 86.13 for an unreasonable delay in the payment of medical benefits. Klein v. Furnas Elec. Co., 384 N.W.2d 370, 375 (Iowa 1986).

FINDINGS OF FACT

1. Claimant was a credible witness. Claimant's supervisor, Joyner, was not a credible witness.

2. On July 14, 1985, claimant suffered an injury to the lower left abdomen which arose out of and in the course of employment with University of Iowa which either caused or aggravated a hernia condition necessitating hernia surgical repair on November 28, 1985. Claimant had no abdominal pain prior to July 14, 1985.

3. Two or three days after July 14, 1985, at the request of claimant's supervisor, claimant submitted a written report of injury to defendants of the July 14, 1985 injury which was given by claimant to his supervisor which ultimately became a part of claimant's personnel records at the University of Iowa.

4. The work injury of July 14, 1985, was a cause of a period of temporary disability from work beginning on November 27, 1985 through January 12, 1986, at which time claimant returned to work.

5. Claimant's gross weekly earnings on July 14, 1985 was $215.38 per week.

6. The work injury of July 14, 1985, was a cause of reasonable medical expenses in the amount of $3,033.40.

7. Defendant, the State of Iowa, denied claimant's claim for weekly compensation benefits and delayed commencement of those benefits without reasonable or probable cause or excuse. Claimant's account of the incident of July 14, 1985 was uncontroverted except for claimant's supervisor's failure to recall the incident which was directly refuted by the written report of injury submitted by claimant to defendant at the approximate time of injury. Denial of the claim was due to improper investigation of the claim which would have revealed the written notice of July 14, 1985. The claim only involved temporary total disability benefits of six and five-sevenths weeks. Claimant received no written or oral notice prior to the institution of litigation as to the reasons, if any, for the denial of his claim by the State of Iowa.

CONCLUSIONS OF LAW

Claimant has established by the preponderance of the evidence entitlement to the benefits as awarded below.

ORDER

1. Defendant, the State of Iowa, shall pay to claimant temporary total disability benefits from November 27, 1985 through January 12, 1986 at the rate of one hundred forty-three and 12/100 dollars ($143.12) per week.

2. Defendant, the State of Iowa, shall pay claimant the sum of three thousand thirty-three and 40/100 dollars ($3,033.40) as reimbursement for reasonable medical expenses.

3. Defendant, the State of Iowa, shall in addition pay penalty benefits in the total amount of three point three-six (3.36) weeks at the rate of one hundred forty-three and 12/100 dollars ($143.12) per week from November 27, 1985.

4. Defendant, the State of Iowa, shall pay all accrued weekly benefits in a lump sum.

5. Defendant, the State of Iowa, shall pay interest on weekly benefits awarded herein as set forth in Iowa Code section 85.30.

6. Defendant, the State of Iowa, shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 and specifically the State of Iowa shall be taxed the sum of one hundred and no/100 dollars ($100.00) for the medical reports of Drs. Shimp and Tung as requested in the prehearing report.

7. Defendant, the State of Iowa, 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 February, 1988.

Larry P Walshire

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Thomas M. Wertz
Mr. Steven E. Howes
Attorneys at Law
4089 21st Ave., SW
Suite 114
Cedar Rapids, Iowa 52404

Mr. Charles Lavorato
Assistant Attorney General
Hoover State Office Bldg.
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY P. SHANK, Claimant, vs. MERCY HOSPITAL MEDICAL CENTER, Employer, and AETNA CASUALTY & SURETY CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 719627 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 Larry P. Shank against Mercy Hospital Medical Center, Aetna Casualty & Surety Company and the Second Injury Fund of Iowa. The case was heard at Des Moines, Iowa, on June 19, 1987, and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Larry P. Shank and claimant's exhibits 1, 3, 4, 5 and 6. The record also contains what has been marked as defendants' exhibit A, a collection of records from the Social Security Administration, which were received into evidence upon the request of the Second Injury Fund of Iowa.

ISSUES

The only issues presented for determination are the nature and extent of claimant's permanent disability and the allocation of the responsibility for its payment among the defendants. The occurrence of injury arising out of and in the course of employment was stipulated. The healing period was stipulated to have been paid in full by the employer, a total of 100.143 weeks with the healing period ending on January 21, 1985. It was further stipulated that the employer had paid a total of 27.875 weeks of permanent partial disability benefits to claimant for his right lower extremity and 4.5 weeks of permanent partial disability

for claimant's left foot. The employer and claimant stipulated that claimant had a three percent disability of the left foot, based upon an injury of August 17, 1979 and a 10% impairment to the right lower extremity as a result of the injury of November 15, 1982, which resulted in an entitlement of 22 weeks of compensation at the stipulated rate of $165.45 per week. The Second Injury Fund of Iowa did not fully join in those stipulations.

REVIEW 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.

Claimant testified that he was born on April 28, 1947. He resides in Prairie City, Iowa with his wife, Carla, who is a registered nurse at Des Moines General Hospital. Claimant has no children from his current marriage, but does have two children from a prior marriage.

Claimant is a 1966 graduate of the Iowa Braille and Sightsaving School in Vinton, Iowa. He testified that he was born with congenital cataracts in both eyes and was placed at the school at age five by his father. Claimant testified that, with corrected vision, his eyes test at 20/200 and that he is unable to read without glasses. Claimant related that he does not know the rating for his uncorrected vision. He testified that he has two pair of glasses, one for seeing at a distance and another for close work. He appeared at hearing with two pair of extremely thick glasses. Claimant testified that he does not have an Iowa driver's license because he cannot see well enough to obtain one. Claimant testified that his current primary source of income is Social Security disability benefits which were awarded to him based solely upon his eye condition. He testified that his eye problem has not changed over the years and that he could have always qualified for Social Security disability, but chose to work and would much rather be working.

Claimant testified that his vision problems did not limit him in his employment at Mercy and that they do not interfere much with his day-to-day living.

Claimant testified that, while in high school, he worked at a number of jobs. He operated a jackhammer on a construction crew when he was approximately age 19, he worked at a lumber yard where he unloaded box cars and he worked in the principal's office at his school. Claimant testified that he came to Des Moines from Ottumwa, Iowa, the area of his home, planning to go to California, obtained what he thought would be a temporary job at Mercy in order to accumulate money for the trip, but ended up staying in that employment. Claimant had been employed at Mercy

since August 1, 1966.

Claimant worked as an orderly assisting nursing personnel. He related that he did some record keeping, but that 98% of his working time was spent on his feet.

Claimant testified that, in August, 1979, while participating at a dog show at the Iowa State Fair, he experienced a pain in his left heel. He continued to work, but eventually sought medical treatment which included a surgical tarsal tunnel decompression of his left lower extremity performed by J. D. Bell, D.O., in November, 1979. Claimant returned to work as an orderly in March, 1980.

Late in 1982, claimant began to develop problems with his right foot. He again sought medical treatment and eventually underwent a right tarsal tunnel release in January, 1983. Claimant had a slow recovery due to infection and pain. He returned to work on September 17, 1984, but worked for only three days.

Since September 19, 1984, the last day claimant worked at Mercy, he has engaged in various activities. Claimant has cared for and showed his own dogs and worked in a kennel. He obtained a job briefly as a pet groomer, but did not have the knowledge necessary to hold the position. He has performed house sitting and dog care. He actively engages in showing Samoyed dogs. Claimant has completed a veterinary assistant correspondence course.

Claimant's recovery from the 1983 surgery on his right foot was complicated by continued complaints of pain. He was evaluated by a number of physicians, namely, William R. Boulden, M.D., Robert F. Breedlove, M.D., Joshua Kimelman, D.O., and Kenneth A. Johnson M.D., as well as the treating physician, J. D. Bell, D.O. (exhibit 1, pages 1-26 and 44-51). The general consensus of the physicians was that claimant had a probable reflex sympathetic distrophy syndrome in his right lower extremity. He was also diagnosed as having a Morton's neuroma between his third and fourth toes, a neuroma at the site of surgery and scarring on the nerve at the site of the surgery. Dr. Bell rated a three percent impairment of claimant's left foot (exhibit 1, page 12). No other physician has assigned any impairment rating to the left foot. All indications from the other physicians are that claimant had an excellent result from the surgery on his left lower extremity. Dr. Breedlove indicated that claimant had no permanency in the left foot (exhibit 1, page 46). Dr. Boulden rated claimant as having a 10% impairment of his right lower extremity and indicated that claimant needed to change his type of work to a sedentary occupation (exhibit 1, pages 3, 4 and 7).

During the course of recovery, claimant attended the Mercy

Pain Center under the directions of James L. Blessman, M.D. The notes made upon his admission indicate that he had excellent results from his left tarsal tunnel surgery (exhibit 1, pages 59 and 65). When claimant was discharged, it was indicated that he would be expected to return to work at full duty without restrictions within three weeks, even though he continued to complain of pain in his right foot (exhibit 1, pages 63 and 64). Claimant's return to work did not occur within that three-week interval and, as previously indicated, when he did finally return to work, it was for only three days.

Claimant testified that, since leaving Mercy, he has interviewed for other jobs, including home health care nursing assistant, parking lot attendant and surgical laboratory animal assistant, but that none of them were offered to him. He testified that currently he spends a lot of his time as a house husband where he cleans, mows the yard and takes care of his hobby, a kennel of Samoyed dogs, of which he currently has six. Claimant testified that, in order for him to obtain any employment, it would have to be at a time where he could ride to and from work with his wife or for which other transportation arrangements could be made.

Claimant testified that currently his left ankle and foot are not 100% well, but that he gets around on it without much difficulty. He testified that his right foot is the primary problem. He stated that, after standing, he experiences a sharp, burning pain and that the foot swells and discolors to a purplish or bruised color.

A report from Russell H. Watt, M.D., of the Wolfe Clinic in Marshalltown, Iowa, indicated that claimant's ocular diagnoses are: (1) aphakia OU following surgery for congenital cataracts, (2) congenital nystagmus with reduced visual acuity OU, and (3) left exotropia and amblyopia (exhibit A, page 70). In connection with claimant's claim for Social Security disability benefits, he was examined by David S. Dwyer, M.D., who reported in part as follows:

> The patient's visual acuity with his present aphakic glasses was 20/200, Jaeger 7 in the right eye and count fingers at four feet in the left eye. Repeat refraction did not improve the visual acuity in either eye. Goldmann visual fields were relatively normal in the right eye but showed slight superior nasal and inferior nasal peripheral field loss in the left eye. External exam showed a small amplitude rapid pendular nystagmus which varied from vertical to horizontal. Pupils were equal and reactive. Extraocular motility exam showed an -pattern left exotropia. Slit lamp examination showed small but clear cornea in each eye. Anterior chambers were

clear and deep in each eye. Both eyes showed dense white remnants of the congenital cataracts with clear optical axes, giving a good view of the anterior vitreous cavity. Intraocular pressures were normal at 18 in the right eye and 19 in the left eye. Funduscopic examination of each eye was very difficult due to the small opening in each congenital cataract combined with the patient's nystagmus. However, the optic nerve appeared relatively normal in the right eye.

This patient has severe amblyopic, worse in the left eye, secondary to bilateral congenital cataracts which were surgically treated when the patient was five years of age. I would not anticipate any significant increase in his vision in the foreseeable future.

Claimant was evaluated by Charles A. Ross, M.D., who stated that claimant's best corrected vision is 20/200 bilaterally (exhibit A, page 89).

APPLICABLE LAW AND ANALYSIS

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

The evidence from Drs. Bell and Boulden and elsewhere in the record stands uncontradicted. It is clear that claimant did sustain injuries to both of his lower extremities as a result of his employment at Mercy Hospital Medical Center.

The claimant has the burden of proving by a preponderance of the evidence that the injuries to his lower extremities 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).

The stipulation regarding permanent partial impairment of claimant's left foot is made in a setting of conflicting evidence. Claimant's complaints regarding his left foot were quite minimal. Dr. Breedlove determined that the foot had no permanent impairment, while Dr. Bell imposed a three percent permanent impairment rating. Throughout the medical records, the result from the surgery on the left foot is characterized as excellent and the record characterizes claimant as having no further symptoms in the left foot. It is therefore found that the August 17, 1979 injury to claimant's left foot did not produce any permanent partial disability, as urged by the Fund.

Claimant's right lower extremity is the source of his continuing complaints and seems to be the physical ailment which has prevented him from returning to employment with Mercy Hospital Medical Center. Dr. Boulden initially imposed a 10% impairment rating, but later reduced it to seven percent. Dr. Boulden also had recommended that claimant seek sedentary employment. Dr. Blessman had released claimant to return to full activity. The opinion expressed by Dr. Boulden is accepted as correct since claimant clearly does have a diagnosed, objectively determinable condition in his right foot which provides a solid basis for his complaints. The impairment rating of 10% of the right lower extremity, as stipulated by the parties and as supported by the early reports from Dr. Boulden, is accepted as correct. It is therefore found that the injury of November 15, 1982 produced a 10% permanent impairment of claimant's right leg.

It has been stipulated by claimant that he has received all healing period compensation which is due for both injuries and that the date for commencement of permanent partial disability compensation is January 22, 1985. As stipulated by the parties in the prehearing report, Mercy Hospital Medical Center has paid all permanent partial disability compensation that is due for a scheduled member injury to claimant's right leg under the provisions of section 85.34(2)(o).

The Second Injury Fund of Iowa contends that, where both injuries to scheduled members as specified in Code section 85.64 occur in the employ of the same employer, the Second Injury Fund should not be held responsible because the purpose of the Second Injury Fund legislation is to encourage the hiring of individuals who are handicapped or partially disabled. First, if there was no Second Injury Fund legislation, a scheduled member injury would make the employer of an employee with a pre-existing

permanent partial scheduled member disability responsible for payment of only the scheduled member benefits, the same as occurs under the Second Injury Fund statute. This case does not deal with a most recent injury being one that is to the body as a whole and a discussion of how to allocate responsibility in that type of case is unnecessary. The Second Injury Fund legislation makes it overwhelmingly clear that the liability of Mercy Hopital Medical Center is payment of healing period, section 85.27 benefits and payment of the scheduled member permanent partial disability resulting from the injury, all of which has previously been paid. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300 (Iowa 1979); Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978); Irish v. McCreary Saw Mill, 175 N.W.2d 364 (Iowa 1970); Fulton v. Jimmy Dean Meat Co., file number 755039, appeal decision July 23, 1986; Estep v. State Workmen's Comp. Comm'r., 298 S.E.2d 142 (W. Va. 1982).

The Second Injury Fund also contends that claimant has failed to meet the requirements for qualifying to receive Second Injury Fund compensation as set forth in the case Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978). Claimant clearly has a partial loss of use of his right foot and leg as a result of the 1982 injury. The Fund correctly contends that the 1979 injury to claimant's left foot did not produce any permanent loss of the use of that foot. The Fund overlooks, however, claimant's visual problems. Claimant receives Social Security disability benefits, apparently based solely upon his visual impairment. He testified that he is considered to be legally blind and that his vision is insufficient, even with the best available corrective lenses, to permit him to obtain an Iowa driver's license. The source of the preexisting disability is of no importance so long as it is permanent and acts as a hindrance to the individual's ability to obtain and retain effective employment. Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978). It is accepted, as a matter of law, that a person who is legally blind has a handicap. The record in this case indicates that claimant's visual handicap originated from congenital cataracts. There is no indication in the record that the condition has ever changed appreciably and Dr. Dwyer has indicated that he would not anticipate any significant increase in claimant's vision in the foreseeable future (exhibit A, page 88). Clearly, claimant's visual handicap is permanent.

The degree of claimant's visual impairment is not easily determined from the record that has been made in this case. Drs. Ross and Dwyer have indicated that his corrected vision is 20/200 bilaterally (exhibit A, pages 88 and 89). He has been diagnosed as having aphakia, nystagmus and left exotropia and amblyopia (exhibit A, page 70). Claimant's right eye near vision was evaluated as being Jaeger 7 while his left eye was rated in a manner which stated "count fingers at four feet in

the left eye" (exhibit A, page 88). The examination from Dr. Dwyer went on to indicate that the visual fields were relatively normal in claimant's right eye, but slightly impaired in the left eye. Other abnormalities were noted in the June 13, 1986 report.

Visual impairment is covered in Chapter 6 of the Guides to the Evaluation of Permanent Impairment, Second Edition, issued by the American Medical Association. Using the guides, as permitted by Division of Industrial Services Rule 343-2.4, it appears that the 20/200 rating for distance would provide an 80% loss of visual acuity as shown in table 1 at page 142. The Jaeger 7 rating would appear to give a near rating of 14/40 with a 55% loss of visual acuity as shown in the lower portion of table 1 at page 142. Applying the 20/200 and 14/40 to table 2 -- Loss of Central Vision in Percentage -- as found on page 143, the result would be an 84% impairment of vision, since the records clearly show claimant to be afflicted with aphakia.

The undersigned is unable to make similar computations with regard to the central vision of claimant's left eye, but it appears that the left eye is even more impaired than the right since no Jaeger rating was given and the only rating for the left eye was "count fingers at four feet." The left eye also showed an impaired visual field, although no numerical rating of the impairment is contained in the reports.

Moving on to page 147, there is found a directive concerning the method of determining the impairment of the whole person as contributed by the visual system. Applying what is known about claimant's right eye would provide an 84% loss of central vision and a 0% loss of visual field. Combining the two using the combined values chart found at pages 240-242 produces an 84% loss of vision in the right eye. Claimant's left eye cannot be evaulated under the record made, but it is even more impaired than the right eye. If the impairment of the left eye is assumed to be the same as the impairment of the right, the result would be an 84% impairment of the visual system when the computations provided on page 147 are made. Table 6 at page 151 shows an 84% impairment of the visual system to be equivalent to a 79% impairment of the whole person. It is that impairment which preexisted claimant's employment at Mercy Hospital Medical Center. It is that impairment which provides the first scheduled member loss and which is the basis for imposing Second Injury Fund liability in this case.

The statute does not clearly direct whether the value of the preexisting visual impairment should be determined under sections 85.34(2)(p) and (q), rather than section 85.34(2)(s). The loss in both eyes apparently occurred at the same time, but did not result from a single accident. Construing the statute in the light most favorable to the injured worker mandates computing

the compensable value to be deducted under sections 85.34(2)(p) and (q) which provides 340 weeks of benefits for loss of both eyes rather than the 500 weeks provided by section 85.34(2)(s). The result is 285.6 weeks (84% loss times 340 weeks equals 285.6 weeks) to be deducted for claimant's prior visual impairment and 22 weeks for the 10% impairment of the right leg, providing a total of 307.6 weeks to be deducted. The employer has paid its 22 weeks and the balance remaining to be deducted is the 285.6 weeks representing the visual impairment.

Since Second Injury Fund liability has been determined, claimant's industrial disability must be evaluated. 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).

Larry P. Shank has an 84% permanent partial impairment of visual system. He has a 10% impairment of the right lower extremity as a result of the 1982 injury. Shank testified that he could have qualified for Social Security permanent disability benefits on the basis of his eyes alone at all times throughout his life, but that he only recently applied for and received those benefits because he preferred working. Shank has now chosen to receive disability benefits rather than to engage in gainful employment. The problems with his right foot and ankle are a quite significant factor in his decision. Most sedentary employments involve a great deal of visual acuity, namely reading. The visual impairment indicates that claimant would not be well-suited to most sedentary employments.

All of claimant's prior employments, except whatever work he actually performed in the school office, involved being on his feet. This is something which he can no longer do.

Shank was arguably what could have been termed an odd-lot employee as the status is described in the case Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985) based solely upon his visual impairment prior to the time he commenced work at Mercy. The injury to his right ankle has not increased his earning capacity. Larry Shank is excluded from most occupations

by his visual problems. He is excluded from occupations which involve substantial standing or walking by the problem with his right foot and leg. The test of permanent total disability in a workers' compensation case 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); Diederich v. Tri-City R. Co. 219 Iowa 587, 594 258 N.W. 899, 902 (1935). Claimant, in his brief, urged that his visual handicap was minimal. Any visual handicap which is sufficiently severe as to prevent a person from being able to obtain a driver's license and which qualifies him for Social Security disability benefits is not minimal or insignificant. Claimant, much to his credit, worked in spite of his handicap. He found a niche in the labor market into which he could fit and function. The fact that he was able to find that niche does not indicate that he had broad access to the labor market. It is simply a demonstration of the fact that nearly anyone, regardless of their physical condition, can find gainful employment if all of the surrounding circumstances are right. It simply demonstrates that claimant found one of the few jobs for which he was suited. His injury to his right foot and leg has made him unsuited for that job and, probably, for most of the others for which he had previously been suited. Claimant's previous choices were to live the life of the totally disabled or to live as normal a life as was possible in spite of his handicap. The fact that he chose the latter and was somewhat successful in overcoming the handicap does not erase or absolve that very substantial handicap.

Since the injury to his right foot and leg, claimant has attained some additional educational achievement. He has attempted employments, but was unsuccessful. It is found and concluded that Larry P. Shank is permanently and totally disabled within the meaning of the Iowa Workers' Compensation statutes and that he is entitled to compensation for permanent total disability under the provisions of section 85.34(3) for the period of that disability.

At the commencement of the hearing, the Second Injury Fund indicated that it was seeking a credit under the second unnumbered paragraph of section 85.64. The only evidence in the record, however, was that the benefits claimant receives are from Social Security disability and that claimant, through his employment, contributed directly toward Social Security. Accordingly, no credit is allowable. It seems somewhat illogical, in view of the remedial nature of the Second Injury Fund legislation, that its benefits be used as an offset to reduce Social Security disability payments, rather than vice versa, but that is the result under the statute as it was enacted (exhibit A, page 96).

In the prehearing report, it is indicated that the employer is entitled to full credit for group plan benefits under the provision of section 85.38(2) and claimant stipulated to that entitlement. The stipulation is clearly correct and is approved.

In those cases where the industrial disability is less than permanent and total, a deduction is taken from the industrial disability award for the total amount of compensation that would be due for the scheduled member injuries and the Fund commences payment of the balance upon completion of the employer's permanent partial disability payments. Where an award is for less than permanent and total disability, it is conditioned upon a finding that the individual is still capable of supporting himself or herself and the award of permanent partial disability is, in essence, an award of damages. The concept of industrial disability is quite similar to impairment of earning capacity, an element of damages in tort cases. It is clearly consistent and rational with the intent of the workers' compensation system to deduct from the permanent partial disability award, the amount of the damages which are attributable to the preexisting disability.

The underlying premise for awarding permanent total disability benefits is that the individual is unable to be self-supporting. An award of permanent total disability is intended to give the person a means of sustenance because the person is unable to sustain himself or herself through gainful employment. The statute does not direct how the deduction is to be taken in cases of permanent total disability.

There are a number of rules of construction which must be applied. The ultimate goal is to detemine and effectuate the intent of the legislature. Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530, 532 (Iowa 1981); American Home Products Corp. v. Iowa State Board of Tax Review, 302 N.W.2d 140, 142 (Iowa 1981). One must look to the object to be accomplished, the mischief to be remedied, or the purpose to be served, and place on the statute a reasonable or liberal construction which will best effect, rather than defeat, the legislature's purpose. City of Mason City v. Public Employment Relations Board, 316 N.W.2d 851, 854 (Iowa 1982); Peffers v. City of Des Moines, 299 N.W.2d 675, 678 (Iowa 1980). Strained, impractical or absurd results are to be avoided in favor of a sensible, logical construction. Ida County Courier and The Reminder v. Attorney General, 316 N.W.2d 846, 851 (Iowa 1982); Iowa Beef Processors, Inc., 312 N.W.2d at 532. All parts of the statute are to be considered together, without attributing undue importance to any single or isolated portion. Iowa Beef Processors, Inc., supra; Peffers, supra. The spirit of the statute must be considered along with its words, Hansen v. State, 298 N.W.2d 263, 265 (Iowa 1980), and the manifest intent of the legislature will prevail over the literal import of the words used. Iowa Beef Processors, Inc., supra. Legislation should be given a rational, workable meaning.

Iowa Department of Transportation v. Nebraska-Iowa Supply Co., 272 N.W.2d 6, 11 (Iowa 1978). The legislature is presumed to not intend to overturn long established principles of law unless its intention to do so is clearly expressed, necessarily implied or no other construction can be reasonably made. Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969). The policy is to liberally construe workers' compensation statutes in favor of the worker. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503, 506 (Iowa 1981); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980). The Workers' Compensation Act is to be construed to provide benefits to all who can fairly be brought within its coverage. Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 459, 127 N.W.2d 636, 639 (1964). Its beneficient purpose is not to be defeated by reading something into it that is not there. Cedar Rapids Community School v. Cady, 278 N.W.2d 298 (Iowa 1979). Nevertheless, the requirements of the statute are controlling. Halstead v. Johnson's Texaco, 264 N.W.2d 757, 759 (Iowa 1978). It is generally presumed that statutory words are used in their ordinary and usual sense with the meaning commonly attributed to them. American Home Products Corp., supra.

The only practical way the deduction for the previously lost member or organ can be accomplished is to impose a waiting period, in this case 285.6 weeks (approximately 5 1/2 years) between the completion of the employer's payments and commencement of payments from the Fund. Hickson v. W. A. Klinger Co., Inc. and Second Injury Fund, I Iowa Industrial Commissioner Report 141 (1980); Asay v. Industrial Engineering Equipment Company and Second Injury Fund, 33rd biennial Report 224 (1977). If payments from the Fund were, in this case, commenced upon completion of the employer's payments, as is done in cases of permanent partial disability, the statutory deduction could never actually be taken. In this case, claimant has Social Security disability and a working wife to support him until benefits from the Fund commence. It is likely that he could survive indefinitely without the payments from the Fund if he can survive for nearly 5 1/2 years without them. The undersigned is not at liberty to enter a ruling that is contrary to the cited agency precedents. The Supreme Court has not yet addressed the issue. (See also 2 Larson Workmen's Compensation Law, §59.34.)

The employer paid permanent partial disability compensation for 27.857 weeks commencing January 22, 1985. If further permanent disability benefits from the Fund were commenced immediately, the date for commencement would be July 29, 1985. Two hundred eighty-five point six weeks after July 29, 1985 is January 12, 1991.

FINDINGS OF FACT

1. Larry P. Shank is a 39-year-old man with a history of congenital cataracts which have produced an 84% impairment of

his vision which is equivalent to a 79% impairment of the whole man.

2. In spite of his visual impairment, Shank was employed for nearly 20 years by Mercy Hospital Medical Center as an orderly.

3. Claimant's employment at Mercy produced injury to his right leg and has left him with a 10% permanent functional impairment of the right leg.

4. Claimant's injury to his right leg has left him unable to engage in employment which requires extended standing or otherwise being on his feet and the recommendation from Dr. Boulden that he change to a sedentary occupation is correct.

5. Claimant is a credible witness whose description of his symptoms and complaints is accepted as correct. He is a highly motivated individual who would prefer to be employed rather than drawing disability compensation, as evidenced by his work history.

6. When all the applicable factors of industrial disability and earning capacity are considered, Larry P. Shank does not have sufficient residual earning capacity in order to be self-supporting.

7. The injury to claimant's left foot did not produce any permanent disability.

CONCLUSIONS OF LAW

1. Claimant's cataract condition in his eyes constitutes a previous loss within the meaning of section 85.64.

2. The injury to claimant's right foot and leg, which arose out of and in the course of his employment at Mercy Hospital Medical Center, produced a permanent loss of use of that leg within the meaning of section 85.64.

3. The injury to claimant's right leg was limited to the leg and did not extend into the body as a whole and the employer's liability for compensation for permanent disability is limited to that provided by section 85.34(2)(o).

4. Where two methods of computing the compensable value of the previously lost member or organ are available, the method most favorable to the worker should be used.

5. Larry P. Shank is permanently and totally disabled within the meaning of section 85.34(3) of The Code.

6. Where an award of permanent total disability is made, there is an interruption of payments to deduct the compensable value of the previously lost member or organ since the only way to actually accomplish the deduction is to delay the commencement of the payments from the Second Injury Fund of Iowa.

7. The Second Injury Fund of Iowa is responsible for payment of compensation for permanent total disability benefits commencing January 12, 1991, a date 285.6 weeks after July 29, 1985, the date Mercy Hospital Medical Center completed payment of its permanent partial disability benefits.

ORDER

IT IS THEREFORE ORDERED that the Second Injury Fund of Iowa pay claimant weekly compensation for permanent total disability at the rate of one hundred sixty-five and 45/100 dollars ($165.45) per week payable commencing January 12, 1991 [two hundred eighty-five point six (285.6) weeks after July 29, 1985] and continuing each week thereafter for so long as Larry P. Shank remains permanently and totally disabled.

IT IS FURTHER ORDERED that the costs of this action are assessed against the Second Injury Fund of Iowa pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 21st day of January, 1988.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Channing L. Dutton
Attorney at Law
West Towers Office Complex
1200 35th Street, Suite 500
P.O. Box 65355
W. Des Moines, Iowa 50265

001558

Ms. Lorraine J. May
Attorney at Law
Fourth Floor, Equitable Building
Des Moines, Iowa 50309

Ms. Shirley A. Steffe
Assistant Attorney General
Tort Claims Division
Hoover State Office Building
Des Moines, Iowa 50319

001559

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED

JAN 20 1988

IOWA INDUSTRIAL COMMISSIONER

VESTER C. SHAW, Claimant, vs. ARLEDGE TRANSFER, INC., Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 644828 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

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

The record on appeal consists of the transcript of the review-reopening hearing and joint exhibits 1 through 59. Both parties filed briefs on appeal.

ISSUES

The issues on appeal can be stated as: Whether claimant has established a causal connection between his injury and his present disability, and whether claimant is permanently and totally disabled.

REVIEW OF THE EVIDENCE

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

Briefly stated, on June 16, 1980 claimant injured his back attempting to stop a 2,500 pound steel beam from falling on his foot. The steel beam was falling from the truck claimant was loading.

After some chiropractic treatment claimant was admitted to the hospital for surgery on August 15, 1980 to remove a herniated

disc in his lumbar spine. Claimant underwent a second surgery on his back in December 1981. Claimant then returned to work in June 1982 with a 25 pound lifting restriction. He was laid off later that summer for economic reasons.

Claimant was then hired by Tollie Freightways, Inc., as a truck driver on August 27, 1982. On his application claimant indicated that he had no physical limitations. See Joint Exhibit 57a, page 1. At his company physical claimant indicated that he had had no back injury. See Joint exhibit 39. Claimant was terminated by Tollie on March 8, 1983. The reason given for the termination was "[d]river failed to make his points in a 6 month period. Points are earned by M/P/G, miles traveled & self service, fuel."

Claimant was recalled by defendant Arledge Transfer in March 1983, and he worked for Arledge intermittently until September 1983. At that time claimant received a lump sum payment of compensation in the amount of $19,000 which he used to purchase a bar. He worked in the bar as general manager. Claimant states that he was never able to work full time at the bar. Claimant got out of the bar business in June 1984.

Claimant reveals on cross-examination that he was attacked in a bar on July 3, 1984 which caused him to seek emergency treatment for his back. Emergency room records for this incident show a diagnosis of "contusions and abrasions." X-rays taken at that time reveal no evidence of fracture.

On April 24, 1984 claimant was examined by E. Torage Shivapour, M.D. Dr. Shivapour states his impression and recommendation:

Impression:
1) Chronic low back pain, etiology to be determined.
2) Probable L4-S1 root lesion, left greater than right.
3) Status post two back surgeries, July of 1980 and August of 1981, respectively.
4) Rule out underlying cervical radiculopathy.

Recommendation: I discussed with Mr. Shaw in detail regarding his symptoms. I advised him to avoid predisposing factors which might aggrevate [sic] his pain and discomfort such as heavy lifting, frequent bending and pushing. In view of his recent abnormal lumbar CT, I believe he should have electrophysiological testing (EMG's-NCV's) including evaluation of cervical and lumbosacral paraspinal muscles. He also may benefit from nonsteroidal anti-inflammatory medications. Following the

completion of his EMG's-NCV's further decision regarding future plan for treatment, if any will be taken. You will receive a copy of the report for your own review. My follow up appointment with him will be on prn basis. I will be happy to see him in the future if his pain and discomfort worsen or if he develops new neurological symptoms or signs.

(Joint Exhibit 15b)

On May 3, 1984 claimant was examined by John C. VanGilder, M.D., at the University of Iowa Hospitals. Dr. VanGilder opines in a letter to Dr. Shivapour:

Review of his studies which are of excellent quality demonstrates on his initial myelogram in 1980 an S1 root cut off at L5-S1 on the right presumably from herniated disc. Subsequent myelogram in 1981 again shows a partial deformation of the S1 root on the left which is either secondary to scar tissue or recurrent herniated disc. It is noted on subsequent x-rays after this surgery, he has had laminectomy of the L5 vertebra. Current x-rays of the low back show degenerative narrowing of the L5-S1 interspace. Recent CT scan from April again confirms the absence of the lamina over the L5 vertebra. There is some soft tissue ventral to the thecal sac at L5-S1, but I see no evidence of root impingement or asymmetry. I would interpret this most likely as postoperative change rather than recurrent disc.

Based on his neurological assessment, I do not think a myelogram is indicated. I think he should be conservatively managed and have prescribed Motrin, 400 mg. t.i.d. as an anti-inflammatory agent to determine if this would be helpful.

(Joint Ex. 19b)

On July 30, 1984 claimant saw Dr. Wilson for a referral to Dr. Shivapour. Dr. Wilson states in his notes for that visit:

The question which is likely to come up is the one which was posed earlier by the patient's insurance company and that is "did I refer him to Dr. Shivapour in January, 1983, or anytime previously to this?" Unfortunately, I did not. Had the patient asked me for such a referral, I probably would have done so. I might have referred him either to Dr. Lehmann or Dr. Jim Weinstein at the University of Iowa, the back surgeons. I have

worked with Dr. VanGilder and cooperated with other patients and would agree with a referral there also. Thus, if the insurance company poses the question to me "would I have referred him?", I would have at the patient's request. I am sure there will be some hassle as regards to the compensation for the care rendered to Mr. Shaw by Dr. Shivapour insofar as it was apparently unbeknownst to the insurance carrier. In any event, I am happy at this stage to try and help the patient in whatever way I can and at this stage, I've written a formal letter of referral to Dr. Shivapour. Hopefully, this will help him cover any future financial commitments.

(Joint Ex. 1h)

Claimant was experiencing severe back pain by November 1984 which required that he be hospitalized on November 30, 1984. The course of treatment for that hospitalization is discussed in joint exhibit 14f:

DIAGNOSIS: Recurrent sciatica left L-5.

This pt. was admitted with severe back pain and lt. leg pain, status post-back surgery. On this admission, he had a positive straight legraise [sic] on the lt. at 30°, negative on the rt. No change in motor weakness. It was planned that he be admitted for bedrest, epidural steroid injection.

The pt. received Ascriptin with meals, Valium 2 mgs. t.i.d., Amitriptyline 100 mgs. at h.s., Morphine Sulfate 5-10 mgs. severe pain and Talwin 50 mgs. p.r.n. pain.

His lab work was performed and found to be relatively wnl. X-ray of the L-S spine showed slight degenerative narrowing of L-3, 4 disc, otherwise bones and spaces between them had a normal appearance. He underwent a repeat epidural on 11/30/84 which provided him with about 30% relief. He was continued at bedrest and allowed to be up slowly and ambulate. Dr. Michael Wilson's plans were to make arrangements with Dr. Jim Weinstein in Iowa City for consultation about the pt's. scheduled treatment. Appointment will be made for him and he will pick up his records. He was discharged in improved condition on 12/4/84.

Claimant was next examined by James Weinstein, D.O., on December 27, 1984. Dr. Weinstein admitted claimant to the hospital for a myelogram on January 9, 1985. Dr. Weinstein

testified in his deposition about the results of that myelogram:

> Q. Doctor, what were the results of the myogram [sic] on Vester Shaw on January 9, 1985?
>
> A. According to the radiologist, their impression was Vester had a ventral left lateral postoperative changes versus herniated nucleus pulposis with some superior extrusion.
>
> Q. Can you tell us what that means in lay people's terms?
>
> A. I think that's what we suspected and defined in our initial impression that this either represented a recurrence of a herniation and extruded sequestered fragments outside the disk or postoperative scar changes, and that's taken from pretty much what we thought.

(Weinstein Deposition, page 16)

Dr. Weinstein then admitted claimant to the hospital in February 1985 for "diskectomy exploration, possible foraminotomy, neurolysis, and whatever was necessary to make sure his S1 nerve root was free." (Weinstein Dep., p. 17) This surgery was performed on February 11, 1985. Dr. Weinstein states that the main problem for claimant was scarring and bony encroachment. As to the cause of these problems Dr. Weinstein opines:

> Q. We've already discussed scarring. Can you describe for us this bony encroachment? Was it the result of calcium deposit? Did the bone grow this way or did it just shift with normal motions?
>
> A. I think a number of factors may be hypothesized. No one could tell you exactly, but I would hypothesize that as a result of the previous surgery of like arthritis, new bones forming, and was possibly a secondary -- as a secondary phenomenon causing some compression of the nerve root.
>
> Q. All right. When you opened up the area near the S1 nerve root in February 1985, did you find any evidence of traumatic damage that was causing the S1 radiculopathy?
>
> A. Could you describe trauma.
>
> Q. With symptom like a fracture or something that was -- would evidence a damage from a fall or car accident or something like that.

> A. Well, scar tissue, I suppose, the healing process can occur from anything when you cut your finger or you fall and hurt your back. But I would probably hypothesize that the scar was from his previous surgeries, and I saw no signs of a fracture, but certainly scar tissue can be stimulated by almost anything.

(Weinstein Dep., pp. 19-20)

Dr. Weinstein states that he has no opinion whether the bar fight caused or aggravated any of the problems found in the 1985 surgery. Dr. Weinstein opines that claimant does suffer some permanent impairment of the low back and opines that claimant's healing period had ended at the time of the deposition - August 14, 1985. Dr. Weinstein declined to assign a rating to claimant's impairment until he could examine claimant again for the purpose of determining a rating. Dr. Weinstein opines that claimant should "avoid heavy lifting, twisting, repetitive bending and twisting, vibration" and that claimant should not return to truck driving. See Weinstein Deposition, page 26.

Joint exhibit 21b contains clinical notes by Dr. Weinstein concerning claimant. In an entry dated August 14, 1985 Dr. Weinstein states: "Vester had his deposition today with his attorneys for his disability hearing. It is my interpretation that Mr. Shaw's degree of impairment is in the 25-30 percent range. This is based on his physical findings that are well documented in the chart and have remained unchanged." (Joint Ex. 21b)

Duane A. Willander, M.D., examined claimant on June 27, 1983, and he opines in a July 7, 1983 letter:

> The above-named patient has a disability equivalent to thirty percent loss of use of the lower extremity. This percentage is predicated on his muscle spasm, atrophy of the left calf, diminished to absent left achilles reflex, and limitation of back motion. It is felt that this patient would be benefited, however, by a lift of three-eighths inch to be worn on the right shoe at all times to compensate him for his leg length inequality and his pelvic obliquity. He should then be on back exercises to rehabilitate the individual.

(Joint Ex. 29)

Since the 1985 surgery claimant states that he has been helping Judy Marcoux, his girlfriend, at her gift and craft shop. He testifies that he is not paid a salary for this work. Claimant relates that he is not able to work in Judy's shop more

than four hours per day due to extreme pain in his lower extremities if he stands or sits too long. Claimant testified that he has not looked for work in the last 12 months because he feels he is not able to work.

Claimant testifies that he is 48 years old and has a GED. He states that he served four years in the air force and received training in aerography and fire fighting. Claimant indicates that he has been employed as a construction worker, meat packer, truck driver and janitor.

APPLICABLE LAW

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

ANALYSIS

Contrary to defendants' arguments, the greater weight of evidence supports causal connection. Dr. Weinstein testifies that the scar tissue was probably from claimant's two previous surgeries. He also opines that the bony encroachment was possibly caused by the previous surgeries. Dr. Weinstein's testimony together with that of claimant, Judy Marcoux, and Dr. Wilson supports a finding of causal connection.

The greater weight of evidence also supports the deputy's finding that claimant is permanently and totally disabled. Claimant's work restrictions preclude him from truck driving. Claimant is 48 years old and his education is limited. His attempts at light work managing a bar and working in the gift and craft shop have been hampered due to severe back and leg pain. It is determined that claimant is unemployable.

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

FINDINGS OF FACT

1. On June 16, 1980 claimant received an injury arising out of and in the course of his employment.

2. As a result of his injury, claimant herniated the nucleous pulpi of the disc at L4/L5 and L5/S1.

3. In August 1980 claimant received surgical treatment on the disc at L5/S1.

4. In December 1981 claimant received surgical treatment on the disc at L4/L5.

5. As a result of the two surgeries, claimant developed

arachnoiditis and possibly a bony growth at the disc levels of L4/L5 and L5/S1.

6. In February 1985 claimant received surgical treatment for removal of scar tissue and the bony encroachment.

7. Claimant continues to suffer severe pain and discomfort in his back and legs.

8. Claimant has a GED, but did not complete high school.

9. Claimant is well motivated and credible.

10. Claimant has a significant functional impairment and severe physical limitations.

11. Claimant is not now employable and this will continue indefinitely into the future.

12. Claimant's medical expenses were authorized.

13. Claimant cannot return to any of his former employment positions.

14. Claimant became permanently and totally disabled on July 1, 1984 as a result of his injury.

15. Claimant's rate of compensation is $306.20.

16. Claimant's injury in a bar fight did not materially aggravate his work injury.

CONCLUSIONS OF LAW

Claimant has proven by a preponderance of the evidence that there is a causal relationship between his work injury and his disability.

Claimant has proven by a preponderance of the evidence that he is permanently and totally disabled as a result of his injury.

Claimant has proven by a preponderance of the evidence that there is a causal connection between his injury and the medical expenses he incurred and that the medical expenses were authorized by defendants.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant weekly compensation at his rate of three hundred six and 20/100 dollars ($306.20) commencing July 1, 1984 and continuing thereafter during the period of his disability pursuant to section 85.34(3), Code of Iowa. All accrued payments shall be made in a lump sum together with statutory interest. Defendants may take credit for any prior, unaccrued payments due claimant.

That defendants pay the following medical expenses of claimant:

a.	University of Iowa Hospitals & Clinics	$10,225.10
b.	Burlington Medical Center	1,694.70
c.	Radiologists Services	184.00
d.	E. Torage Shivapour, M.D.	695.50
e.	Anesthesiology, Inc.	116.00
f.	Apothecory 24	60.11
g.	Nelson's Sunnyside Drug	467.23
h.	Vester Shaw - mileage	243.00

That the costs of the review-reopening proceeding and the appeal including the transcription of the hearing proceeding are taxed to defendants.

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

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Steven J. Crowley
Attorney at Law
Sixth Floor Burlington Bldg.
P.O. Box 517
Burlington, Iowa 52601

Mr. Greg A. Egbers
Attorney at Law
600 Union Arcade Bldg.
111 East Third STreet
Davenport, Iowa 52801-1550

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES SHELTON,	:	
Claimant,	:	File No. 833568
vs.	:	A R B I T R A T I O N
CITY OF DES MOINES,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by James Shelton against the city of Des Moines, his self-insured employer.

The case was heard and fully submitted on September 15, 1987 at Des Moines, Iowa. The record in this proceeding consists of testimony from James Shelton and Michael Peterson and joint exhibits 1, 2 and 3.

ISSUES

The only issue presented by the parties is the extent of claimant's permanent disability. All other pertinent parts of the case were established by stipulation. The rate of compensation is stipulated to be $235.67 per week. It was stipulated that claimant's entitlement to compensation for temporary total disability or healing period commenced August 27, 1986 and ran through November 16, 1986 and has been fully paid. It was stipulated that any permanent disability should be compensated industrially and that, if awarded, it should commence on November 16, 1986.

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.

James Shelton is a 45-year-old divorced man. He completed the ninth grade in school, but has no further formal education or vocational training.

Since high school, claimant has performed a variety of jobs, most of which have involved moderate or heavy physical exertion.

Claimant was initially employed by the city of Des Moines in approximately 1965 as a casual laborer. He became full time in approximately 1974 or 1975. Throughout his term of full-time employment, he has been classified as either a truck driver or a laborer (exhibit 2, pages 10-55). Claimant testified that he has engaged in a variety of activities including operating an endloader, mowing, trimming trees, shoveling snow and dirt and, in general, a lot of lifting and carrying. Claimant's evaluation reports show that he was consistently graded as performing satisfactorily overall, but there were a few instances where it was indicated that improvement was needed (exhibit 2, pages 56-73).

Shelton testified that, on August 26, 1986, he was riding a lawn mower, mowing in the cemetary, when a tire hit a hole and the mower flipped over. Claimant testified that he twisted the lower part of his back and experienced pain. Claimant testified that he reported the incident to his supervisor, John Lowe, and was then sent to the health clinic.

Claimant testified that he underwent x-rays and was treated for a time at the health clinic, but was then referred to Scott Neff, D.O. Claimant testified that Dr. Neff told him his back was deteriorating and sent him to therapy, but that the therapy did no good.

Claimant testified that he continues to experience pain in his back that is sometimes sharp. He stated that activities such as lifting aggravate his back. He has had no other medical treatment since last seeing Dr. Neff.

Claimant testified that he was released to return to light-duty work in November, 1986. He related that he went back for three or four nights driving a dump truck, patroling a cemetary. Claimant testified that truck driving did not violate Dr. Neff's restrictions and that the roads in the cemetary are asphalt. He related that he would sometimes stop the truck, sit, or get out and walk around if he felt the need. He stated that the sitting and bouncing made his back worse. Claimant testified he reported to his supervisor and to the health clinic that he was unable to do that job. Claimant related that nothing happened with regard to his employment after that and that, since he could not work, he resigned in January, 1987.

Claimant denied having any back injuries prior to the time he commenced employment with the city. However, claimant recalled having back problems off and on prior to hitting the hole with the mower. He stated that, while with the city, he had back injuries in 1975 and 1980 which affected the same general area of his back, but that, on each occasion, he missed

a week or ten days of work and was able to return to work without restriction. Claimant testified that this injury is a lot worse than the others. He stated that he is unable to lift and that his back starts to hurt if he walks as much as three blocks.

Claimant testified that he has applied for Social Security disability, but has not yet received a ruling. He related that he has not applied for unemployment because he was told he was ineligible.

Claimant testified that he does not think he could do any job which he has held in the past. He stated he is unable to sit or stand for very long and that he lies down for a while every day. Claimant related that he has no office skills and that he has not kept records or supervised others.

Claimant related that he never inquired about or bid on any other jobs with the city of Des Moines because he did not think he would be able to do them. He stated that he has not been to a physician since he quit driving the dump truck. He feels there is nothing a doctor can do for him.

Claimant testified that he has not asked to be seen by a different physician. He stated that he has not looked for work because he feels he is unable to perform any work.

Michael E. Peterson, safety and training administrator for the city of Des Moines, testified that, on or about October 10, 1986, a light-duty release for claimant to return to work was received from Dr. Neff. Peterson stated that claimant was assigned to work as a truck driver for a couple of days performing security work since there had been a problem with vandals at the cemetary. Peterson stated that, on October 31, Dr. Neff and James Blessman, M.D., released claimant to light-duty work and a light-duty job was prepared which would enable claimant to simply sit at the park entrance without doing any driving, but that claimant never tried the job. Peterson testified that he also tried to get claimant light-duty work painting park barrels, but that claimant never tried the job.

Peterson stated that claimant was authorized sick leave and vacation leave which provided pay through January 13, 1987 at which time he was given an additional sixty days' leave with benefits. Peterson stated that, on January 15, 1987, claimant resigned.

Peterson testified that it is the policy of the city of Des Moines to place injured employees in positions they can physically handle and that they have a good success rate in placing injured employees. Peterson felt that it became apparent claimant did not want to return to employment.

In rebuttal, claimant testified that he was not informed of the availability of a job painting park barrels or of changing the patrol job so it would not require driving.

The primary portion of claimant's medical care was provided by Dr. Neff, an orthopedic surgeon. On October 27, 1986, Dr. Neff indicated that claimant has degenerative disc disease, but that it is not related to anything that happened at work. He indicated that it was simply the aging process and that claimant had no permanent impairment which was due to his work. He recommended, however, that claimant perform only light work (exhibit 1, pages 4 and 8). On October 20, 1986, Dr. Neff indicated that, while claimant does have degenerative disc disease and should avoid heavy work, he was not disabled from all gainful employment (exhibit 1, pages 3 and 7).

In December, 1986, claimant was evaluated by Thomas Bower, a licensed physical therapist. Bower indicated that claimant did not put forth good effort and that the results of the test do not appear valid. He indicated that there were indications claimant was magnifying his symptoms substantially (exhibit 1, pages 12-17).

APPLICABLE LAW AND ANALYSIS

It was stipulated that claimant sustained an injury on August 26, 1986 which arose out of and in the course of his employment and that his entitlement to compensation for temporary total disability, or healing period, runs from August 27, 1986 through November 16, 1986. The primary issue of this case is whether that injury produced any degree of permanent 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.

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

According to Dr. Neff, claimant's problem is a degenerative condition which is due to aging. Claimant has been extensively tested and the diagnostic tests failed to disclose any basis for his complaints other than the degenerative process, which Dr. Neff

has indicated is due to aging. There is no direct medical evidence in the record which relates claimant's current level of complaints to the August 26, 1986 injury. It is only claimant's own complaints of an increased level of discomfort which support his claim. Having observed claimant's demeanor as he testified and having considered the evidence from Dr. Neff and Mr. Bower, claimant's testimony regarding the degree of his symptoms is found to be unreliable. There is no reliable evidence in the record which shows the injury to have been anything other than a temporary aggravation of a preexisting degenerative condition. It is therefore found and concluded that claimant has failed to prove by a preponderance of the evidence that the injuries he sustained on August 26, 1986 produced any degree of permanent functional physical impairment or any permanent physiological change in his body.

The employer offered claimant work that was within the medically imposed restrictions, yet claimant failed to show up for work or to make any bona fide efforts to retain his employment. The records show that, when he saw Dr. Neff on October 1, 1986, he indicated that he had already applied for Social Security disability. Summarily stated, in a period of approximately five weeks, he went from being gainfully employed to a point that he apparently considered himself totally disabled. Claimant attempts to relate that change to what appears to be a relatively minor incident of trauma that occurred on August 26, 1986. The evidence simply does not support claimant's contentions.

It is therefore found and concluded that claimant has failed to prove by a preponderance of the evidence that there has been any permanent change in his earning capacity as a result of the August 26, 1986 injury.

FINDINGS OF FACT

1. On August 26, 1986, James Shelton was a resident of the state of Iowa employed by the city of Des Moines, Iowa.

2. Shelton was injured on August 26, 1986 when a mower he was operating struck a hole.

3. Shelton has failed to introduce evidence to show that the injuries he sustained on August 26, 1986 were a substantial factor in producing any permanent physical impairment in his body, any permanent change in his physical health or any permanent change in his earning capacity.

4. Having observed claimant's appearance and demeanor as he testified and considering it in relation to the other evidence in the record, his testimony is found to be unreliable.

CONCLUSIONS OF LAW

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

2. The injury of August 26, 1986 produced only temporary disability and claimant has been fully compensated for that temporary disability.

3. Claimant has failed to prove by a preponderance of the evidence that he sustained any permanent disability that was proximately caused by the injuries he sustained on August 26, 1986.

4. Claimant has failed to prove any entitlement to any additional benefits under Chapter 85 of the Iowa Code.

ORDER

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

IT IS FURTHER ORDERED that the costs of this action are assessed against claimant pursuant to Division of Industrial Services Rule 343-4.33.

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

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

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. David Drake
Attorney at Law
West Towers Office Complex
1200 35th Street, Suite 500
W. Des Moines, Iowa 50265

Ms. Anne L. Clark
Assistant City Attorney
City Hall
East 1st & Locust
Des Moines, Iowa 50307

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BURDETTA A. SIEFKEN,

Claimant,

vs.

ARCHER-DANIEL-MIDLAND CO.,

Employer,

and

THE ILLINOIS INSURANCE GUARANTY FUND,

Insurance Carrier,
Defendants.

File No. 762694

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying temporary total disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 6, 11 through 31, and 33 through 35; and defendants' exhibits A through C. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

I. Did the Deputy Industrial Commissioner err in concluding that the Claimant has not established that a causal relationship exists between her April 2, 1984, injury and the disability on which she bases her claim?

II. Did the Deputy Industrial Commissioner err in concluding that the Claimant has not established that she is entitled to temporary total disability benefits from June 13, 1986, onward?

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

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

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted.

FINDINGS OF FACT

1. Claimant sustained an injury on April 2, 1984 when she attempted to stabilize a full enzyme drum weighing between 300 and 350 pounds.

2. Claimant initially treated with Dr. Roberson, Dr. Myers, and Dr. Rasmus.

3. Claimant last treated with Dr. Rasmus on October 22, 1984.

4. Claimant then was not responding to therapy, had been tried on antidepressants, and Dr. Rasmus believed nothing further could be done for her.

5. Claimant first saw Daniel Hoffman, M.D., a general practitioner, on January 29, 1985.

6. Dr. Hoffman subsequently referred claimant to Om N. Sureka, M.D., a physical medicine and rehabilitation specialist.

7. Both Dr. Hoffman and Dr. Sureka treated claimant for diffuse complaints in her neck, shoulders, and sacrolumbar area.

8. Claimant had numerous other complaints relating to her eyes, teeth, veins, and hemorrhoids, for which she saw other medical practitioners.

9. Claimant had a diagnosed hiatus hernia and spastic esophagitis for which John Erickson, M.D., an internist, treated her. The origin of the hiatus hernia is unknown.

10. Robert Martin, M.D., an occupational medicine specialist, examined claimant on August 14, 1986.

11. Claimant had diffuse tenderness on examination, inconsistencies on examination, few objective findings on examination, and diffuse complaints pointing to a nonorganic etiology for her complaints.

12. Claimant's demeanor at hearing was inconsistent with

the nature and severity of her purported complaints.

13. Claimant's complaints are of a nonorganic nature and do not result from her work injury.

14. Claimant reached maximum healing of any work condition as of October 22, 1984.

15. Claimant's medical costs for dental and eye care and for treatment of her hemorrhoids, her veins, and her hiatus hernia and spastic esophagitis are not related to any work injury.

16. Claimant's medical costs incurred after October 22, 1984 are not related to a work-related condition.

17. Claimant's housecleaning expenses and her husband's time off work to drive her to appointments do not relate to any work-related condition.

18. Claimant incurred 1,180 miles for medical treatment of her work condition on or before October 22, 1984.

19. Claimant incurred a prescription cost of $15.75 related to her work condition.

20. Claimant incurred costs of treatment with Dr. Roberson in April 1984 related to her work condition.

CONCLUSIONS OF LAW

Claimant has not established that a causal relationship exists between her April 2, 1984 injury and the disability on which she bases her claim.

Claimant has not established that she is entitled to temporary total disability benefits from June 13, 1986 onward.

Claimant is entitled to payment of costs with Dr. Roberson totaling $55.00; to payment of costs from Fenn's Drug totaling $15.75; and to payment of medical mileage totaling 1,180 miles at the rate of $.24 per mile.

Claimant is not entitled to other claimed medical and miscellaneous expenses.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant medical costs as outlined in the above conclusions of law.

That claimant and defendants are to equally pay the costs of the arbitration proceeding. Claimant is to pay the costs of this appeal including the cost of transcription of the arbitration hearing.

That defendants shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(1).

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Jack C. Vieley
Attorney at Law
1816 Savings Center Tower
Peoria, Illinois 61602

Mr. Christopher Klockan
Attorney at Law
1808 Third Avenue
P.O. Box 1279
Rock Island, Illinois 61204

Mr. Larry L. Shepler
Mr. Bradford B. Ingram
Attorneys at Law
600 Union Arcade Bldg.
111 East Third Street
Davenport, Iowa 52801-1550

1402.30
Filed April 29, 1988
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RANDY A. SIMONDS, Claimant, vs. MT. VERNON STEEL AND WIRE, Employer, and U. S. F. & G., Insurance Carrier, Defendants.	File No. 830598 A R B I T R A T I O N D E C I S I O N

1402.30

Claimant's credibility was found to be lacking. It was held that he had failed to prove he sustained injury which arose out of and in the course of his employment.

001580

FILED

APR 29 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RANDY A. SIMONDS, Claimant, vs. MT. VERNON STEEL AND WIRE, Employer, and U. S. F. & G., Insurance Carrier, Defendants.	:	File No. 830598 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 Randy A. Simonds against Mt. Vernon Steel and Wire, employer, and U. S. F. & G., insurance carrier. The case was heard and fully submitted on November 6, 1987 at Cedar Rapids, Iowa. The record in this proceeding consists of testimony from Randy A. Simonds, David Langer, Bryon Wood, William Sindlinger, Edwin Clark, Paul Robinson and Robert Young. The record also contains joint exhibits numbered 1 through 16 and claimant's exhibits 1, 3 and 4.

ISSUES

Simonds alleges that he sustained an injury on or about July 31, 1986 which arose out of and in the course of his employment. He seeks compensation for healing period, permanent partial disability, section 85.27 benefits and penalty benefits under the fourth unnumbered paragraph of Iowa Code section 86.13.

The issues for determination are whether claimant sustained an injury which arose out of and in the course of his employment on or about the date alleged; determination of claimant's entitlement to weekly compensation for healing period and permanent partial disability; determination of claimant's entitlement to section 85.27 benefits; and, determination of claimant's entitlement to additional benefits under the fourth unnumbered paragraph of Iowa Code section 86.13. For affirmative defenses, the defendants contend that claimant failed to give notice under section 85.23 of The Code and also that claimant's alleged injuries occurred as a result of his willful intent to injure himself and/or from intoxication in accordance with Code section 85.16.

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.

Randy A. Simonds is a 30-year-old man who lives at Mt. Vernon, Iowa. Simonds went through the eleventh grade in high school, obtained a GED and has attended one year at Kirkwood Community College where he obtained a diploma from a machinist course. Simonds denied having any other formal vocational training.

Claimant's employment history includes work as a grocery store carryout, dishwasher in a restaurant, nurse's aide at a nursing home and a number of short-term machinist jobs. Simonds was in the Navy for approximately four months, but was honorably discharged for a medical disorder. Claimant denied injuring his back at any time prior to the injuries which are the subject of this proceeding.

Simonds testified that he commenced employment with Mt. Vernon Steel and Wire on May 14, 1986 and that his primary assignment was operating a small turret lathe, but that he also operated various other machines on occasion. Claimant testified that, on July 30, 1986, he was assigned to cut steel rods. He stated that, in order to do so, he had to get out the machine and set it up and that he used a pallet, which was placed at the proper height, to feed the material into the machine. Claimant stated that the material he was handling was one-inch rods of steel, which were 20 feet long and weighed approximately 100 pounds. He stated that the rods were in a pile under other material and that it was necessary to bend over and pull with both hands in order to free each rod from the pile to feed it into the band saw used to cut it. Simonds did not describe any particular incident of injury on that date, but stated that his back was a little sore when he ended work at the end of the day.

Claimant could not recall what he had done during the evening of July 30, 1986. He testified that his back was quite sore when he awoke on the morning of July 31, 1986. He testified that he went to work as usual and was assigned to run rods through the turret lathe. He testified that, in order to do so, he had to move rods a distance of approximately two to three feet to the turret. He stated that, as he worked, his back worsened and that, at approximately 10:00 a.m., he reported to his foreman, Bill Sindlinger, that his back hurt and that he could not work. Claimant testified that Sindlinger asked him what had happened and he replied that he must have hurt his back

while working the prior day.

Claimant testified that, on July 31, 1986, the materials he used were already at the work station and the machine was prepared and set up for use. He stated that his back popped on the 31st, but that, prior to the time it popped, it was sore. Claimant stated that he did not tell Sindlinger his back had popped while operating the turret lathe that morning.

Claimant testified that he was unable to see his family doctor and that he went to L. E. Cornelius, D.C., where x-rays were taken, he was treated with chiropractic manipulations and was advised to refrain from working. Claimant testified that he also saw Steven Young, M.D., on the following Monday for a second opinion and that he also obtained treatment from Dr. Young.

Claimant testified that he was taken by a friend to St. Lukes Hospital Emergency Room one evening when he was in severe pain and was then sent to see Fred Pilcher, M.D., an orthopaedic surgeon. Claimant testified that Dr. Pilcher examined him, prescribed medication and treated him with physical therapy. Claimant became dissatisfied with the apparent lack of progress he was making under Dr. Pilcher and then sought care from G. Douglas Valentine, D.C. Claimant continues to treat with Dr. Valentine.

During the weeks subsequent to July 31, 1986, claimant had several episodes of brief returns to work. He testified that he received letters from David Langer which informed him that workers' compensation would not be paying his claim (exhibits 8 and 9). Claimant stated that, on October 29, 1986, he met at the Mt. Vernon Steel and Wire office with Mr. Moore and Mr. Langer. He stated that they questioned him and did not approve his claim (exhibit 10). Claimant stated that his employment with Mt. Vernon Steel and Wire has been terminated.

Claimant testified that he contacted vocational rehabilitation and was referred to the Kirkwood Community College. He has taken courses in the business fields. Claimant testified that he needs to improve his academic skills. He estimates that it will take approximately one year to do so to enable him to enter into a four-year degree program. Claimant testified that he would like to get into something technical, such as mechanical engineering or electronic technology.

Claimant testified that he has not received any workers' compensation benefits and has not been employed since leaving Mt. Vernon Steel and Wire. He stated that his only income is from unemployment and food stamps.

Claimant testified that he has constant back pain that is worse on some days than on others. He stated that he feels his restrictions are that he cannot engage in bending, twisting or

heavy lifting of more than 50 pounds. He stated that he is unable to sit for longer than a couple of hours and that sometimes he is limited to sitting for only a few minutes. He stated that he can stand for one half hour to forty-five minutes or longer if he is able to move about.

Claimant testified that his primary means of transportation was a moped at the time of injury and continuing up until August, 1987 when he completed repair of his automobile. He stated he was able to operate the moped without difficulty.

Claimant acknowledged that he has had a problem with excess consumption of alcoholic beverages and that he has had accidents with the moped while under the influence. Claimant recalled one incident when he had an accident with the moped where he fell on a gravel road and scraped his right elbow and right side (exhibit 2A, page 11).

David Langer, vice-president of Mt. Vernon Steel and Wire Company, testified that Bill Sindlinger is the plant foreman and is in charge of production, daily schedule, setting up machines and putting material to be run next to the machines. Langer stated that Ed Clark, a leadman, may also perform the machine setup.

Langer testified that he became aware of Simonds' claim on approximately August 10, 1986 when he began receiving bills from Dr. Cornelius. Langer's investigation revealed that Sindlinger knew claimant had left work due to a sore back, but had no knowledge that it was being claimed to be work-related. Langer testified that he wrote to claimant and told him he did not believe his injury was covered by workers' compensation. Langer stated he thought the matter was ended, but, when claimant returned to work in September, he again asked about workers' compensation and a first report of injury was filed.

Langer testified that, on October 15, he received a telephone call from Jim Mozingo and received a message from Mozingo that, on the night of July 30, 1986, claimant had an accident with his moped and that on the following day, claimant had indicated to Mozingo he was going to file for workers' compensation. Langer testified that he notified the workers' compensation insurance representative of the call. A meeting with claimant was held on October 29, 1986. Langer stated that claimant did not dispute or deny he had injured himself while riding the moped when claimant was confronted with the statement from Mozingo. Langer testified that claimant's employment was terminated on October 29, 1986 due to an accumulation of things.

Langer testified that, since July 31, 1986, he has observed claimant riding a moped on a number of occasions and that he appeared to ride it without any difficulty.

William Sindlinger, foreman at Mt. Vernon Steel and Wire, testified that he was claimant's supervisor in July, 1986. Singlinger stated that he was never advised by claimant that claimant had an injury which was related to work. He acknowledged that, on or about July 30, 1986, claimant asked to see a chiropractor and was given permission to do so. Sindlinger stated that, prior to requesting to make the call, claimant was operating a turret lathe and that claimant's main job was of a turret lathe operator. Sindlinger testified that the job involves picking up five or six rods at a time, which weigh approximately one and one-quarter pounds each. Sindlinger testified that the 20-foot long, one-inch steel rods weigh approximately 53 pounds each.

Sindlinger agreed that it is not unusual for people who work as machinists to go to the chiropractor for treatments, but that those visits are not generally treated as a workers' compensation event.

Edwin Clark testified that he is a leadman and setup man at Mt. Vernon Steel and Wire and that he was in that position during the summer of 1986, working the same shift as the claimant. Clark testified that he had observed claimant at the band saw, but never observed him pick up stock from the floor. He stated that, when the band saw is set up, the bar stock is placed on top of pallets at the same height as the saw table.

Clark testified that claimant never reported any on-the-job back injury to him, but that one day, at the break table, claimant commented he had hurt his back rolling over in bed to shut off the alarm. Clark stated that the conversation occurred shortly before claimant ceased working.

Paul Robinson was the second shift acting foreman at Mt. Vernon Steel and Wire in the summer of 1986. Robinson stated that, on occasion, he set up the band saw and that it was done by putting a bundle of one-inch bar stock on a pile of pallets. Robinson testified that he never observed claimant lift the stock from the floor up to the pallets and that he does not put any other material on top of the one-inch bar stock.

Robinson testified that he and claimant went to school and Alcoholics Anonymous together. Robinson stated that claimant had told him he was suing Mt. Vernon Steel and Wire and asked Robinson if he would work for him when he took over the company.

Robert Young, another Mt. Vernon Steel and Wire employee, testified that, on July 4, 1986, he observed claimant have an accident with the moped.

Bryon Wood testified that he formerly lived in the same trailer court as claimant and observed claimant operating a moped. He recalled an incident where claimant had an accident

with the moped. He stated that it was in warm weather, on a Saturday and that it was later in the year than April.

The deposition of James Mozingo appears in the record as exhibit 7. Mozingo testified that, during the summer of 1986, (he was unsure of whether it was in July), he observed claimant fall from his moped onto his left side (exhibit 7, pages 5-13). Mozingo testified that, on another occasion during the summer of 1986, claimant advised him he had flipped the moped and exhibited a pavement burn on his arm (exhibit 7, pages 14-16).

Mozingo testified that he became aware claimant was making a workers' compensation claim the day claimant came over to his residence with a twelve-pack of beer after having been to the chiropractor. Mozingo stated that claimant told him his back had popped while getting out of bed, but that he had gone to work and reported an injury. Mozingo testified that claimant was wearing a brace or wrap on that day (exhibit 7, pages 17 and 18).

Exhibit 1A is a collection of records from Dr. Cornelius. The first page, which is dated July 31, 1986, contains the following wording at the lower portion where the term "Accidents" is printed on the form, "Rolled over in bed to Lt [sic]. Wed. pulling rodds [sic] at work." Exhibit 1C indicates that claimant was evaluated, treated and provided with an orthopaedic support (belt) on July 31, 1986. This is confirmed by the first entry on the reverse side of exhibit 1B. Exhibit 1E indicates that Dr. Cornelius diagnosed claimant's injury as an acute subluxation strain of the right sacroiliac joint and L-5 with severe lumbar myofascitis.

Exhibits 2A and 2B are a collection of records from John Ware, M.D. The fourth page of exhibit 2A indicates that claimant was seen by Dr. Ware on March 31, 1986 with abrasions on his right arm. In exhibit 2B, Dr. Ware indicates that he has been claimant's doctor since 1971 and that he had never treated him for a back problem.

Exhibits 3A through 3G are a collection of records from other physicians at Mt. Vernon, Iowa. The second and third pages of exhibit 3A are records from Steven Young, M.D. On August 4, 1986, Dr. Young indicated that claimant had a back strain. In exhibit 3C, Dr. Young indicates that, when claimant was seen on August 4, 1986, he observed no skin abrasions or other signs of recent injury.

Exhibit 5E is a report from G. Douglas Valentine, D.C., dated April 21, 1987. The report summarizes Dr. Valentine's treatment of claimant. On the third page, Dr. Valentine expresses the opinion that claimant sustained a severe lumbosacral sprain/strain resulting in a posterior inferior slip of the fifth lumbar

vertebra, compressing the intervertebral disc, causing nerve root irritation as a result of an injury that occurred on the job. Dr. Valentine went on to indicate that claimant's prognosis is guarded, but that, with regular chiropractic treatment, the condition of his back could be restored to approximately 90% of normal. He assigned a 10% permanent partial disability rating.

Claimant was evaluated by Fred J. Pilcher, M.D., on October 6, 1986. At the initial evaluation, Dr. Pilcher found claimant to be very rigid and stiff with diffuse tenderness over the thoracolumbar spine and both sacroiliac joints. Claimant exhibited a restricted range of spinal motion. He exhibited an abnormal straight leg raising test on the right side, but the left was normal. Dr. Pilcher's initial impression was that claimant had a probable acute musculoligamentous strain of the low back, but he doubted claimant had a ruptured disc (exhibit 4A; exhibit 12, pages 4-10). X-rays, which had been taken on August 15, 1986, were interpreted as normal (exhibit 6B; exhibit 12, page 6).

When conservative treatment and therapy did not improve claimant's condition, a CT scan was ordered. Dr. Pilcher indicated that the CT scan showed no abnormalities (exhibit 4B; exhibit 12, pages 7 and 14; exhibit 6G).

Dr. Pilcher declined to assign any permanent impairment rating to claimant based upon the information which was available to him (exhibit 12, pages 22-26).

When questioned, Dr. Pilcher stated that the condition he diagnosed in claimant could arise from a fall from a moped or from a number of other types of movements of the body (exhibit 12, pages 11-13).

The defense raised by defendants of lack of notice under the provisions of section 85.23 of The Code is at best, frivolous, and at worst, an issue raised in bad faith without any evidentiary support. It detracts from the credibility of defendants' position in the remaining issues in the case. The employer, acting through David Langer, had written letters to claimant regarding the claim and had met with a representative of the insurance carrier, all within 90 days from the date of the occurrence of the alleged injury. The claim is clearly not barred by the provisions of section 85.23.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received injuries on July 30 or July 31, 1986 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

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

Claimant's testimony regarding his work activities of July 30 and 31, 1986 is corroborated by other employees with regard to the machines he was operating on those days, but it is disputed with regard to the manner in which he would have been operating the band saw on July 30, 1986. Claimant's testimony that he reported to Bill Sindlinger he hurt his back on July 30, is contradicted by testimony from Sindlinger. There is evidence in the record from Edwin Clark and Jim Mozingo that claimant made statements that he had hurt his back while in bed. Corroboration of their testimony is found on the first page of exhibit 1A.

The testimony from Mozingo does not establish that claimant was in a motorcycle accident on the evening of July 30, 1986. It does not establish that it was on the day following the motorcycle accident of which Mozingo testified that claimant appeared at Mozingo's residence wearing a back brace or support, carrying a twelve-pack of beer and stating that he was filing a workers' compensation claim. The evidence in this case does not establish that claimant had a motorcycle accident on the evening of July 30, 1986, although it does show that claimant had a number of moped accidents on various occasions.

As indicated by the authorities previously cited, the claimant has the burden of proving he sustained an injury which arose out of and in the course of his employment. Claimant's appearance and demeanor was observed as he testified at the hearing. The appearance and demeanor of the other witnesses who testified at the hearing was likewise observed. In view of the conflicts between claimant's testimony and that of the other witnesses in combination with the claimant's appearance and demeanor, it is determined that claimant's credibility is not sufficiently strong to establish that it is probable he was injured at his place of employment on July 30 or July 31, 1986. The most likely scenario of injury is that he did, in fact, injure his back in some way between the time he left work on July 30, 1986 and the time he reported to work on July 31, 1986.

It is therefore concluded that claimant has failed to carry the burden of proving an entitlement to any benefits under the provisions of Chapter 85 of The Code of Iowa.

FINDINGS OF FACT

1. On July 30 and July 31, 1986, Randy A. Simonds was a resident of the state of Iowa, employed by Mt. Vernon Steel and Wire Company in the state of Iowa.

2. Claimant has failed to establish the credibility of his testimony.

3. It is possible that claimant was injured at work in the manner of which he testified, but the evidence in the case is sufficiently conflicting and controverted to make it impossible to find that it is probable (more likely than not) that claimant was injured in the manner he described.

4. It is probable that claimant was injured by some movement he made while in his bed on the morning of July 31, 1986.

CONCLUSIONS OF LAW

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

2. Randy A. Simonds has failed to prove, by a preponderance of the evidence, that he sustained an injury which arose out of and in the course of his employment with Mt. Vernon Steel and Wire Company on or about July 31, 1986.

ORDER

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

IT IS FURTHER ORDERED that each party pay the costs incurred by that party in participating in this proceeding in accordance with the provisions of Division of Industrial Services Rule 343-4.33.

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

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Thomas M. Wertz
Attorney at Law
4089 21st Avenue SW
Suite 114
Cedar Rapids, Iowa 52404

Mr. Raymond R. Stefani
Attorney at Law
200 American Building
101 Second Street SE
Cedar Rapids, Iowa 52401

001590

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY W. SIMONS, Claimant, vs. PRIDE SEED COMPANY, Employer, and LIBERTY MUTUAL, Insurance Carrier, Defendants.	FILE NO. 806802 A R B I T R A T I O N D E C I S I O N FILED JAN 26 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Terry W. Simons, claimant, against Pride Seed Company, employer (hereinafter referred to as Pride), and Liberty Mutual Insurance Company, insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury on October 8, 1985. On December 11, 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 Mark Cleveland. 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 at the time of the alleged injury an employer/employee relationship existed between Pride and claimant.

ISSUES

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

I. Whether claimant received an injury arising out of and in the course of employment with a claim that the injury was the result of a non-compensable horseplay;

II. Whether there is a causal relationship between the work injury and the claimed disability; and,

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

SUMMARY OF THE EVIDENCE

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

Claimant testified that at the time of the alleged work injury he was employed at Pride as a general laborer. Generally, this involved the bagging of seed corn and beans but claimant testified that he would also help set up a "wheel" for bagging, check bins, sweep the floor and stack bags after they were filled and sewed. There was no dispute in the evidence that claimant worked under the supervision of Mark Cleveland and a leadman, Dave Holst. Generally, claimant's crew consisted of four persons, claimant, Gary Peterson, Kevin Bauer and Dave Holst who were all involved in the bagging operation.

Claimant testified that a lot of horseplay was conducted on the part of all of the members of his crew during various breaks at Pride during the bagging process with the knowledge of Holst and Cleveland. Claimant said that he observed Cleveland participate in tieing one person up with tape and on another occasion Cleveland hid a bicycle from another employee by tieing it to the ceiling. Cleveland, in his testimony, admitted to the bicycle incident but denied tieing any one up. Claimant further testified that prior to the alleged work injury date such horseplay included shooting objects such as paper clips with a rubber band either at boxes in the area or at birds in the plant. Claimant said there was no attempt to hide any of this activity from their superiors.

On the day of the alleged work injury, claimant testified that at the first morning break the horseplay began again with Bauer, Peterson and claimant shooting small wires at walls in full view of the leadmen who made no attempt to end such activity. They then began to shoot at a nearby box. Claimant said that then Bauer and Peterson went to another area and starting shooting the wires at claimant when he was adjusting the wheel. Claimant said that he told them to stop. When they failed to end this activity, claimant stated that he then shot a couple of

wires at them. When Bauer and Peterson returned fire, claimant said that he again told them to quit because he "didn't want to get hit." Claimant then retreated to the second floor via the one man elevator to get away from this activity and to pound on the treatment barrel located on the second floor with a rubber mallet to jar corn loose from the sides of the barrel. Claimant stated that such pounding on the treatment barrel was a part of his usual duties at Pride although he only occasionally performed such activity. He denied that such work was primarily the responsibility of Bauer. This barrel is located in a small room with contains an opening for persons using the elevator and a door on the other side of the room which opens to the second floor. A person leaving this small room through the door is in full view of persons standing on the first floor adjacent to the stairway. Claimant said that after beating on the barrel three or four times, he opened the door to leave the barrel room and he saw Bauer and Peterson standing immediately below on the first floor but he could not tell if they were shooting at him. Then something hit him in the eye and he fell backwards and experienced a burning sensation in the right eye. Claimant said that he could not tell at that time what had hit him. Claimant stated that it could have been a wire shot by either Bauer or Peterson or a kernel of corn falling from bins located above his head on third floor. There was a number of kernels of corn on the floor at the time.

Claimant then reported the injury to Cleveland and testified that he told Cleveland that he either got dust in his eye from pounding on the treating barrel or from splashing "cat can", a seed corn additive, in his eye. Claimant explains that he lied to Cleveland because he did not want to get anyone into trouble. Cleveland responded that claimant must have done more than splash a chemical in his eye after examining the eye and he had another employee transport claimant to the hospital. Claimant told physicians at the hospital upon admission the same story that he told Cleveland. Claimant testified that the next day he told Cleveland the truth and that Cleveland said he would put down on the company record that a belt broke and slapped into claimant's eye. Claimant stated then that Cleveland talked to Bauer and Peterson who both denied shooting at claimant. Also there is no dispute that Cleveland directed Holst after this incident to sweep the floor around the treating barrel room to look for the wire but Holst found no such wire or any other object that may have been shot at claimant. According to claimant's medical records, a few days after the incident claimant changed his story to his eye physicians and stated at that time that a wire bounced off a wall and struck him in the eye. Also, according to the medical records, claimant was not very cooperative with his physicians. He first refused to take a blood count test. Claimant explained at hearing that he was scared of any procedure involving the taking of blood. Also, according to the records, claimant did not take his medication

as directed and left the hospital early against physicians' advice. Claimant denied leaving the hospital without his doctor's permission.

After extensive treatment of claimant's eye injury, physicians made a final diagnosis of corneal laceration, hyphema, traumatic cataract and chamber angle resession caused by "blunt trauma." Claimant's treating physicians opined that claimant currently suffers from 83 percent loss of vision in the right eye and within one to five years claimant will have to undergo a complete removal of the lens in the right eye which will increase his disability. Claimant is also susceptible to future glaucoma.

The parties submitted a deposition from Kevin Bauer. Absent from the record is any testimony from Peterson or Holst. Bauer contradicted much of claimant's story. Bauer denied that they had shot wires before that day and that claimant was the first person to cut up wires for shooting. This aspect was denied by claimant. Bauer admitted to the fact that claimant, Peterson and himself were shooting wires at each other but denied that claimant ever told them to stop. According to Bauer, Holst had left the area while they were doing this activity. Bauer stated that after about five minutes of this activity claimant went to the barrel room on the second floor. Bauer denied that he heard any hammering inside the barrel room. Bauer testified that it was his sole responsibility to do such hammering and not the duty of claimant. He stated that he had just performed such hammering activity shortly before the wire shooting activity. Bauer testified that after a brief period of time, claimant peered out from behind the doorway looking through the crack on the hinged side of the door and began to open the door very slowly. Bauer said that he and Peterson ran away as they assumed claimant was going to shoot at them from behind the door. According to Bauer shortly thereafter claimant came down from the barrel room and began rubbing his eye and stating that his eye "burns." Bauer stated that he learned later that claimant had injured his eye. Bauer believes that claimant struck himself in the eye while attempting to shoot at Peterson and himself.

Cleveland, now a branch manager for Northrup King, a successor corporation to Pride, testified that claimant initially did not tell him what had happened and he filled out an accident report stating that the cause of the injury was unknown. After an investigation, he eventually learned of the shooting of the incident from Bauer and Peterson. He stated that Holst did not have the ability to fire and hire. He stated that both Bauer and Peterson denied to him shooting anything at claimant on the second floor. Cleveland also testified that Holst was the person responsible for keeping the treatment barrel working. He denied any prior knowledge of any horseplay. He stated that the crew is to be sweeping the floor or performing other duties

between the bagging operations. Cleveland admitted suggesting possible causes of claimant's eye injury such as belt breaking or corn falling when claimant initially stated to him that he did not know what had caused the injury.

APPLICABLE LAW AND ANALYSIS

I. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960) and cases cited therein.

Claimant cited at the hearing a Michigan case, Crilly v. Ballou, 91 N.W.2d 493 (Mich 1958). Justice Smith's eloquent and profound decision in that case nullifying the horseplay defense in Michigan workers' compensation cases certainly is convincing as to what should be the law within this state. Unfortunately for claimant, the law set forth in Crilly is not the law of Iowa. As a presiding officer in an administrative hearing, this deputy commissioner is helpless to change long established precedents of the courts and of the industrial commissioner in this state dealing with horseplay. The rule of law in Iowa is stated in Lawyer & Higgs, Iowa Workers' Compensation -- Law and Practice, section 6-8, page 48 as follows: "When an employee of his own violition initiates horseplay or practical joking and actively takes part, any injury received will not be compensable because it did not arise out of and in the course of employment."

In the case sub judice, few facts are clear. It can be concluded from the evidence that claimant's eye injury probably was the result of a wire shot from a rubber band striking the eye as a result of a horseplay incident. It is also apparent that such horseplay was without any sort of malice or willful intent. The theory that claimant's eye was struck by a kernel of corn from above appears impausible from the testimony of the witnesses. However, nothing can be conluded as to how and by whom the wire was shot. It is possible claimant struck himself and it is equally possible that claimant was struck by a wire. Claimant admits participation but claims he later retreated. Frankly, it is impossible for this deputy to conclude who is telling the truth in this case. One would think that Bauer's testimony would be the most credible as he no longer works for Pride and has the least to gain from lying. On the other hand, an admission of fault by Bauer may subject him to liability for

claimant's eye injury. The conflicting stories of claimant did not aid in establishing his credibility. Although one can appreciate a desire to protect fellow employees, one would think that such a concern would end when it comes to providing proper information to one's physician in case of a serious eye injury. Also, claimant's testimony at the hearing as to the fact that he now does not know what happened is different from the last story he told his physicians. According to the medical reports he last reported to his physicians was that a wire had ricocheted off a wall and struck his eye.

Claimant's attempt to resurrect his case by imputing knowledge or consent to the employer fails due to the hopelessly conflicting evidence as to the prior acts of horseplay involving shooting objects with rubber bands before the work injury.

In a case where the trier of fact is unable to determine when a party is telling the truth, claimant must lose as claimant has the burden of proof and persuasion. The horseplay defense is not an affirmative defense in which defendants assume the burden of proof. Claimant must establish a lack of participation in horseplay activity as a part of his burden that the injury arose out of and in the course of his employment. Therefore, claimant has not established a compensible work injury in this case and cannot be awarded benefits.

FINDINGS OF FACT

1. Claimant's right eye was injured on October 8, 1985 as a result of horseplay activity involving the shooting of pieces of wire with rubber bands. Such horseplay was not the result of maliciousness or willful intent to injure claimant. The final diagnosis of the injury was corneal laceration, hyphema, traumatic cataract and chamber angle resession of the right eye caused by blunt trauma.

2. It could not be found who initiated the horseplay or whether claimant was an active participant in the horseplay at the precise time claimant's eye was injured. It could not be found that claimant and others had engaged in such horseplay in view of their superiors prior to the time of the injury. It could not be found from the evidence and claimant's demeanor whether claimant was telling the truth or whether Bauer, a fellow employee, was telling the truth about the incident. It could not be found that claimant suffered an injury to his right eye which arose out of and in the course of his employment at Pride.

CONCLUSIONS OF LAW

Claimant has failed to establish by a preponderance of the evidence entitlement to disability benefits.

ORDER

1. Claimant's petition is dismissed.

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

Signed and filed this 26 day of January, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. R. Douglas Wells
Attorney at Law
617 Brady Street
Davenport, Iowa 52803

Mr. Greg A. Egbers
Mr. Mark A. Woolums
Attorneys at Law
600 Union Arcade Bldg.
111 East Third St.
Davenport, Iowa 52801-1550

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WALTER L. SMELTZER,

Claimant,

vs.

OSCAR MAYER FOODS CORP.,

Employer,
Self-Insured,
Defendant.

File No. 760113

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits based upon an industrial disability of 20 percent.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 6. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is the extent of claimant's industrial disability.

REVIEW OF THE EVIDENCE

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

Claimant was 53 years old at the time of the hearing. He attended school until the ninth grade but did not finish that grade. He had no more formal education and does not have a high school equivalency certificate. His work experience prior to working for defendant was generally unskilled labor. Claimant began working for defendant in September 1963. He worked six or seven years on the production line pulling leaf lard, snatching guts, shaving hogs, and working on the head table. Those jobs required him to stand eight hours a day. He then worked in the maintenance department as a master mechanic. He testified that the department is responsible to keep the machinery running and for the electrical needs of the plant. He stated that the department does welding and plumbing and is jack of all trades

and master of none. The work varied in physical requirements as well as environmental factors including temperatures. On March 8, 1984, while on his way to fix a dock door, he slipped and fell injuring his back and striking his head.

Claimant testified that he had had asthma for 25 years, that the asthma periodically flares up, that he has been hospitalized when the asthma flared up, that he has missed work because of asthma, that he always returned to work for defendant after an asthma attack, and that his asthma was better after not working for defendant.

Claimant was released to return to work in May 1985 but did not return to work and has not returned to work. Claimant indicated that he did not feel he was able to return to work in May 1985 because his back was still hurting and his legs were swollen. Claimant testified that he did not believe he would be able to work because he would not be able to do an employer justice; that he would not be able to handle it; that he might be able to work for two or three days or maybe one day and then be off the rest of the work week. He testified that he wanted to go back to work but knew he could not handle it.

Claimant is receiving social security benefits. Claimant applied for and defendant awarded claimant his disability pension plan that is available to its workers who are disabled. Claimant also applied for and was awarded benefits due to his disability under a private disability income policy.

After claimant's fall he was seen by Robert Deranleau, M.D., who is claimant's personal physician. Dr. Deranleau referred claimant to Ronald Bunten, M.D., who placed claimant in Iowa Methodist Medical Center for four or five days. Claimant was seen by Bruce Hagen, D.C. In May 1985, Dr. Hagen released claimant to return to work. Claimant was evaluated by John Grant, M.D., as a result claimant's application for benefits from his private disability plan. Claimant was evaluated by Paul From, M.D., and was also seen by Dr. Simmons and Dr. Weinstein at the University of Iowa Hospitals and Clinics.

A hospital report from Iowa Methodist Medical Center dated March 26, 1984, stated:

FINAL DIAGNOSIS: Degenerative disc disease, cervical and lumbar spine.

SECONDARY DIAGNOSIS:

1. Peripheral neuropahty.
2. Bilateral carpal tunnel syndromes.
3. Intrinsic asthma with chronic obstructive pulmonary disease.

4. Hypertension.
5. Obesity.

(Joint Exhibit 1, page 215) -

Office notes of Dr. Bunten dated August 24, 1984, reads in part:

I think he is likely to continue to be significantly impaired by his chronic obstructive pulmonary disease, and apparently his peripheral neuropathy affecting his extremities is likely to continue to prevent him from physically performing a great deal. I do not think his degenerative changes in the back or neck would warrant additional treatment, but may continue to bother him with physical performance. I think his work-related fall in March 1984 may have precipitated or aggravated some of his degenerative change in the low back, but that his principal impairments and disabilities relate to the pre-existing degenerative changes in the spine, peripheral neuropathy, and pulmonary disease. I would regard him as having a 10% permanent partial impairment of his total body function, based on the aggravation sustained in the fall, and that his remaining disability and inability to work are related to his chronic illnesses.

(Jt. Ex. 1, p. 44)

Dr. Simmons' statement dated October 5, 1984, reads in part: "IMPRESSION: The patient was seen and examined with Dr. Weinstein. He has chronic low back pain and multiple trigger points. His impairment rating is 10-12 percent at this time." (Jt. Ex. 1, p. 243)

Dr. Grant's orthopedic report in June 1985 reads in part: "In combining the impairments of 5 percent for the cervical spine, 10 percent for the lumbosacral spine, and 4 percent for the ulnar nerve, the combined table values reveal a partial permanent physical impairment of 17 percent of the body as a whole." (Jt. Ex. 1, p. 40)

In a letter dated November 21, 1985, Dr. From wrote:

His impairment from the injuries sustained in March 1984, since they do involve the neck and the lower back, can be translated into whole man impairment. He has not had surgery for this condition. One examiner previously gave him a total 17% impairment, but I would think that his impairment was about 11 to 12%, based upon 5% for

> the cervical spine, 10% for the lumbosacral spine, and 4% for the ulnar nerve. He has not had surgery for any of his musculoskeletal conditions.

(Jt. Ex. 1, pp. 23-24)

Dr. Bunten also testified:

> A. ...I felt the degenerative disc disease likely had been aggravated by falling down....
>
> ....
>
> A. ...I thought his problems were sort of a combination of peripheral neuropathy and his intrinsic asthma and chronic obstructive lung disease as well as the pain in his back and the numbness that he experienced intermittently and variably in the extremity. And that's the sum total of all that would perhaps not allow him to return to his former work.

(Bunten Deposition, pages 6-7, 13-14)

Phil Schumacher, personnel manager for defendant, testified that claimant's last job with defendant was as a master mechanic. The job involves performing a number of functions. Schumacher testified that the last few years claimant worked for defendant claimant's job was not heavy and claimant's job was open until he retired.

APPLICABLE LAW

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

ANALYSIS

Claimant argues on appeal that the deputy erred in awarding only a 20 percent industrial disability. Defendant counters by saying that the deputy's award was generous. In discussing his decision, the deputy stated:

> Defendant argues in its brief on pages 8-9 that claimant is poorly motivated to return to work because of the various monies that he is currently receiving. Defendant also points to claimant's failure to look for work and his failure to return to the job he was performing for Oscar Mayer at the time of his injury. Claimant counters that he is well-motivated to return to work, but that his

physical problems prevent him from doing so. Phil Schumacher testified that at some point claimant decided not to retire because he could not afford to live on the retirement monies available to him at the time. At the present time, however, claimant is receiving about $1300 on a monthly basis. This deputy believes, and it will be found, that claimant is poorly motivated to return to work and that his various sources of income play a part in his motivational problems. Claimant is not a good candidate for vocational rehabilitation at this point and he is poorly educated. Taking into account all relevant factors, it is determined that claimant's industrial disability is 20 percent.

Claimant argues that the deputy erred in finding that claimant is poorly motivated to return to work and alleges that the deputy is penalizing claimant for applying for and receiving benefits. The conclusion that claimant is poorly motivated is inescapable. The record is devoid of any evidence indicating that claimant has sought employment, retraining, or any source of earnings. The fact that income from claimant's various benefits are comparable to his earnings while working for defendant would play a part in his lack of motivation. When all factors are considered, the deputy correctly concluded that claimant's disability is 20 percent.

FINDINGS OF FACT

1. Claimant is 53 years old.

2. On March 8, 1984, claimant sustained a whole body injury while working for defendant.

3. Claimant sustained permanent partial impairment of 10-15 percent as a result of his work injury of March 8, 1984.

4. The impairment that resulted from the work injury of March 8, 1984 caused some loss of earning capacity.

5. Claimant did not complete high school.

6. Claimant is a poor candidate for rehabilitation.

7. Claimant currently has an income of about $1300 per month from various sources.

8. Claimant has permanently separated from employment with defendant.

9. Claimant was a "master mechanic" with defendant when he last worked for defendant.

10. Claimant's job as "master mechanic" was available to him at the time of his separation or retirement from defendant.

11. Claimant did not make a good faith effort to return to work after his work-related injury of March 8, 1984.

12. Claimant's industrial disability is 20 percent.

13. Claimant's stipulated rate of weekly compensation is $248.08.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence that there is a causal connection between his work-related injury of March 8, 1984 and some disability.

Claimant has established by a preponderance of the evidence that as a result of his injury on March 8, 1984, his industrial disability is 20 percent.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay one hundred (100) weeks of permanent partial disability benefits at the stipulated rate of two hundred forty-eight and 08/100 dollars ($248.08) commencing May 2, 1985.

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

That claimant pay the costs of this appeal and transcription of the arbitration hearing.

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

Signed and filed this 21st day of June, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies to:

Mr. David Drake
Attorney at Law
West Towers Office Complex
1200 3rd St., Suite 500
P.O. Box 65355
West Des Moines, Iowa 50265

Mr. Barry Moranville
Attorney at Law
974 73rd Street, Suite 16
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GLADYS E. SMIDT,

Claimant,

vs.

JOSEPH C. WEST, BERT C. HANSON, and H AND W COMPANY, A PARTNERSHIP,

Employer,
Defendant.

FILE NO. 806002

A R B I T R A T I O N

D E C I S I O N

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Gladys E. Smidt, claimant, against Joseph C. West and Bert C. Hanson, partners in a partnership known as H and W Company, employer (hereinafter referred to as West) (the partnership is uninsured), for workers compensation benefits as a result of an alleged injury on January 22, 1985. On March 24, 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: Diane Hanson, Rudolph Baxa, Marvin Oyer and Joseph West. 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. At the time of the alleged injury, an employer-employee relationship existed between claimant and West;

2. Claimant was last employed on January 31, 1985;

3. At the time of the alleged injury, claimant was married and entitled to two exemptions on her tax returns; and,

4. The fees charged and the medical bills submitted by claimant in hearing were fair and reasonable but the issue of their causal connection to any work injury is a disputed issue to be decided herein.

ISSUES

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

I. Whether claimant received an injury arising out of or in the course of employment;

II. Whether there is a causal relationship between the work injury and the claimed disability;

III. The extent of claimant's entitlement to weekly disability benefits;

IV. Claimant's rate of compensation in the event of an award of weekly benefits;

V. The extent of claimant's entitlement to medical benefits under Iowa Code section 85.27; and,

VI. The extent of claimant's entitlement to penalty benefits under Iowa Code section 86.13.

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 she worked at a motel owned by West at the time of the work injury from September, 1983 until January 31, 1985. During this time claimant was a maid assigned to cleaning rooms at the motel. Claimant testified that she normally worked in the morning hours approximately 30 to 35 hours per week at the rate of $3.45 per hour at the time of the alleged injury.

Claimant and her daughter testified that on January 22, 1985, while cleaning rooms, claimant slipped and fell in the parking and sidewalk areas adjacent to the rooms she was cleaning. Claimant said that she struck her entire right side. Claimant said that Joe West, the owner/manager, was out of town at the time and she reported the incident to Rudy Baxa, the person she claimed was placed in charge when West was absent. Claimant testified that she was transported then to the hospital by her daughter. According to hospital records, claimant received

treatment at that time for a contusion to the right shoulder after a fall when she "tripped on a pile of wire at work." X-rays of her shoulder taken at the time revealed no abnormalities and claimant was released with a prescription for medication and orders to return within one week. Claimant was seen by a family physician two more times in early February, 1985, for the right shoulder problem and she was fitted at one time with a shoulder sling. Claimant did not miss work following the accident and continued working with the assistance from her daughter in performing the more physical work at the motel.

Claimant then left the employment of West at the end of January, 1985. Claimant has not returned to work since. Claimant testified that she submitted bills to West and West refused to pay for them. The circumstances of claimant's leaving West's employ eventually became a litigated matter before the Job Service Division of the Iowa Department of Employment Services when claimant applied for unemployment compensation benefits. According to the unemployment compensation hearing officers' decision, claimant contended that she left her employment at West due to unsuitable working conditions. The hearing officer decided that although claimant's working conditions were not ideal, they were not unsafe, unlawful, intolerable or detrimental conditions so as to consider the leaving as involuntary. The hearing officer held that claimant left West's employ due to dissatisfaction with her working environment and labeled the termination as a voluntary quit in denying benefits. This decision was not appealed and became the final agency decision.

Claimant testified that after leaving West's employ she continued to have problems. In April, 1985, she sought treatment from W. J. Wolbrink, M.D., a surgeon. Dr. Wolbrink, in his reports, indicates that claimant complained to him of a sore right shoulder at the time. No specific injury was reported. Claimant testified that she told Dr. Wolbrink of the January, 1985, fall at work. Dr. Wolbrink notes in a report in evidence that although he normally keeps good notes on any reported injury, he could have failed to mention the injury in his office notes. Dr. Wolbrink states that it is possible that claimant's sore right shoulder problems were related to a January, 1985, fall. Dr. Wolbrink treated claimant over the next few months with medication and physical therapy. He states that claimant reached maximum healing of the right shoulder problems on September 30, 1985 and from an examination of claimant at that time opined that claimant had suffered no permanent partial impairment from these problems.

In July, 1985, claimant complained to Dr. Wolbrink of right elbow problems which was diagnosed by Dr. Wolbrink as olecranon bursitis. Dr. Wolbrink does not believe this condition is work related. Claimant injured her hip in a fall in April, 1987, which claimant admits is unrelated to her work injury in this case.

Claimant denies any prior shoulder problems but admits to a prior work injury to her low back which has resulted in permanent partial disability. Claimant has received a settlement from a prior employer as a result of that back injury.

Dr. Wolbrink reports that his office visits with claimant on July 9, 1985, September 30, 1985, October 4, 1985, and October 31, 1985 are not related to the alleged injury of January, 1985.

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.

Claimant has shown by her credible testimony that she has suffered a work injury from a fall at work at the time alleged in her petition. Claimant's testimony is consistent with hospital records at that time.

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, the evidence fails to demonstrate that the work injury was a cause of any period of disability, temporary or permanent. Claimant returned to work and received the assistance of her daughter. However, the fact remains that she did return to work and did not leave work in January, 1985, as a result of her work injury. The decision of the Job Service hearing officer fails to demonstrate any physical complaint or that claimant was physically unable to work due to any work injury or chronic shoulder problems. Claimant's inability to lift or bend at that time was the result of a prior work injury to her back. The opinions of Dr. Wolbrink that claimant has not suffered permanent impairment and that the elbow problems are not work related are uncontroverted. Matters of causal connection and extent of physical impairment are largely a matter of medical expert opinion. Claimant has not been demonstrated to possess any medical knowledge and her views as to the extent of her disability and the causation of that disability cannot be given much weight.

Pursuant to Iowa Code section 85.27, claimant is entitled to either an order directing the defendants to pay reasonable medical expenses for treatment of a work injury or to an order of reimbursement if those expenses have been paid. Krohn v. State, ___ N.W.2d ___ (Iowa 1988), decision filed March 16, 1988.

Although claimant has not shown the injury in this case caused disability, it certainly necessitated medical treatment.

Claimant was credible in giving her testimony of the events leading up to the treatments both in February and April of 1985. Also the views of Dr. Wolbrink that his treatment of the right shoulder is possibly causally connected to the work injury is uncontroverted. Claimant has by the greater weight of evidence shown entitlement to reimbursement for the medical expenses listed in the prehearing report, except for the visits and related treatment referred to by Dr. Wolbrink as not work related. One exception is made for the visit of September 30, 1985. Although Dr. Wolbrink stated that this visit was not work related, on a later occasion he stated that he performed an examination of claimant on September 30, 1985 and found no permanent partial impairment from this examination. Therefore, one half of the charges for that visit will be awarded. All of the medical mileage expenses requested appears reimbursable. They were incurred for transportation to an office visit considered worked related by Dr. Wolbrink. Therefore, excluding the October 4, 1985 and October 31, 1985 visits to the Park Clinic and also excluding the July 9, 1985 x-ray of claimant's elbow, but including one half of the September 30, 1985 Park Clinic charge, the total reimburseable expenses amount to $765.96.

As no weekly benefits were awarded, the issue of rate and penalty benefits under Iowa Code section 86.13 is moot. The provisions of Iowa Code section 86.13 and 85.30 allowing the commissioner to award penalities and interest for delays in payment are only applicable to weekly benefits, not medical expenses. Klein v. Furnas Elec. Co., 384 N.W.2d 370, 375 (Iowa 1986).

FINDINGS OF FACT

1. Claimant was a credible witness.

2. On January 22, 1985, claimant suffered an injury to the right shoulder from a fall at work which arose out of and in the course of her employment with West.

3. It could not be found that the work injury of January 22, 1985, was a cause of temporary or permanent disability from work.

4. As a result of the injury of January 22, 1985, claimant incurred medical expenses listed in the prehearing report except for one half of the Park Clinic charges for September 30, 1985 and the charges for the office calls in the Park Clinic on October 4, 1985 and October 31, 1985 and the x-ray of July 9, 1985.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence entitlement to the medical benefits awarded below.

001610

ORDER

1. Defendants shall pay to claimant the total sum of seven hundred sixty-five and 96/100 dollars ($765.96) for medical expenses as a result of the work injury on January 22, 1985, except that if claimant has not actually paid any of these expenses listed in the prehearing report, defendants shall pay the medical provider directly.

2. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 and specifically those requested by claimant in the prehearing report.

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

Signed and filed this 16 day of June, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Ms. Iris J. Post
Mr. Henry A. Harmon
Attorneys at Law
2222 Grand Ave.
P. O. Box 10434
Des Moines, Iowa 50306

Mr. Kurt John Stoebe
Attorney at Law
P. O. Box 365
Humboldt, Iowa 50548

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DANIEL E. SMITH, Claimant, vs. DOBBS HOUSE, INC., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 838605 A R B I T R A T I O N D E C I S I O N FILED MAY 3 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Daniel E. Smith, claimant, against Dobbs House, Inc., employer, and Liberty Mutual Insurance Company, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained November 24, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner March 8, 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 Robert Kenney; and joint exhibits A through C, inclusive. Claimant's answers to interrogatories were also received into evidence although not marked as an exhibit.

ISSUES

Pursuant to the prehearing report and order submitted and approved March 8, 1988, the following issues are presented for determination:

1. Whether claimant's injury is causally connected to the disability on which he now bases his claim; and

2. The nature and extent of claimant's entitlement, if any, to disability benefits.

FACTS PRESENTED

Claimant sustained an injury which arose out of and in the

course of his employment November 24, 1984 when a safety guardrail broke loose and landed on his left shoulder, neck, and the back of his head. After two weeks, claimant noticed he was feeling a "tingling" in his shoulder and was dropping things with his left hand and therefore sought medical attention for the first time since the injury. Claimant was initially treated with warm compresses, "electricity" and a cortisone injection. He continued to work at his regular job with defendant employer until defendant insurance carrier referred him to Scott B. Neff, D.O., on March 6, 1985, who administered an injection. Claimant explained that none of this treatment provided any lasting benefit and that Dr. Neff eventually "gave up" with no recommendations for further treatment. Claimant testified he contacted the insurance company who told him they would find another doctor. However, two days later claimant presented himself at Mercy Hospital complaining of neck pain and was referred to Robert T. Brown, M.D., who prescribed medications and ran another EMG which was negative. Claimant explained he was eventually referred to the University of Iowa Hospitals and Clinics and that when he later returned to see Dr. Neff, Dr. Neff again had no offer of additional treatment.

Claimant explained that after the first time he was released to return to work by Dr. Neff, he did return as instructed. He described the job to which he returned as having lesser physical requirements than the job he held at the time of his injury, but that it required him to lift and work overhead. Claimant stated he was taken off the job a second time by a representative of defendant insurance carrier and that he did not return to work after this period of unemployment because of a dispute with the employer over whether he quit or was discharged. Claimant is currently employed in a maintenance position with Villa of Patricia Park earning approximately $5.50 per hour. Claimant testified that he was earning $6.35 per hour with defendant employer at the time of his injury and $5.15 per hour when he left work on the second occasion. Claimant explained that he had previously worked for Villa of Patricia Park on a part-time basis as a painter but that he had to give that up because of the requirement that he work over head.

Claimant testified that his current symptoms are not unlike those he has had all along: He has pain on the top of his shoulder, down into his arm and up across his neck which swells on the left side when he attempts heavy lifing or overhead work; he has numbness in his left shoulder and sometimes in the tips of his fingers on the left hand; and pain at the "trigger point" area of his back between the shoulder blades. Claimant testified that he is neither currently under any medical care nor that he has any medical appointments for further care.

Robert Kenney, general manager for Dobbs Unit 716, testified claimant was offered two positions subsequent to his injury, but

because the jobs involved evening hours and claimant had been working days, claimant rejected each one as the hours interfered with his other job.

On December 21, 1984, claimant, on referral from the Dietz Clinic, came under the care of Joshua Kimelman, D.O., of Orthopedic Associates, P.C. Dr. Kimelman noted claimant had essentially full, "excellent" range of motion of the left arm without evidence of atrophy and that the x-ray of the left shoulder was within normal limits. Dr. Kimelman ruled out rotator cuff tear and the arthrogram performed was negative. Dr. Kimelman gave claimant a 1:1:1/2 injection in the left A/C joint, noting relief from discomfort on January 23, 1985. Approximately one month later Dr. Kimelman noted claimant was no longer getting the tingling and numbness that was previously the subject of complaint. Claimant discontinued treatment with Dr. Kimelman in March 1985 when he was referred to Scott B. Neff, D.O., by defendant insurance carrier.

Claimant was first seen by Dr. Neff March 6, 1985 who, after examination and injection to the subacromial bursa, concluded:

> In summary, I feel that this patient has two problems. I feel he has had a muscle contusion to the posterior aspect of his left shoulder and neck, secondary to his injury. This is the result of the muscle spasm and trigger point tenderness, and this should be treated with trigger point injections, physical therapy, and conservative treatment. He does have impingement syndrome, and the left subacromial bursa and coracoacromial ligament area, but this is not his area of primary complaints.
>
> I would like him to remain off work for a period of ten days and I would like to re-evaluate him again....The scapular syndrome is a situation with which I am sure you are familiar. It is frustrating to treat, and can result in a pain/spasm/pain frustrating vicious cycle. It is generally associated with underlying stress, or can be made worse with stress, and is called the "cerviocothoracic tension state" by many authorities. It is generally not a disabling condition, and it is generally not permanent.

(Joint Exhibit A, part 5, page 1)

EMG studies done April 10, 1985 were interpreted as totally normal and claimant was released to return to work on May 8, 1985 with Dr. Neff stating: "I do not believe there are any significant abnormalities with reference to this patient, and I see no reason to restrict him from work activity at this time."

(Jt. Ex. A, pt. 5, p. 3) When claimant was again seen on July 1, 1985, Dr. Neff appears not to doubt claimant's subjective symptoms of pain but admits "I don't have anything to offer him, and don't have any idea why his neck is puffing up...." (Jt. Ex. A, pt. 5, p. 4) However, because of persistence of the symptoms, Dr. Neff made arrangements for claimant to be seen at the University of Iowa neurosurgery and the department of physical medicine. In October 1986, Dr. Neff noted claimant stated nothing had changed in his condition and the functional capacity evaluation, conducted in association with Thomas Bower, L.P.T., a physical therapy consultant, resulted in an impairment rating of one percent to the upper left extremity based on "a very slight loss of abduction of approximately 15 degress."

On July 15, 1985, claimant was evaluated by Thomas B. Summers, M.D., who concluded:

> I find no evidence of serious injury or residuals of injuy in the case of Mr. Smith. Certainly, there is no evidence of neurologic deficit or orthopedic deficit on examination at this time. I am inclined to feel that the functional element here is sizeable in degree and contributing to the symptomatology in whole or in large part.
>
> Copies of reports submitted by other examiners concerned with care and treatment of Mr. Smith in the recent past are reviewed at length and noted. Appropriate diagnostic studies have been carried out, including arthrography and electromyography.
>
> I see no reason for any further studies or treatment in the case of Mr. Smith at this time. It is my feeling that he is capable of regular and gainful employment and without restriction, if he can be so motivated.

(Jt. Ex. A, pt. 8, pp. 3-4)

Claimant was seen in the neurosurgery outpatient clinic of the University of Iowa Hospitals and Clinics on July 28, 1986 and was evaluated by David W. Beck, M.D., assistant professor of neurosurgery. Dr. Beck found claimant to be well muscled with no evidence of atrophy; that his rhomboid, supraspinatus, and infraspinatus muscles were within normal strength; that his entire motor examination was normal; that sensory examination revealed a subjective decreased pin sensation to the left side of the neck; and that he had full range of motion of the cervical spine. Dr. Beck also reported that cervical spine x-rays were obtained and were unremarkable. Dr. Beck, in a report dated July 29, 1986, concluded:

It is my impression that Mr. Smith probably had a soft tissue injury to the left side of his neck. It is curious that he has this numb feeling which would really be in the distribution of either C2 or cutaneous nerve. Because of the lack of any muscle atrophy, I doubt if he has injured any of his brachial plexus.

I have nothing really to offer Mr. Smith. I know he has been on TENS units and anti-inflammatory medications without much relief. I do think he does not have a significant brachial plexus injury or herniated disk, and therefore I am left with the diagnosis of soft tissue injury.

(Jt. Ex. A, pt. 11, p. 2)

Thomas A. Carlstrom, M.D., neurological surgeon, evaluated claimant November 19, 1987 and found claimant to have a good range of motion of his neck and shoulder with no atrophy of the muscles although he stated there was tenderness diffusely over the shoulder and scapula. On neurological examination, Dr. Carlstrom noted no abnormalities except subjectively diminished sensation over the apex of his shoulder. On December 1, 1987, Dr. Carlstrom stated: "I think this patient experienced a myofascial injury at the time of his altercation with the guardrail in 1984. I see no evidence for a permanent impairment at the present time." (Jt. Ex. A, pt. 13, p. 1) Approximately one month later, Dr. Carlstrom explained to claimant's counsel:

Yes, I do believe that there is pain associated with a myofascial injury; that really is the only symptom that we can associate with it, in fact. The length of time into the future that this patient will experience these symptoms is probably related to his physical activity. If he continues to do heavy work, he can expect to experience remissions and exacerbations more or less permanently. However, I believe it is more likely that over the years, his symptoms will gradually resolve completely.

The last physician to see claimant was Jerome G. Bashara, M.D., orthopedic surgeon, who conducted an evaluation and examination on February 19, 1988. Dr. Bashara found the motion of claimant's cervical spine to be restricted and a full range of motion of the left shoulder of approximately 10 to 15 degrees of full abduction lacking. Dr. Bashara appeared to have reviewed previous x-rays and test results and concluded:

DIAGNOSES: 1. Myofascial strain, cervical spine, related to his injury; and

2. Soft tissue injury to the left shoulder, specifically the supraspinatus and ratator cuff muscle group.

I would give the patient a 2% permanent partial physical impairment rating of his left upper extremity related to the shoulder diagnosis.

I would give the patient a 3% permanent partial physical impairment of his body as a whole related to the myofascial strain of the cervical spine.

(Jt. Ex. A, pt. 14, p. 4)

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 November 24, 1984 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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 Barick Cattle Company, 240 Iowa 1174, 38 N.W.2d 161 (1949).

Iowa Code section 85.33(1) provides:

> Except as provided in subsection 2 of this section, the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code section 85.34(2) provides, in part:

> Compensation for permanent partial disability shall begin at the termination of the healing period.... For all cases of permanent partial disability compensation shall be paid as follows:
>
> ....
>
> (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.

ANALYSIS

The parties have stipulated that claimant sustained an injury which arose out of and in the course of his employment and that the extent of claimant's entitlement to weekly compensation or temporary total disability/healing period benefits, if any, is March 16, 1985 through April 1, 1985 and May 13, 1985 through June 16, 1985. What is first at issue is whether the disability on which claimant now bases his claim is causally connected to the work injury.

As stated above, the question of causal connection is essentially within the domain of expert testimony, although the expert testimony must be considered with all other evidence presented. Initially, it is accepted claimant was asymptomatic of shoulder and neck pain prior to the work injury of November 24, 1984. The physicians from whom claimant received treatment and by whom claimant was evaluated agree that the reason for claimant's need of medical assistance in the first place and his absences from work for the above mentioned periods was the work injury of November 24, 1984. Claimant has, therefore, met his burden of establishing a causal connection between the work injury and any resulting disability.

Generally, a claim of permanent disability invokes an initial determination of whether the work injury is the cause of a permanent physical impairment or any permanent limitations in his work activity. By the very meaning of the phrase, a person with a permanent impairment can never return to the same physical condition he or she was in prior to the injury. See, e.g., Armstrong Tire & Rubber Company v. Kubli, 312 N.W.2d 60 (Iowa 1981) and 2 A. Larson, The Law of Workmen's Compensation, § 67.12. Claimant testified he continues to experience pain in his shoulder, down into his arm, and up across his neck which is aggravated by "heavy" lifting or overhead work, pain which he did not have and work which he could do prior to his injury. Both Dr. Neff, who treated claimant, and Dr. Bashara, who evaluated him, find claimant to have some permanent impairment as a result of the work injury. Although Dr. Carlstrom saw no evidence of a permanent impairment at the time of his examination of claimant, he admits that if claimant continues to do heavy work, claimant can expect to experience remissions and exacerbations more or less permanently. It is, therefore, accepted claimant has established that the work injury is the cause of a permanent impairment. This finding thus gives rise to the issue of whether claimant's disability is to the upper extremity or extends to the body as a whole. Based upon the situs of the injury (claimant testified the guardrail struck him on the shoulder, neck and back of the head) as well claimant's objective symptoms of pain beyond the upper extremity, it is found claimant sustained, under Alm, an injury to the body as a whole. See also Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Reports 281 (Appeal Decision 1982). In Alm, claimant had a rating of 25-30 percent impairment to the arm and the court, noting the anatomical location of the injury extended from the arm into the shoulder, ruled that the injury was not restricted to a schedule, thus, by law, an injury to the shoulder which produces permanent impairment entitles the claimant to an industrial disability. See also Lauhoff Grain Company 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).

Dr. Neff, along with Thomas Bower, L.P.T., found claimant to have a one percent impairment to the upper left extremity. Dr. Bashara found claimant to have a two percent impairment to the upper left extremity and a three percent impairment to the body as a whole.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

A finding of impairment to the body as a whole by a medical evaluator does not equate to industrial disability. This is so as impairment and disability are not synonymous. The degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the later to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally 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 30 years old with a tenth grade education as an average student. He worked for seven years as a gas station attendant and mechanic where he rebuilt carburators, did tuneups, oil changes, automobile electrical work and where he was able to use the "high-tech" equipment provided by the Amoco Company. Claimant has also rebuilt small engines such as those found in lawnmowers, rototillers and go-carts and also has worked as a laborer, truck and equipment operator and truck foreman for an asphalt company. It is interesting to note that none of the health care providers who saw or treated claimant have placed any restrictions on claimant's employability. Although testifying he could no longer do the "heavy" lifting required of an asphalt laborer, claimant did not indicate he could no longer do any of these other types of jobs. Claimant continued to work for defendant employer in his regular job after his injury and after his return to work lifted as much as 55 pounds. Claimant is currently employed in a maintenance position for Villa of Patricia Park earning approximately $5.50 per hour. He was earning approximately $6.35 per hour with defendant employer at the time of his injury. It is unclear from the testimony exactly why claimant did not return to work for defendant employer when work was offered. If claimant did not want to work nights because it interfered with his other employment, defendants clearly cannot be held liable for any asserted loss of earnings when the reason for claimant's failure to return to work was not related to his injury. While claimant also maintains he was not capable of doing the work, he was under no medical restrictions which would have kept him therefrom. Because claimant now has difficulty with lifting that he once did with relative ease as well as problems with overhead work which were not problems before the injury, it is accepted claimant's capacity to earn has been hampered as a result of the work injury. Considering then all the elements of industrial disability in light of the medical evidence as well as the testimony, it is found claimant sustained a permanent partial disability of three percent for industrial purposes. As indicated above, and pursuant to Iowa Code section 85.33, claimant is entitled to healing period benefits for the stipulated periods of March 16, 1985 through April 1, 1985, inclusive, and May 13, 1985 through June 16, 1985, inclusive.

FINDINGS OF FACT

Wherefore, based on all of the evidence presented, the

following facts are found:

1. Claimant sustained an injury which arose out of and in the course of his employment on November 24, 1984 when a guardrail struck him on the left shoulder, neck and back of the head.

2. During the next two weeks following his injury claimant felt a "tingling" in his left shoulder and was dropping things with his left hand and therefore sought medical attention.

3. Claimant has a permanent impairment as a result of the work injury.

4. Claimant perceives persistent pain in his arm, across his shoulder, into his neck which increases with heavy lifting and overhead work.

5. Claimant is currently employed in a position which does not require either heavy lifting or overhead work.

6. Claimant is 30 years old with a tenth grade education as an average student.

7. Claimant has work experience for which he is still qualified notwithstanding his injury.

8. Claimant is currently under no medical restrictions, no medical care and has no appointments for medical care.

9. Claimant's capacity to earn has been hampered as a result of the work injury.

10. Claimant has sustained a permanent partial disability to the body as a whole as a result of the work injury.

11. Claimant has a three percent industrial disability as a result of his injury.

CONCLUSIONS OF LAW

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

1. Claimant has established his injury is the cause of the 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 establishing an industrial disability of three percent as a result of the injury which arose out of and in the course of his employment on November 24, 1984.

ORDER

THEREFORE, IT IS ORDERED:

That defendants shall pay to claimant seven point four two nine (7.429) weeks of healing period benefits for the stipulated periods from March 16, 1985 through April 1, 1985, inclusive, and May 13, 1985 through June 16, 1985, inclusive, at the stipulated rate of one hundred fifty-seven and 79/100 dollars ($157.79) per week.

That defendants shall pay to claimant fifteen (15) weeks of permanent partial disability benefits at the stipulated rate of one hundred fifty-seven and 79/100 dollars ($157.79) per week commencing June 17, 1985.

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

That payments that have accrued shall be paid in a lump sum together with statutory interest thereon pursuant to Iowa Code section 85.30.

That a claim activity report shall be filed upon payment of this award.

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

Signed and filed this 2nd day of May, 1988.

Deborah A. Dubik
DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. Fredd J. Haas
Attorney at Law
5001 S.W. Ninth Street
Des Moines, Iowa 50315

Mr. W. C. Hoffmann
Attorney at Law
1000 Des Moines Building
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEVIN SPENCE,

Claimant,

vs.

GRIFFIN WHEEL COMPANY,

Employer,
Self-Insured,
Defendant.

FILE NO. 667226

R E V I E W -

R E O P E N I N G

D E C I S I O N

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Kevin Spence, claimant, against Griffin Wheel Company, employer (hereinafter referred to as Griffin), for workers' compensation benefits as a result of an injury on April 10, 1981. A prior approved Iowa Code section 86.13 settlement for this injury was executed by the parties on March 26, 1984. On March 1, 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: Jerome Neyens, Allen C. Vikdal and Rose Harmon. The exhibits received into the evidence at the hearing are listed in the prehearing report. Official notice was taken of the prior settlement papers. According to the settlement papers, claimant was paid a total of 85 weeks for permanent partial disability to the left foot which would be equivalent to a 57 percent loss of use of that foot.

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 $198.53 per week.

2. Claimant had been paid 85 weeks of compensation at the rate of $198.53 per week prior to the hearing pursuant to the agreement of settlement.

ISSUES

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

I. Whether claimant has experienced a change of condition since the last agreement for settlement; 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 testified that at the time of the work injury, he was employed at Griffin as a utility man in the foundry department in defendant's manufacturing plant in Keokuk, Iowa. Griffin manufactures wheels for railroad cars. On the date of injury, claimant said that his foot became entangled in a conveyor mechanism resulting in amputation of all of the toes of his left foot. Treatment consisted of several surgeries and skin grafts. To date, claimant has not returned to work inside the Griffin plant. Since September, 1983, claimant has returned to work at Griffin as a security guard. This job involves more than just security work. Claimant acts as a receptionist, answers phone calls, delivers mail to offices both inside and outside of the plant building and runs errands along with other various clerical duties. Claimant is currently being paid $10.11 per hour for this work. His hourly rate at the time of the work injury was $8.45 per hour. However, claimant testified that he no longer is eligible for overtime work which he states amounted to 16 hours per day as a utility man and also included weekend work at double time rate. Claimant said that he worked 50 to 60 hours per week before the work injury herein.

Claimant testified that since the 1984 settlement, the skin irritation problems he experienced on his skin grafts at the top of his left foot are not improving despite several attempts to find suitable shoes to prevent the problem. He now can only wear tennis shoes. Lesions break out in the effected areas causing soreness which in turn causes his gait to be worsened which has already been modified because of the loss of his toes. Claimant testified that he has now developed back problems due to this worsened gait. Claimant admits to fatigue and tireness at the time of the last settlement in his back, but not to the

type of pain he has today. Claimant described a chain of events starting with skin problems leading to gait problems eventually leading to back pain and disability.

Claimant said that his back pain gets worse during the latter part of his average work day. Claimant further states as a result of his back problems he cannot shovel snow, scoop gravel, rake leaves or carry heavy objects such as small children as he once did prior to the 1981 injury. Claimant said that he can no longer perform farm work or go hunting as before. Claimant complains of pain upon repetitive bending and lifting. In his job, claimant complains of back pain from prolonged sitting and walking. At the time of the March, 1984 settlement, claimant's physicians had not opined that claimant had suffered any permanent impairment from his back fatigue at that time.

Claimant denies any prior back problems or injuries before 1981. Claimant was involved in an auto accident in 1985 in which his car was "rear ended" totally demolishing his car. Claimant was treated at a local hospital for severe neck and mid back strain. There were some complaints involving the low back as well. However, the majority of the complaints and the primary diagnosis was neck strain or sprain.

Claimant has been treated and evaluated by two physicians for his back problems since March of 1984. Claimant has reported back complaints to Charles F. Eddingfield, M.D., a board certified surgeon, who opines that claimant does have some degree of permanent partial impairment due to his gait problem. Claimant also has consulted Donald MacKenzie, M.D., an orthopedic surgeon. Dr. MacKenzie likewise believes that claimant's back problems are caused by his gait which in turn was aggravated by the skin problems in the grafted areas of his left foot. Dr. MacKenzie prescribed Williams exercises for claimant's back problems and opines that the back problems can be kept at a minimum if claimant performs these exercises. However, Dr. MacKenzie in his deposition testimony opined that claimant will still have a five percent permanent partial impairment due to his back problems caused by the original work injury of 1981.

Claimant has also been seen since the settlement by John Havey, M.D., another orthopedic surgeon. Dr. Havey reports that he has nothing in his notes of examination about claimant's back problems. Claimant has also been examined by a neurosurgeon, O. Gerald Orth, M.D. Dr. Orth agrees with the treatment recommendations of Dr. MacKenzie with reference to claimant's back problems.

Claimant also claims to have developed psychological problems. Claimant testified that he became extremely fearful of further injury when he enters the plant for short periods of time in his current job to run errands and deliver the mail. Claimant has

been examined by two clinical psychologists, Craig Rypma, Ph.D., and Todd Heinz, Ph.D. Dr. Rypma examined claimant on several occasions for a period of several weeks. He opines that claimant has permanent mental injuries stemming from the injury. The psychologist explains that claimant is not handling his disability weil and reacts adversely when he is forced to confront his disability in daily life situations. Also, he has considerable anxiety and fear of reinjury which is experienced while he is physically within a manufacturing plant resembling the plant at Griffin. Due to these two factors, Dr. Rypma states that claimant should be treated to improve his life style but that such treatment will not result in a return to a manufacturing environment. Dr. Rypma's qualifications and background are excellent and he was formerly a consultant to the United States Senate Labor and Human Resources Committee.

Dr. Heinz, whose background is unknown, reports from his single examination that he did not find any permanent psychological problems from his interview and testing of claimant. He indicated that claimant was happy in his present job and states that claimant reports that he is not "consumed by anxiety."

Claimant testified that his past employments consist solely of nine and a half years as a heavy manual laborer at Griffin Foundry performing such duties as draw furnace operation, moving molds, pouring moulton steel into molds, baking, spraying, split and set gaskets over molds and cleaning of molds.

All of claimant's treating physicians have restricted claimant to working in a clean environment to avoid problems with infections in his skin graft irritations. They also recommend that he not return to the foundry and seek an occupational change to sedentary employment. They also recommend that claimant avoid temperature extremes. Claimant states that due to his back problems he cannot perform heavy lifting or repetitive lifting or bending or stooping; or prolonged sitting or walking.

Claimant stated at the hearing that he is 29 years of age, married and has a high school education. Claimant has not attempted any further training beyond high school. According to Marian Jacobs, a vocational consultant, tests given by her indicate that claimant has potential for formal education beyond high school. Jacobs states in her report that absent such retraining, claimant's work options are limited to "controlled work settings with controlled work duties." This is due both to claimant's physical and psychological factors. Jacobs indicates claimant's potential jobs outside of his current employment at Griffin as night clerk, office clerk, receptionist and watchman with pay ranging from $4.00 to $5.10 per hour. Claimant is currently making $9.91 per hour. After retraining, Jacobs opines that claimant can be expected to earn from $5.71 per hour to $9.00 per hour. She would also expect claimant to lose

fringe benefits and opportunities for advancement if he cannot secure employment in a union or government work setting.

A vocational assessment of claimant's situation has also been made by Allen C. Vikdal. Vikdal recommends suitable alternative employment for claimant to accomplish this retraining. Vikdal reports that claimant did not mention to him any psychological barriers to employment.

Claimant testified that he enjoys his job at Griffin but states that he has been told that it is only temporary. Claimant feels rather insecure in his present position and is unaware of his status with reference to union protection. According to the personnel safety director, Rose Harmon, claimant's old job as a utility man now pays $11.63 per hour. She states that claimant has been informed of several job openings in the plant such as crane operator, forklift operator, material handler, gasket setter, sand mixer and recorder. Harmon admits that all but the recorder job is physically located in the plant which is a dirty environment. She states that the recorder job requires little physical effort and very little walking and is located in an office separate from the plant. She states that the office has a controlled environment. The recorder job pays $10.14 per hour. She states that claimant has failed to apply for any of these positions when he was notified of the openings and that they have hired people from the outside to fill some of these openings. In cross-examination she admitted that claimant has not actually been offered any of these jobs and would still have to compete with others should he apply. Harmon also testified that claimant's current job is not under the union contract and that she did not know if claimant could bump back into the plant should his current job be abolished. In rebuttal testimony claimant said that he is not physically able to perform the plant jobs described by Harmon and that the recorder job was in a dirty location, not a union job and not located outside of the plant environment.

Claimant's appearance and demeanor at the hearing indicated that he was testifying truthfully.

APPLICABLE LAW AND ANALYSIS

I. 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 the original injury, subsequent to the date of the award or agreement for compensation under review, which entitles him to additional compensation. Deaver v. Armstrong Rubber 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 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 established a permanent worsening of his condition and more importantly an extension of the injury into the body as a whole. The chronic skin graft irritations have not improved which has worsened his gait since the March, 1984 settlement which has now led to chronic back problems and further impairments. The views of Dr. MacKenzie and Dr. Eddingfield which substantiate a permanent partial low back impairment are uncontroverted. Critical to claimant's case was his credibility. From his demeanor, claimant is found to be credible. Although claimant certainly had a serious auto accident in 1985, his complaints in this proceeding are to the lower back which do not appear to be a major component of the 1985 accident.

Claimant has also demonstrated a permanent mental impairment resulting from his inability to return to any manufacturing job in a plant similar to the plant at Griffin. The views of Dr. Rypma are given more weight in this proceeding then those of Dr. Heinz due to his excellent background and longer and more extensive clinical contact with claimant. Claimant's attorney is correct when he agrues in his brief that the recent agency case of Pilcher v. Penick & Ford, Appeal Decision of the Industrial Commissioner filed October 21, 1987, is not applicable. That case appeared to deny additional permanent partial disability benefits for a psychological injury arising out of a scheduled member case. However, by virture of claimant's back difficulties, claimant has demonstrated a body as a whole impairment without resort to any mental impairment claim.

Therefore, claimant has shown that he has a five percent permanent partial impairment to the body as a whole as a result of the injury of April 10, 1981 caused by his chronic back difficulties and additional permanent mental impairment which is not treatable. Neither of these impairments existed at the time of the March, 1984 settlement.

II. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As the claimant has shown that the work injury was a cause of a permanent physical impairment or limitation upon activity involving the body as a whole, the degree of permanent disability must be measured pursuant to Iowa Code section 85.34(2)(u). However, unlike scheduled member disabilities, the degree of disability under this provision is not measured solely by the extent of a functional impairment or loss of use of a body member. A disability to the body as a whole or an "industrial disability" is a loss of earning capacity

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

As a result of his foot and back impairments, claimant is not able to fully perform physical tasks involving heavy lifting; repetitive lifting; bending; twisting and stooping; or prolonged walking and sitting. Claimant is not able to work in a dirty environment which severely restricts the number of available manufacturing jobs he can perform even in the light duty status. Claimant emotionally is unable to return to work in a manufacturing plant such as Griffin due to the problems described by Dr. Rypma. As a result, claimant is unable to perform the work to which he is best suited and most experienced in, that is heavy manual labor in a manufacturing environment.

Claimant is currently working but his testimony that the current work is temporary is uncontroverted. Claimant is earning a substantial hourly rate but this is still less than the rate for the job he was performing at the time of the work injury. Also, claimant is unable to work overtime as before which substantially reduces his yearly income. In any event, regardless of his current earnings, the concept of industrial disability involves a loss of earning capacity, not only a loss of actual earnings. See Michael v. Harrison County, Thirty-Fourth Biennial Report of the Iowa Industrial Commissioner 218, 220 (1979). Therefore, claimant's admirable efforts to remain employed at Griffin despite continuing problems with his foot and now his back should not be rewarded by failing to adequately compensate him for his substantial disability.

Defendant attempted to point to jobs which claimant could have applied for which would stablize his current position. However, claimant credibly testified that he was not physically able to perform many of these jobs. Also, all of the jobs would

involve working in the foundry which is clearly not a clean environment. With reference to the recorder job, defendant has not shown that any particular job was offered to him. Also, the recorder job, even if it were suitable to claimant physically, it is still located within the plant and claimant would experience the difficulties as described by Dr. Rypma.

Claimant is relatively young, 29 years of age and at least has a high school education. All of the vocational rehabilitation counselors agree that claimant is retrainable. However, he has no history of educational pursuits beyond high school. The future success of any pursuit by claimant of higher education and its impact on his earning capacity is much too speculative at this time to effect the current determination of his industrial disability. See Stewart v. Crouse Cartage Co., appeal decision filed February 20, 1987.

Claimant's current employment is therefore not suitable physically or emotionally. Also, the stability of such employment has not been established. Claimant has been told that this employment is temporary and there is apparently some question in claimant's mind and in the mind of management that the union will protect him in the event claimant loses his current guard job. Vocational consultants agree that claimant's employment possibilities outside of Griffin absent retraining are limited. Jacobs opines that the potential earnings drop would be from 49 to 60 percent if he were lucky enough to find suitable employment. Certainly it would be difficult for claimant to find any suitable employment given the type of disability he must bare.

After examination of all the factors, it is found as a matter of fact that claimant has suffered a 65 percent loss of his earning capacity from his work injury. Based upon such a finding, claimant is entitled as a matter of law to 325 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 65 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 already been paid 85 weeks pursuant to the prior settlement agreement, claimant is entitled to an order directing defendant to pay an additional 240 weeks from the date of the last payment of permanent partial disability benefits pursuant to the prior settlement.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. The work injury of April 10, 1981 is a cause of a five percent permanent partial impairment to the body as a whole as a result of chronic low back difficulties and of permanent restrictions upon claimant's physical activity consisting of no heavy lifting; no repetitive lifting; bending; twisting or stooping; or, no

prolonged sitting or standing. The back difficulties resulted from a worsened gait since March, 1984 caused by failure of claimant's skin graft irritations on the left foot to improve. The work injury of April 10, 1981, is also a cause of a permanent mental impairment restricting claimant from work activity in a manufacturing environment similar to the environment at Griffin and to work which involves only minimum contact with other workers and with superiors. None of these permanent impairments existed at the time of the compromise settlement in March, 1984. Prior to that time, claimant's impairment as a result of the work injury was limited to a percentage loss of use of the left foot due to a partial amputation.

3. The work injury of April 10, 1981, and the resulting permanent partial impairment and work restrictions is a cause of a 65 percent loss of earning capacity. Claimant is currently working but such work is unsuitable and unstable. Claimant will suffer 49 to 60 percent loss in actual earnings outside of his current employment. Claimant is 29 years of age and has a high school education. Claimant's only work history has been in heavy foundry work. Claimant has not attempted formal education beyond high school although educational testing reveals that he has an aptitude for such schooling. Absence retraining, claimant is only able to secure employment in limited work settings involving sedentary, clerical or similar work in a clean and temperature controlled environment.

CONCLUSIONS OF LAW

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

ORDER

1. Defendant shall pay to claimant two hundred forty (240) weeks of additional permanent partial disability benefits at the rate of one hundred ninety-eight and 53/100 dollars ($198.53) per week from the date of the last payment of permanent partial disability benefits under the Iowa Code section 86.13 settlement entered into by the parties on March 26, 1984.

2. Defendant shall pay accrued weekly benefits in a lump sum.

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

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

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

Signed and filed this 10th day of May, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. James P. Hoffman
Attorney at Law
Middle Road
Keokuk, Iowa 52632-1066

Mr. J. Patrick Wheeler
Attorney at Law
314 North Eleventh St.
P. O. Box 248
Canton, Missouri 63435

Mr. John E. Kultala
Attorney at Law
511 Blondeau Street
Keokuk, Iowa 52632

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEORGE J. STANCEL,

Claimant,

vs.

PENICK & FORD, LTD.,

Employer,

and

THE HARTFORD and NATIONAL UNION FIRE INSURANCE COMPANY,

Insurance Carriers,
Defendants.

File Nos. 757632/780141

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals and defendants cross-appeal from an arbitration decision awarding medical costs and medical mileage; temporary total disability benefits; and permanent partial disability benefits based on disability of five percent. The award was apportioned to two injuries with one-third being attributed to the February 15, 1984 injury and two-thirds being attributed to the October 6, 1984 injury. The cross-appeal was made by the employer and the insurance carrier who was the insurer at the time of the second injury date.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 and 9 through 13; joint exhibits 2 through 8; and defendants' exhibits A, B, D through M, and 0 through S. Both appealing parties filed briefs on appeal.

ISSUES

The issues on appeal are: whether claimant received an injury on October 6, 1984 that arose out of and in the course of his employment; whether there is a causal relationship between claimant's disability and the alleged injury on October 6, 1984; the nature and extent of benefits; and rate of compensation.

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects

the pertinent evidence and it will not be totally reiterated herein.

On February 15, 1984 claimant fell from the top of a railroad car to a concrete surface at work. He reported that he experienced back, hip and shoulder pain and was hospitalized for three days. William R. Basler, M.D., treated claimant and in a note dated February 17, 1984 his impression was multiple contusions and abrasions, deep puncture wound of the left tibia, and thoracic and lumbar contusions and sprain. Claimant was released to return to work March 5, 1984. Although he experienced sharp, intermittent right back and hip pain while doing certain work activities during the summer of 1984, he did not visit a physician again until October 8, 1984.

On October 6, 1984 claimant experienced back pain and hip pain while moving one hundred pound sacks of cornstarch with a coworker. Claimant worked the following day but sought medical care with Dr. Basler on October 8, 1984 and a note of Dr. Basler on that date stated: "pain in rt hip-esp bad last couple days & weakness down in rt thigh trouble lifting - ? [sic] related to fall in Febr. Trouble lifting with pain in the (R) hip posteriorly-- 2 Lam. in past - L4 - (L) side. Lifting 100 lb sacks - above onset Sat. worse yesterday....Above due to 100 lb sacks not due to accident 6 mo ago." In another note dated December 11, 1984 the doctor reported that claimant had had pain off and on all summer but failed to see the doctor.

Claimant was seen by James W. Turner, M.D., on October 10, 1984 and Dr. Turner prescribed Motrin, an anti-inflammatory medication. After rechecking claimant on January 2, 1985, Dr. Turner thought claimant could return to work in about one week on a restricted basis if such work was available. No limited duty work with defendant was available. Dr. Basler pronounced claimant able to resume work as of March 15, 1985 (Exhibit H). Claimant returned to work on March 18, 1985 and worked the following day. He then sought treatment for gastrointestinal problems and was under the care of Julius Pietrzak, M.D., from March 21 through March 29, 1985 and under the care of Robert A. Silber, M.D., from March 29 through June 26, 1985. (Joint Ex. 3, page 20)

In a letter dated October 22, 1985 Dr. Turner reported that claimant had two prior laminectomies, one in 1968 and one in 1970, and that his x-rays of October 1984 showed rather significant degenerative changes of the lumbar spine of rather long standing duration. He felt that claimant's symptoms were an aggravation of his underlying condition that would probably return to the pre-injury status if allowed sufficiently to do so. He also expressed the opinion that claimant should not be participating in unlimited bending and lifting activities and that there should be some restrictions on the degree of work.

Claimant began to develop gastrointestinal problems including vomiting in February 1985 for which Dr. Silber, a gastroenterologist, treated him. Claimant's condition was diagnosed as severe esophagitis with ulcers and narrowing with medium size hiatal hernia and shallow, duodenal bulb ulcerations. The hiatal hernia was originally diagnosed in 1976. Dr. Silber removed claimant from the Motrin and all other medications but for Reglan which the doctor prescribed. In a letter of April 15, 1985, Dr. Silber indicated that he could not say with certainty the cause of claimant's upper G.I. tract disease stating that his hiatal hernia placed him at some risk of having esophagitis, but that the nonsteroidal anti-inflammatory medications which claimant had taken, of which Motrin is one, can cause upper G.I. tract disease such as esophagitis. Claimant had been off work for the esophagitis from March 29, 1985 through June 26, 1985. Dr. Silber released him to return to work on June 27, 1985.

On July 1, 1985 claimant was hospitalized at St. Luke's Hospital under treatment of Robert W. Shultice, M.D., a psychiatrist for unipolar affective disorder, depression. Claimant testified at the artitration hearing:

> The Deputy Industrial Commissioner: Maybe I should explain better.
>
> I'm going to permit you to tell us how you felt and why you thought you felt that way when you were hospitalized.
>
> A. I was off work quite a while. Probably worried too much. I don't know. Maybe I wasn't treated right by the company too.
>
> Q. Anything else, George, that you feel -- or any other feeling that you had that you could relate?
>
> A. I don't think so. Not that I can think of.

(Transcript, p. 34)

Medical records indicate that claimant was twice previously hospitalized at the Veteran's Administration Hospital in Iowa City for affective disorder with admissions on December 4, 1974 and June 10, 1980. Claimant was treated with anti-depressant medication following his 1980 discharge and was seen at the Veteran's Administration Hospital on an outpatient basis throughout 1981, 1982 and 1983 for medication checkups and renewals. In a discharge summary of July 7, 1985, Dr. Schultice characterized claimant's 1985 condition as a recurrent, unipolar affective disorder. Claimant returned to work at Penick & Ford on July 8, 1985 and has continued to work.

On a note dated December 30, 1985 Dr. Turner reported:

Summary of discussion with attorney in Des Moines. Attorney for one of apparent two Insurance companies called.

Explained that it is my opinion that the patient's back problems for which I saw him for resulted from the alleged fall occurring in the Spring of 1984. I have no documentation of subsequent injury in the Fall of 1984. I feel that the nature of the injury is one of aggravation of underlying changes resulting from degenerative disc disease and two previous operations and based on an overall opinion from the last time that I had seen the patient and from Dr. Robb's notes in April, the patient would carry a 25 to 30% permanent parti [sic] impairment rating which had not been applied previously but that only 5% or so of this could be counted as aggravation from the recent injury. It is my understanding that the patient has now returned to work. I believe this substantiates my opinion.

(Ex. 5)

In a letter dated January 15, 1986, Dr. Basler stated:

I have reviewed pages 47 through 72 and 100 through 121 of the transcript of Mr. Stancel's alleged deposition, as well as my records concerning Mr. Stancel, and have come to the following conclusion concerning Mr. Stancel's right hip and right leg symptoms after October 8, 1984. I believe that his fall off the railroad car on February 15, 1984 aggravated a back previously weakened by two laminectomies and degenerative changes.

After careful study of the alleged deposition by Mr. Stancel under oath, I am unable to render an opinion as to which insurance company should be responsible for his care.

(Ex. A)

Claimant's hourly rate of wage was $10.61 per hour to July 30, 1984 and was $11.09 per hour thereafter. The last pay period he was paid in October was the period ending October 7, 1984 and he worked 63 hours that period. Claimant was paid on a bi-weekly basis. Claimant worked less than 40 hours four times in the period July 8, 1984 through October 7, 1984 and each of those times he worked either 24 or 25 hours and it appears in at least two of those four times he took no vacation nor sick time.

(These are the periods ending July 8, 1984 and September 30, 1984). The parties stipulated claimant's rate of compensation regarding the February 15, 1984 injury is $344.32.

APPLICABLE LAW

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

ANALYSIS

Two matters raised on appeal can be disposed of summarily. Claimant correctly notes that the arbitration decision is unclear as to the award of healing period benefits although the deputy discussed entitlement to such benefits in the decision. The deputy's apparent oversight will be corrected by making the award as indicated below. The defendant cross-appellant (hereinafter defendant) argues that credit should be allowed for payments already made. Those credits will also be ordered below.

The second matter that can be disposed of summarily is that defendants noted that the arbitration decision discusses an alleged injury of December 24, 1985. Defendants correctly note that that injury was the subject of a separate proceeding and should not be part of this decision. The files of this agency indicate that the proceeding for that injury (file No. 812869) was settled and approved on February 3, 1987. The decision in the instant proceeding should not include any determination on the alleged injury of December 24, 1985 and any references to that injury in the arbitration decision are inappropriate and can be ignored.

The first issue to be resolved is whether claimant received an injury that arose out of and in the course of his employment on October 6, 1984. This issue is important because the insurance carrier on October 6, 1984 was not the same insurance carrier as on February 15, 1984. The earlier insurance carrier stipulated claimant received an injury that arose out of and in the course of his employment and the rate of compensation. The defendants (the later insurance carrier) on appeal argue that the second incident was merely a recurrence of the first injury and that the second incident did not conribute causally to the disability condition. In discussing this issue the deputy stated:

> Defendant, National Union Fire, apparently contends claimant's condition after October 6, 1984 was merely a manifestation of a physical condition created by the February 15, 1984 injury. We are unable to concur. Claimant was an unreliable witness as far as describing his complaints and physical condition between February 15, 1984 and October 6, 1984. His wife also was not altogether

> reliable in this regard. She variously reported to Dr. Basler that claimant sought medical care in the Summer 1984 and that claimant did not seek care because he could not afford it. The objective evidence is that claimant sought no medical care from March 6, 1984 to October 8, 1984. Claimant has sought extensive medical care since then. Likewise, claimant's activities of October 6, 1984 were such as could produce aggravation of a weakened back even without a prior incident such as that of February 15, 1984. We conclude claimant had an injury which arose out of and in the course of his employment on October 6, 1984.

The deputy correctly concluded that claimant had received an injury on October 6, 1984 because he sought extensive treatment for his back condition and was unable to work after that date. Claimant has established by the greater weight of evidence that he sustained an injury on October 6, 1984 that arose out of and in the course of his employment.

The next issue to be resolved is whether there is a causal relationship between claimant's disability and the injury on October 6, 1984. Defendants argue on appeal that there is insufficient medical evidence in the record to support the deputy's conclusions that there was a causal relationship between claimant's disability and the injury of October 6, 1984 and that two-thirds of claimant's disability resulted from that injury. In discussing this issue the deputy stated:

> Claimant has established the requisite causal relationship between his work injuries and his disability. Both Drs. Basler and Turner opine claimant's current disability is an aggravation of underlying degenerative changes originating in his previous surgeries. Both doctors ultimately also attributed the disability to the February 1984 fall. While we ultimately agree that that incident was a causal factor in claimant's disability, we do not agree that it was wholly responsible for claimant's condition. Dr. Basler, on October 8, 1984, concluded claimant's condition of that date was due to lifting sacks and not to his February fall. He later concluded otherwise after being told claimant had pain and medical treatment throughout Summer 1984. Claimant never told Dr. Turner of the October 6, 1984 incident and Dr. Turner drew his conclusions unaware that that incident had taken place. Both doctors were not accurately appraised of factors bearing on claimant's ultimate condition. Their opinions are considered in that light. Claimant's condition substantially manifested

itself after his October 6, 1984 activity. He sought extensive medical treatment and was off work for prolonged periods following that date. We conclude at least two-thirds of claimant's ultimate disability attributable to his aggravation of his preexisting back condition resulted from that incident.

Claimant participated in an activity on October 6, 1984 that aggravated a preexisting condition. His current back condition manifested itself after this activity. He sought extensive treatment and did miss work. The deputy correctly concluded that there was a causal relationship between the injury and claimant's back condition.

The deputy also concluded that there was a causal connection between claimant's esophagitis and unipolar affective disorder (depression) and his work injury. Defendants argue that the deputy erred. In discussing this issue the deputy stated in relevant part:

> Dr. Silber has indicated that claimant's hiatal hernia increased his risk of esophagitis and that Motrin can cause esophagitis. Claimant's condition apparently improved resolved [sic] after he ceased taking Motrin and received medical treatment. We find ingestation of Motrin to treat claimant's compensable injury was a proximate cause of his esophagitis. Claimant claims no permanency on account of that condition. He is entitled to payment of related medical costs and payment of temporary total disability benefits during the time he was actually off work on account of the condition, however.

The deputy was correct in reaching this conclusion. The medication that Dr. Silber indicated could cause claimant's esophagitis was prescribed for treatment of claimant's back condition. There was a direct causal relationship between the esophagitis and the claimant's back injury.

While there was medical evidence to establish a direct causal relationship between the esophagitis and claimant's injury, there is no such evidence regarding treatment of claimant's depression. Claimant's depression is a recurrent disorder for which he had previously been hospitalized and had received medication. Claimant merely testified that he was off work quite a while and probably worried too much. There is insufficient evidence in the record to conclude that claimant's treatment for his depression was related to his work injury or that his work injury was a temporary aggravation of his preexisting condition.

The next issue to be resolved is the extent of claimant's disability. Claimant argues on appeal that the deputy's finding of five percent industrial disability is too low. In discussing the extent of disability the deputy stated in relevant part:

> Dr. Turner has stated claimant has a back related permanent partial injury of 25 to 30 percent of which only five percent results from claimant's recent aggravation. The doctor also stated he believes claimant's back will eventually return to its preinjury state if allowed to do so. ... Claimant is 60 years old and has very limited education and other work experience. He has returned to work with the employer. ... Claimant is a long term employee and his position with the employer appears secure. Likewise, although claimant testified he would like to continue working for as long as he is able, it appears unrealistic to project that claimant would continue to work more than another decade. In any event, were he to choose to work longer than that, factors other than the limited permanent partial impairment related to his work injuries would likely have a greater impact on his job access. All factors support a finding that claimant's industrial disability related to his work injuries is not greater than is [sic] permanent partial impairment related to his work injuries, that is five percent. Claimant is entitled to 25 weeks of permanent partial disability benefits.

It is not exactly clear from Dr. Turner's letter or notes what he felt was claimant's impairment as it relates to the two injuries in question and claimant's preexisting condition. However, it is clear that he was of the opinion that claimant did have an impairment due to the two injuries. Claimant's activities and medical treatment of the injuries support the conclusion that claimant's impairment caused by the two injuries is a five percent impairment of the body as a whole. When all factors are considered, the deputy correctly concluded that claimant had suffered an industrial disability of five percent.

The next issue to be resolved is healing period benefits. Claimant is entitled to healing period benefits for all the time he actually lost from work on account of his alleged injuries. There is no dispute in this appeal that claimant was injured on February 15, 1984 and returned to work on March 5, 1984. Claimant was again injured on October 6, 1984 and was unable to work. He was treated for back pain and was eventually released to return to work on March 15, 1985 by Dr. Basler. He is entitled to healing period benefits from October 8, 1984 through March 14, 1985.

Claimant was unable to work and was under Dr. Pietrzak's and Dr. Silber's care from March 21, 1985 through June 26, 1985 for treatment of gastrointestinal problems. He is entitled to compensation for temporary total disability benefits during this period of time.

Claimant's inability to work, his gastrointestinal problems, and his permanent disability all relate to his back condition. As discussed above, his back condition is the result of the two injuries. The back condition is attributable to the two injuries. Two-thirds is attributed to the October 6, 1984 injury and one-third is attributed to the February 15, 1984 injury.

Defendant insurers are liable for permanent disability benefits in the same portion that claimant's back condition is attributable between the two injuries. The insurer at the time of the first injury is liable for one-third of the five percent disability (one and two-thirds percent) and the insurer at the time of the second injury is liable for two-thirds of the five percent disability (three and one-third percent). The first insurer is liable for medical costs and mileage and healing period benefits between the first injury (February 15, 1984) and October 5, 1984. The second insurer is liable for medical costs and mileage incurred on or after the date of the second injury (October 6, 1984) except for those expenses related to treatment of claimant's unipolar affective disorder; healing period benefits October 8, 1984 through March 14, 1985; and temporary total disability benefits March 31, 1985 through June 26, 1985.

The last issue to be resolved is the rate of compensation for the injury of October 6, 1984. The claimant argues on appeal that the deputy erred in not including the week of the injury and in determining the correct "completed" consecutive weeks in the calculation. In discussing this issue the deputy stated:

> Claimant's rate is determined under section 85.36(6). Claimant's actual overtime hours are paid at his straight time rate. Division of Industrial Services Rule 500-8.2. A nightshift pay differential is considered premium pay which is not included in the weekly earnings computation. See Lawyer and Higgs, Iowa Workers' Compensation -- Law and Practice, section 12-3. Burmeister v. Iowa Beef Processors, Inc., II Iowa Industrial Commissioner Report 59, 64 (1982). We believe the same rationale applies to a Sunday pay differential and to a holiday pay differential. The week in which the injury occurs is not part of the last completed period of 13 consecutive calendar weeks immediately preceding the injury. It, therefore, is not included in those weeks from which the rate calculation is

drawn. It might have been better had weeks in which claimant was absent from work on account of illness, vacation or other causes had not been included in the weeks available for wage computation. Claimant's employer paid him for those absences, however. Therefore, a determination of the earnings to which the employee "would have been entitled had he worked the customary hours for the full pay period in which he was injured" can be made. We find claimant's rate should be computed from the week ending July 8, 1984 through the week ending September 30, 1984. The rate should include hours not worked for which claimant received wages as representative of earnings he would have been entitled to had he worked the customary hours for the full pay period. All hours are calculated at the straight time rate.

The deputy correctly calculated claimant's gross weekly wages. In light of the fact that claimant sometimes was on a shift that was to work only three or four days some weeks and seven days other weeks, the claimant's argument that "short" weeks should be excluded because they are not completed weeks is not persuasive. Claimant's rate is $288.45.

FINDINGS OF FACT

1. Claimant had a back injury in 1965 with laminectomies at the L4-L5 interspace in 1965 and 1967.

2. Claimant was hospitalized with traction for back pain in 1977.

3. Claimant returned to work after his back treatment in 1965, 1967, and 1977.

4. Claimant was hospitalized for recurrent depression, unipolar affective disorder in 1974 and 1980.

5. Claimant received outpatient anti-depression medication and medical monitoring at the Veteran's Administration Hospital in 1981, 1982, and 1983.

6. Claimant sustained an on-the-job injury on February 15, 1984 in which he experienced lumbosacral back pain.

7. Dr. Basler treated claimant for that injury and returned him to work on March 5, 1984.

8. Claimant saw Dr. Pietrzak for prostrate problems on March 6, 1984 and did not receive or seek other medical treatment until October 8, 1984.

9. Claimant has been under medical care since October 8, 1984.

10. Claimant, with a co-worker, transferred 100 pound sacks of cornstarch from his employer's to a customer's pallet for a substantial period of the October 6, 1984 work day.

11. Claimant worked on October 7, 1984 with pain.

12. Claimant had pain and needed to rest on intermittent occasions in the Summer 1984. He had more periods of pain and has needed more rest after October 6, 1984.

13. Claimant had some life activity restrictions in the summer 1984; his life activity restrictions were greater after October 6, 1984.

14. Claimant did not tell Dr. Turner of his October 6, 1984 incident. Claimant nor his spouse told Dr. Basler claimant had seen a physician for back pain throughout summer 1984.

15. Claimant's back condition is an aggravation of his preexisting degenerative condition resulting from the residuals of his two prior laminectomies.

16. Claimant has a 25 to 35 percent permanent partial impairment of the body as a whole. Claimant has a five percent impairment of the body as a whole caused by the injuries on February 15, 1984 and October 6, 1984. Two-thirds of claimant's current aggravation results from the October 6, 1984 incident; one-third from the February 15, 1984 incident.

17. Claimant has restrictions on bending, lifting, twisting and other physical maneuvers.

18. Claimant is a long term employee who has returned to work.

19. Claimant is 60 years old and has completed eighth grade.

20. Claimant is not now contemplating retirement.

21. Claimant was hospitalized for unipolar affective disorder, recurrent on July 1, 1985 and released July 7, 1985.

22. Claimant developed esophagitis following his October 6, 1984 work injury.

23. Claimant has a history of gastrointestinal disorders and has a hiatal hernia which increases the risk of esophagitis.

24. Claimant was taking Motrin for his back condition.

Motrin can cause esophagitis.

25. Claimant's back injury of October 6, 1984 was a substantial contributing factor in claimant's gastrointestinal disorders.

26. Claimant's treatment for his recurrent unipolar affective disorder was not caused by his back injuries of February 15, 1984 and October 6, 1984.

27. Claimant was off work for treatment of his esophagitis from March 21, 1985 through June 26, 1985.

28. Claimant was off work for treatment of his back injury of October 6, 1984 from October 8, 1984 through March 14, 1985.

29. Claimant is an hourly employee.

30. Claimant receives premium pay for work on Sunday.

31. Claimant receives overtime pay for work in excess of 40 hours per week.

32. Claimant is married and entitled to two exemptions.

33. Claimant was paid for holiday and vacation time taken in the 13 consecutive weeks immediately preceding his October 6, 1984 injury.

34. Claimant earned $6,160.13 in straight time hours in that period.

CONCLUSIONS OF LAW

Claimant has established an injury of October 6, 1984 which injury contributed two-thirds to his additional physical impairment.

Claimant has established a causal relationship between his injuries of February 15, 1984 and October 6, 1984 and the disabilities on which he bases his claim. Two-thirds of the established disability relates to claimant's October 5, 1984 injury; one-third to his February 15, 1984 injury.

Claimant is entitled to permanent partial disability resulting from his injuries of five percent of the body as a whole, two-thirds (three and one-third percent) resulting from the October 6, 1984 injury, one-third (one and two-thirds percent) from the February 15, 1984 injury.

Claimant is entitled to payment of medical expenses and mileage as set forth in this decision except as relating to treatment for claimant's depression and relating to treatment of the injury of December 24, 1985; defendants are entitled to

credit against medical benefits paid.

Claimant is entitled to payment of temporary total disability from March 21, 1985 to June 26, 1985. These benefits are all attributable to the October 6, 1984 injury.

Claimant is entitled to healing period benefits from February 16, 1984 through March 4, 1984. These benefits are all attributable to the February 15, 1984 injury.

Claimant is entitled to healing period benefits from October 8, 1984 through March 14, 1985. These benefits are attributable to the October 6, 1984 injury.

Claimant's rate for the February 15, 1984 injury is the stipulated rate of $344.32.

Claimant's rate for the October 6, 1984 injury is $288.45.

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

ORDER

THEREFORE, it is ordered:

That defendants Penick & Ford, Ltd., and The Hartford pay claimant permanent partial disability for eight and one-third (8 1/3) weeks at a rate of three hundred forty-four and 32/100 ($344.32) per week.

That defendants Penick & Ford, Ltd., and The Hartford pay claimant healing period benefits from February 16, 1984 through March 4, 1984 at a rate of three hundred forty-four and 32/100 dollars ($344.32) per week.

That defendants Penick & Ford, Ltd., and The Hartford pay medical costs and medical mileage between February 15, 1984 and October 5, 1984.

That defendants Penick & Ford, Ltd., and National Union Fire Insurance Company pay claimant permanent partial disability for sixteen and two thirds (16 2/3) weeks at a rate of two hundred eighty-eight and 45/100 dollars ($288.45) per week.

That defendants Penick & Ford, Ltd., and National Union Fire Insurance Company pay claimant temporary total disability from March 21, 1985 through June 26, 1985 at a rate of two hundred eighty-eight and 45/100 dollars ($288.45) per week.

That defendants Penick & Ford, Ltd., and National Union Fire Insurance Company pay claimant healing period benefits from

October 8, 1984 through March 14, 1985 at a rate of two hundred eighty-eight and 45/100 dollars ($288.45) per week.

That defendants Pennick & Ford, Ltd., and National Union Fire Insurance Company pay medical costs and medical mileage on or after October 6, 1984 except as they relate to treatment for claimant's unipolar affective disorder and the injury of December 24, 1985.

That defendants receive credit for payments that they have already made.

That defendants pay any accrued amounts in a lump sum and pay interest pursuant to section 85.30.

That defendants pay costs pursuant to Division of Industrial Services Rule 343-4.33. Costs are borne equally as regards the October 6, 1984 and the February 15, 1984 injuries.

That defendants 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 28th day of June, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert R. Rush
Attorney at Law
526 Second Avenue, S.E.
P.O. Box 2457
Cedar Rapids, Iowa 52406

Ms. Sara J. Sersland
Attorney at Law
Tenth Floor Hubbell Bldg.
Des Moines, Iowa 50309

Mr. Larry L. Shepler
Attorney at Law
111 East Third Street
600 Union Arcade Bldg.
Davenport, Iowa 52801

001647

FILED

JAN 20 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAURIE SUMMERS, Claimant, vs. JOHN MORRELL & CO., Employer, Self-Insured, Defendant.	:	File No. 770698 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 Laurie Summers, claimant, against John Morrell & Company, self-insured employer, for the recovery of benefits as a result of an alleged injury on January 3 or 4, 1984. This matter was heard before the undersigned on June 23, 1987 at the Courthouse in Storm Lake, Iowa. It was considered fully submitted at the conclusion of the hearing.

The record in the proceeding consists of the testimony of Laurie Summers and Dennis Howrey, claimant's exhibits A, B & C and defendant's exhibits 1, 2, 3, 4 and 5. Official notice was taken of the date upon which claimant filed her petition, namely September 8, 1984.

STIPULATION AND ISSUES

The parties, in their prehearing report, stipulated that there was an employer-employee relationship between claimant and the employer at the time of the alleged injury. If the injury is found to be a cause of permanent disability, the parties have stipulated it to be an industrial disability to the body as a whole. The commencement date for permanent partial disability, in the event such benefits are awarded, was stipulated to be October 15, 1984. In the event of an award, the rate of compensation was stipulated to be $146.81 per week.

The following issues remain for determination:

Whether claimant sustained an injury on January 1-4, 1984 which arose out of and in the course of her employment;

Whether the alleged injury caused temporary disability during a period of recovery;

Whether the work injury was a cause of permanent disability;

The extent of the entitlement to weekly compensation for temporary total disability or healing period;

The extent of entitlement to weekly compensation for permanent disability;

Whether defendant received notice required by section 85.23; and,

Whether claimant is entitled to medical benefits under 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.

Claimant, Laurie Summers, who is 22 years of age, testified that she dropped out of school in the tenth grade and subsequently worked as a nurse's aide, a cook and a waitress.

Claimant testified that she had generally enjoyed good health throughout her life, other than for the incident now at issue. She denied sustaining any injury to her back other than the one which is the subject of this action.

Claimant was first employed by John Morrell & Company in September, 1983. Claimant was unsure of the exact date, but she testified that on or about the third or fourth of January, 1984, she slipped and fell on a stairway at Morrell's Estherville, Iowa plant, landing on her tailbone. She testified that she felt immediate pain, but that the pain was not disabling. Claimant further testified that she immediately advised her foreman, Jim Koenecke, of the fall, but did not report it to the nurse at that time because she did not think it was serious (Summers deposition, pages 6-8).

The medical records of the Estherville Medical Center (claimant's exhibit B) reflect that claimant sought medical treatment on February 10, 1984 when she complained that her left thigh was sore, especially when she was sitting. The records indicate that she did not recall any injury. Claimant testified that she did not associate the pain in her thigh with the fall or with any injury to her lower back.

The first written record of the alleged injury being reported to the employer is found in claimant's exhibit A, an entry dated March 23, 1984 which states "slipped down steps and bumbed tailbone." Claimant testified that what she reported on that

day was the fall that occurred in January.

On April 2, 1984, when claimant reported for work, she met with industrial nurse Trisha Merrill and told her that her boyfriend had beat her up on the previous Saturday night, that he had thrown her on the ground, sat on her and was beating her about the face and that that's how she got the bruises and black eye. At that time, claimant exhibited a black eye and several bruises up and down her neck (defendant's exhibit 1, pages 4 and 5). Claimant made no complaints concerning her back at that time (defendant's exhibit 1, pages 16 and 17).

On April 5, 1984, claimant returned to Nurse Merrill and stated that she wanted a chiropractor appointment because she had fallen down steps in the plant. Merrill told her that workers' compensation would probably not pay for it because she had just been beaten up three days earlier. At that time, Merrill was not yet aware of the fall that had been reported on March 23, 1984 (defendant's exhibit 1, page 14).

On April 5, 1984, claimant sought treatment from the Moreau Chiropractic Clinic. The clinical notes (defendant's exhibit 5), contain a history that claimant fell down three stairs at work by the clock which was two weeks past (March 23, 1984). Her complaints were then left lateral leg pain and over the posterior left thigh and over the posterior lateral calf region. She returned for additional treatment for the same conditions on April 9, 1984. Claimant testified that Dr. Moreau was the first person that told her there was an association between her back injury and her leg pain.

According to the clinical notes of the Estherville Medical Center (defendant's exhibit 3), claimant returned for medical care on May 14, 1984 complaining of pain in her left thigh and in her lower back which was noted to be the same pain that she had experienced back in February, 1984. On May 15, 1984, an appointment was made for claimant to see Richard Nice, M.D., of Orthopaedic Associates in Sioux Falls, South Dakota, on June 13, 1984.

Claimant appeared at Orthopaedic Associates on June 13, 1984, and gave a history of having fallen down a flight of stairs at Christmas time, at work, but that she did not think much of it and continued to work. The history related that claimant began to develop pain in her back approximately two weeks after the fall.

Examination by Dr. Nice revealed, among other things, pronounced sciatic nerve tenderness in the sciatic nerve area in her left buttock which radiates down the left leg. He noted she had significant weakness of the dorsiflexors of the left foot and the left great toe. He also reported she had contralateral

positive SLR (an abbreviation for "straight leg raising," a test used to diagnose pinching of the sciatic nerve by a herniated lumbar disc), and SLR on the left side was almost impossible. Dr. Nice noted that there was no question that claimant had a disc herniation, probably at L4-5, and recommended that she be off work in a corsett and resting for the next month (claimant's exhibit B, page 4). When that treatment was not effective, claimant was hospitalized for further conservative care from July 16 through July 24, 1984 (claimant's exhibit B, page 8).

On August 9, 1984, claimant was again hospitalized. She underwent a lumbar myelogram and CT scan which revealed an abnormal central bulging disc at L5-S1. Claimant was discharged on August 14, 1984 (claimant's exhibit B, page 9).

On October 15, 1984, claimant returned for further care and it was noted that she was improved, but still had some symptoms. Dr. Nice reported that she could then return to light work, provided that she was not required to sit for prolonged periods. He also started her on an exercise program. Dr. Nice indicated that claimant was not a surgical candidate, but that she should seek additional care, should the need arise (claimant's exhibit B, page 5).

Claimant's exhibit C is testimony of Richard Nice, M.D., a board-certified orthopaedic surgeon. Dr. Nice testified, at pages 11 and 12, that claimant's history of falling and lifting at work was consistent with her lower back condition, which was diagnosed as a herniated lumbar disc. Dr. Nice testified on cross-examination that he could not recall anybody that he had seen in his office that got a disc herniation in their lumbar spine as a result of being hit in the head and having their neck jerked around. He indicated that claimant's condition was more consistent with falling (claimant's exhibit C, pages 13 and 16).

At page 12 of his deposition, Dr. Nice testified that, in his opinion, the disc herniation created a permanent physical impairment that amounts to a disability of five percent of the loss of function of her body as a whole. Dr. Nice testified that claimant should avoid jobs that would require heavy lifting and a lot of sitting, but did not impose any other limitations or restrictions for her.

The employer offered no testimony to contradict the testimony of Dr. Nice regarding a causal connection between the falling injury on the job and the subsequent disc herniation and permanent physical disability. The employer offered no evidence to contradict Dr. Nice's testimony that claimant sustained a functional permanent partial disability of five percent of the body as a whole which will affect her ability to engage in employment involving prolonged periods of sitting or heavy lifting.

Claimant testified that she subsequently became pregnant and, during the course of her pregnancy, returned to school to obtain her GED diploma. Claimant testified that, since the birth of her child, she has been employed on a part-time basis as a homemaker health aid and that she has been able to do this type of work, provided she does not do any significant lifting or standing for prolonged periods. Claimant has started a course of study toward a nursing degree.

Claimant testified that, at the present time, she performs exercises, which consist of lying on her back and pulling up her legs, which provide some relief. She stated that her physical activity level has been reduced below what it had been prior to the time she was injured. She stated that she is unable to perform situps because of pain. She stated that, at times, due to pain, she is unable to lift her two-year-old child, who weighs 30 pounds, but that, at other times, she can lift without pain.

Claimant was last seen by Dr. Nice on June 23, 1986 (claimant's exhibit B, page 6). Dr. Nice advised at that time that claimant continue swimming, avoid prolonged sitting and do no more lifting than was absolutely necessary. At that time, she reported few symptoms, but also indicated that her activity level had been reduced. Dr. Nice offered no additional treatment for her condition.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on January 1-4, 1984 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The record contains conflicts regarding the incident of falling. Claimant has testified that it occurred in early January while records of the employer and Dr. Moreau record falling on March 23, 1984. Claimant has explained the apparent conflict by stating that it was on March 23, 1984 when she reported the fall that had occurred in January. This would adequately explain the employer's records, but it still leaves some question regarding the history found in Dr. Moreau's records, defendant's exhibit 5. It should be noted, however, that Dr. Moreau is indicated in the record to have been the authorized chiropractor for the employer. It also appears that the employer's nurse made the appointment for claimant (defendant's exhibit 1, page 6). Claimant is found to be a credible witness, but she is not particularly adept as an historian. It is clear that claimant did seek treatment at the Estherville Medical Center on February 10, 1984, with complaints of pain in her thigh, as shown in claimant's exhibit B, page 1 and in defendant's

exhibit 3. Claimant apparently forgot about that fact, which is quite favorable to her claim, when she was deposed. Her testimony of falling in early January, 1984, is accepted as being correct. Her testimony that she did not realize that her leg pain was related to a condition in her back until she was told of such by a physician is also accepted as correct. Claimant's testimony that she reported the January fall on March 23, 1984 is likewise accepted as being correct. It is therefore concluded that claimant has established, by a preponderance of the evidence, that she sustained injury in a fall at her place of employment on January 3, 1984, as alleged in her petition.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 4, 1984 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Dr. Nice indicated that claimant's condition is consistent with the stated history of falling, which history has been found to be correct. His opinion is buttressed by claimant's unrefuted testimony that she had enjoyed excellent health, free from back difficulties, prior to the fall. The employer's hypothetical question asked of Dr. Nice at pages 15 and 16 of his deposition, claimant's exhibit C, is inaccurate because the record clearly shows that claimant had the complaints of pain in her leg as early as February, well before the incident where she was beaten up by her boyfriend. It is therefore found and concluded that the fall claimant sustained on the steps at the employer's place of business on or about January 3, 1984 is a proximate cause of the herniated disc in her lumbar spine and of her resulting physical complaints and restrictions, all as indicated by her testimony and by Dr. Nice.

Code section 85.23 provides that an employee who does not give notice to the employer within 90 days from the date of injury is barred from recovering for the injury. The discovery rule applies to section 85.23. Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980). In this case, it is obvious that there was some confusion regarding whether claimant fell on or about January 3, 1984 or on March 23, 1984. In either event, claimant did report the incident to the employer on March 23, 1984. Claimant testified that she had no indication that her condition resulting from the fall was serious until a couple of weeks after it had occurred. Such is accepted as true and correct and claimant's report of March 23, 1984, as confirmed by Nurse Merrill, was clearly within the 90-day limitation provided by section 85.23. Claimant's claim is therefore not barred for lack of notice.

Under the provisions of section 85.34(1), claimant is entitled to recover compensation for healing period. Dr. Nice took claimant off work effective June 13, 1984 (claimant's exhibit B, page 4). He released her to return to work, in a light-duty status, on October 15, 1984. As stipulated by the parties, this marks the end of the healing period and commencement of claimant's entitlement to compensation for permanent partial disability.

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963).

Claimant's educational background is somewhat lacking. Her work history is limited. Dr. Nice has recommended that she avoid lifting and also that she avoid prolonged sitting. Most types of employment which are unskilled require significant lifting while most sedentary occupations, those which do not require substantial lifting, are performed in a sitting position. Claimant testified that she continues to have difficulties with her back and, at times, is unable to lift her own small child. Having observed her demeanor as she testified and viewing her

statements in light of what Dr. Nice has indicated, she is found to be a credible witness concerning her symptoms and complaints which have continued up to the present time. The record indicates, in defendant's exhibit 4, that she was earning $7.00 per hour at the time her employment with John Morrell & Company ended. She will, in all likelihood, have difficulty obtaining a similar level of earnings, even if she successfully completes a substantial amount of further education. Claimant's current nursing course should provide her with many skills, but handling and lifting patients is commonly a part of many nursing jobs. Claimant's ability to handle patients is, at best, questionable.

When all the applicable factors of industrial disability are considered, it is found that claimant has sustained a 25% loss of her earning capacity and that she is entitled to an award of 125 weeks of compensation for permanent partial disability under the provisions of section 85.34(2)(u) of The Code.

FINDINGS OF FACT

1. On or about January 3, 1984, Laurie Summers was a resident of the state of Iowa, employed by John Morrell & Company at Estherville, Iowa.

2. Claimant was injured on or about January 3, 1984 when she fell on steps at the employer's place of business.

3. Following the injury, claimant continued to work, but experienced increasing symptoms. She first sought medical care for those symptoms on February 10, 1984 at the Estherville Medical Center.

4. On March 23, 1984, claimant reported the fall to her employer, but the employer misinterpreted the incident as having occurred on the date that it was reported rather than on the date that it actually occurred.

5. A similar error regarding the date of injury is found in the treatment records of Dr. Moreau.

6. Following the injury, claimant continued to work, whenever work was available, until June 13, 1984, when Dr. Nice took her off work. She remained medically incapable of performing work in employment substantially similar to that she performed at the time of injury until October 15, 1984, when claimant reached the point that it was medically indicated that further significant improvement from the injury was not anticipated and she was released to return to light-duty work.

7. Claimant is a fully credible witness with regard to the incident that produced her injury and her continuing complaints. She is, however, a poor historian concerning the dates and

sequence of events dealing with her medical care.

8. The assessment of claimant's case as made by Dr. Nice is accurate. Claimant's injury produced a herniated lumbar disc, but due to her age and symptomatology, surgery is not recommended at the present time. Claimant has a five percent permanent partial physical impairment of the body as a whole and is impaired in her ability to lift and in her ability to sit for prolonged periods of time.

9. Claimant gave the employer notice of her fall on March 23, 1984, a date within 90 days from the date of injury.

10. Claimant has sustained a 25% loss of earning capacity as a result of the injuries she sustained in the fall which occurred on or about January 3, 1984.

11. The fall that occurred on January 3, 1984 was a substantial factor in producing claimant's herniated disc and the continuing symptoms that she experiences in her low back and left leg.

12. Claimant's lower back was not injured in the incident where she was beaten up by her boyfriend in early April, 1984.

CONCLUSIONS OF LAW

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

2. Claimant sustained injury which arose out of and in the course of her employment with John Morrell & Company on or about January 3, 1984.

3. The claim is not barred by the provisions of section 85.23 of The Code.

4. Claimant is entitled to recover healing period compensation running from June 13, 1984 through October 14, 1984, a span of 17 5/7 weeks.

5. Claimant is entitled to receive 125 weeks of compensation for permanent partial disability representing a 25% disability of the body as a whole in industrial terms compensable under section 85.34(2)(u) of The Code.

6. Claimant's injury, which arose out of and in the course of her employment on or about January 3, 1984 was a proximate cause of her healing period disability and of the permanent partial disability with which she is afflicted.

ORDER

IT IS THEREFORE ORDERED that the employer pay claimant seventeen and five-sevenths (17 5/7) weeks of compensation for healing period at the stipulated rate of one hundred forty-six and 81/100 dollars ($146.81) per week payable commencing June 13, 1984.

IT IS FURTHER ORDERED that the employer pay claimant one hundred twenty-five (125) weeks of compensation for permanent partial disability at the stipulated rate of one hundred forty-six and 81/100 dollars ($146.81) per week payable commencing October 15, 1984.

IT IS FURTHER ORDERED that all amounts awarded be paid in a lump sum together with interest pursuant to section 85.30 computed from the date each weekly payment came due until the date of actual payment.

IT IS FURTHER ORDERED that the costs of this action are assessed against the employer.

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

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Joseph L. Fitzgibbons
Attorney at Law
108 North Seventh Street
P.O. Box 496
Estherville, Iowa 51334

Mr. Dick H. Montgomery
Attorney at Law
Professional Building
P.O. Box 7038
Spencer, Iowa 51301

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL L. SWIFT,

Claimant,

vs.

ALLIED CONSTRUCTION SERVICES, INC.,

Employer,

and

MARYLAND CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 799010

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability and healing period benefits.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 14; and claimant's exhibit 15, the admissability of which is discussed below. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are whether the deputy erred in allowing into evidence the deposition of a witness; whether there is a causal connection between claimant's disability and his work injury, and the nature and extent of claimant's disability.

REVIEW OF THE EVIDENCE

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

Claimant testified that he was injured at a construction site on May 6, 1985 when he tumbled down a flight of stairs while attempting to descend the stairs to the break room. Claimant, who had been a working foreman, said that he returned to work in a supervisory capacity only to June 4, 1985. Claimant reported that his physicians have told him it would be very

threatening if he were to receive another trauma on account of his deep vein thrombosis. He also reported that he was told that drywall work especially would be dangerous as would all construction work.

Claimant also testified that he had sustained a prior right knee injury on Labor Day 1984 when he tripped at home and sprained the knee. He reported that he received treatment at the emergency room through his family doctor who referred him to James W. Dinsmore, M.D., who performed an arthroscopy in November 1984. Claimant indicated that he recovered quickly from that arthroscopy and was back to hanging drywall on the Monday following the Thursday surgery.

In a letter dated October 29, 1985 Dr. Dinsmore reported:

> Michael Swift re-injured his right knee on 5/6/85 when he fell down a flight of stairs at work. Prior to this fall, he had undergone arthroscopic surgery on 11/2/84 at which time a partial medial meniscectomy was carried out. He had gotten along reasonably well following that surgery even though we knew that he had an old tear of the anterior cruciate ligament. Following the 5/6/85 fall, he was unable to return to work and was complaining of pain on the top and lateral side of the right knee....
>
> ....
>
> On examining him on 5/24/85, I noticed that he had a markedly positive drawer sign. This was more significant now than it had been prior to his surgery in 1984....
>
> ....
>
> On 6/11/85, I arthroscoped the knee again. I did not find any tearing of the cartilage. The anterior cruciate ligament was completely torn. I followed this procedure with a Slocum pes anserina tenodon transfer....
>
> ....
>
> On 7/10/85 he phoned stating that he was running a temperature. He was having pain into the thigh and groin area. He was admitted to the Methodist Hospital immediately.
>
> During his admission, he was diagnosed to have a deep vein thrombosis and treated accordingly. ... He was finally discharged on 7/20/85 from the Methodist

Hospital. During this time he was placed on anti-coagulation therapy and it was the intention to maintain him on this treatment. Before his discharge, his cylinder cast was removed and he was allowed to begin moving the knee....

....

Michael Swift will have a certain degree of permanent disability with his knee. This will not only be injury to the knee but also will have to include his complication of deep vein thrombosis. I feel at this time that it is too early to estimate a permanent disability.

(Joint Exhibit 8)

In a letter dated March 27, 1986 Dr. Dinsmore indicated: "I would presently rate Michael's permanent partial disability at approximately 25 percent of the right lower extremity. This is based on his ligamentous instability and the effects of his complication or deep vein thrombosis."

Dr. Dinsmore testified in his deposition:

Q. Okay. Did you examine the patient on May 24, 1985?

A. I did.

....

Q. Were those findings on examination similar to those on October 16, 1984?

A. Well, they were similar but not the same.

....

Q. And was that thrombosis -- in what leg, Doctor?

A. It was in his operative leg.

....

Q. And on a comparison of his stability and his condition in March or 1985 and that after the Slocum procedure and treatment of his injury in May, what difference did you -- would you say there is in the use of his knee?

A. The main difference was that he wasn't able to

function following the injury, which I feel aggravated his preexisting condition.

Q. Would you be able to, with a reasonable degree of medical certainty, give us an opinion as to what extent his disability now would be related then to the injury or aggravation?

A. I feel it is approximately ten per cent.

....

Q. So as to the deep thrombosis, that is not included with the ten per cent disability that you would relate to the aggravation of the May injury?

A. It's a type of disability that I really can't -- I can't really put my finger on. I just can't -- I think Dr. Waltke could better do that.

(Jt. Ex. 13)

Claimant saw Anil K. Agarwal, M.D., in April 1986 per the defendant insurer's direction. Dr. Agarwal reported in a letter dated July 7, 1986:

Following surgery he also had an episode of deep vein thrombosis of the right knee.

....

Although it is possible that the May 1985 injury aggravated the knee symptoms, however, patient's pathology of instability of the knee was a pre-existing problem and subsequent surgery was not related to this injury of May 1985, instead it was done to correct the instability which was pre-existent. I do not think any permanent disability was added to an all ready unstable knee.

(Jt. Ex. 11)

Claimant was evaluated by Eugene A. Waltke, M.D., a vascular surgeon. Dr. Waltke, in discussing an evaluation of claimant in the non-invasive vascular lab, reported in a letter dated September 11, 1986: "He says he is asymptomatic at this time. ... Because of his complete lack of symptoms at this time and the present but rather remote possibility of future difficulties, I would give him a 10% disability rate at this time."

The file in this matter shows that the Hearing Assignment Order dated July 11, 1986 provided that a list of all witnesses

to be called at the hearing and a list of all proposed exhibits was to be served on opposing parties no later than 30 days after the order. At the hearing on October 7, 1986 the claimant filed a Description of Disputes which referred to a deposition of Dr. Waltke (Claimant's Ex. 15). Also on the day of the hearing, defendants filed Defendants' Objections to Claimant's Exhibits which indicated that Dr. Waltke's name first appeared on a witness list served on defendants on August 18, 1986; that notice of taking the deposition of Dr. Waltke was served on September 26, 1986; and that the deposition was taken on September 30, 1986.

The file also showed that the arbitration decision was dated November 3, 1986. Notice of appeal by the defendants was filed on November 20, 1986. A letter dated November 25, 1986 and filed December 1, 1986 from the defendants to the certified shorthand reporter requested that a transcript of the hearing be prepared. The transcript was filed on January 23, 1987. A Certificate of Filing Transcript indicating that the transcript was placed in the mail on January 21, 1987 was filed on January 23, 1987. Defendants filed their appeal brief on February 19, 1987 which indicated that it had been served on February 12, 1987. Claimant filed an appeal brief on March 3, 1987 which indicated that it had been served on March 2, 1987. In a letter dated March 6, 1977 and filed March 10, 1987 the defendants waived the right to file a reply brief.

APPLICABLE LAW

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

ANALYSIS

The first issue to be decided is whether the deputy erred in allowing the deposition of Dr. Waltke (Cl. Ex. 15) into evidence. The July 11, 1987 hearing assignment order specified that the witness list and exhibits to be used at the hearing should be served upon opposing parties within 30 days. Dr. Waltke's name was not on a timely witness list nor was his deposition timely served. A deputy industrial commissioner does not have the power or authority to change another deputy's order. If a party does not agree with a deputy's order they have an opportunity to appeal that decision. The deputy erred in allowing the deposition into evidence and it will not be considered in making this decision.

The second issue to be resolved is whether there is a causal connection between claimant's disability and his work injury. Prior to claimant's fall he had been working full time at construction work. After his fall he was not able to do work he had done before and the reason was that his knee had been injured and that he had developed thrombosis as a result of

treatment of the knee. Dr. Dinsmore who was a treating physician for both of claimant's knee injuries clearly indicated that claimant's fall aggravated a preexisting condition and that claimant's condition was different after the fall at work. Dr. Dinsmore's opinions are given more weight than Dr. Agarwal who only saw claimant one time after both injuries to the knee had occurred. Claimant's physical condition and his work activities changed substantially after his May 1985 injury. Claimant has proved by the greater weight of evidence that his injury of May 6, 1985 is the cause of his disability.

The third issue to be resolved is the nature and extent of claimant's disability. Dr. Dinsmore's testimony clearly indicates that it was his opinion that claimant suffered ten percent of his present "disability" from the May 1985 aggravation of the lower right extremity. The medical evidence indicates agreement that the thrombosis related to the surgical procedure and the immobilization following the surgical procedure for claimant's knee injury. The extent of the impairment related to claimant's deep vein thrombosis remains to be decided. Dr. Dinsmore deferred to Dr. Waltke to determine the "disability" resulting from the thrombosis. Dr. Waltke stated that claimant was asymptomatic but he would give claimant a ten percent "disability" rate because of possible future difficulties. There is insufficient medical evidence to determine what claimant's current impairment is as it relates to the thrombosis. From the evidence available it is impossible to tell if the thrombosis increases the current rating of impairment of the lower right extremity and to tell if the thrombosis impairs any other part of claimant's body. Furthermore, the undersigned cannot base an opinion on mere speculation of what may or may not occur in the future but must look at claimant's present condition. It is more important to consider claimant's present condition than possible future difficulties. Claimant has failed to prove that he has any disability because of the thrombosis. However, claimant has proved by the greater weight of evidence that his work injury was the cause of ten percent disability of the lower right extremity.

Claimant argues in his appeal brief that defendants' appeal should be dismissed for late filing of the transcript and appellants' brief. The claimant notes that the transcript was filed 61 days after the notice of appeal and that appellants' brief was filed 22 days after the the transcript was filed. Claimant argues that the Division of Industrial Services' rules provide that the time periods for these filings are 30 days and 20 days respectively.

Claimant correctly notes that Division of Industrial Services Rule 343-4.30 provides that a transcript is to be filed within 30 days after the notice of appeal is filed. In this case the appeal was filed November 20, 1986, the request for the transcript

was filed on December 1, 1986 and the transcript was filed on January 23, 1987. There is no indication why the transcript was not filed until January 23, 1987 but defendants clearly requested the transcript within thirty days of the filing of the notice of appeal. The violation of rule 4.30 does not warrant a dismissal of the appeal in this case.

While claimant correctly noted the provisions of rule 4.30, he did not correctly note and apply Division of Industrial Services Subrule 343-4.28(1). That subrule provides:

> Appellant shall serve its brief within fifty days after the date on which notice of appeal was filed, or within twenty days after filing of the hearing transcript, whichever date is later. Appellee shall serve its brief within twenty days after service of the brief of appellant. If appellant serves a reply brief, it shall be done within ten days after service of appellee's brief. (Emphasis added)

In this case the transcript was filed on January 23, 1987 and the brief was served on February 12, 1987. The brief was served within 20 days of the filing of the transcript and the requirements of subrule 4.28(1) have been met. Claimant's arguments that the appeal should be dismissed are not persuasive.

FINDINGS OF FACT

1. Claimant injured his right knee at home in September 1984.

2. Claimant underwent an arthroscopy in November 1984 with debridement of a torn anterior cruciate ligament and of a torn medial meniscus. Dr. Dinsmore advised claimant in March 1985 that claimant would probably need a Slocum procedure some day.

3. A Slocum procedure was not necessary in March 1985 as claimant was able to function at work and otherwise.

4. Claimant fell down a flight of stairs in the course of his employment on May 6, 1985.

5. Objective findings regarding claimant's right knee were not significantly different from those prior to the May 6, 1985 injury, but claimant was unable to work subsequent to the injury.

6. Claimant's right knee condition was aggravated by the injury.

7. Claimant underwent a second arthroscopic examination and a Slocum pes anserina transfer.

8. Claimant subsequently developed deep vein thrombosis as a result of the procedure and resulting immobilization.

9. It is not possible to determine if claimant's deep vein thrombosis has impaired his right lower extremity or any other part of his body.

10. Claimant had a preexisting impairment of his right lower extremity on account of his September 1984 injury.

11. Claimant has a 10 percent permanent partial impairment of his right lower extremity as a result of his knee injury alone without accounting for his deep vein thrombosis.

12. Claimant has no impairment of his right lower extremity as a result of his deep vein thrombosis.

13. Claimant's healing period extended from June 7, 1985 to September 8, 1985.

CONCLUSIONS OF LAW

Claimant has established that his injury of May 6, 1985 is the cause of the disability to his right lower extremity on which he now bases his claim.

Claimant is entitled to permanent partial disability resulting from his injury of May 6, 1985 of ten percent of the right lower extremity.

Claimant is entitled to healing period benefits from June 7, 1985 to September 8, 1985.

Defendants are entitled to a credit for benefits previously paid with claimant entitled to payment of those weekly benefit amounts he has been underpaid during those weeks in which he received payments at the inappropriate rate.

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

ORDER

THEREFORE, it is ordered:

That defendants pay claimant permanent partial disability benefits for twenty-two (22) weeks at the rate of three hundred forty-four and 19/100 dollars ($344.19) per week with those payments to commence on September 9, 1985.

That defendants pay claimant healing period benefits from June 7, 1985 to September 8, 1985 at the weekly rate of three

hundred forty-four and 19/100 dollars ($344.19).

That defendants receive credit for benefits already paid claimant.

That defendants pay claimant the amounts claimant has been underpaid during those weeks he received benefits at the inappropriate rate.

That defendants pay accrued amounts in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30.

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

That defendants file claim activity reports as required by Division of Industrial Services Rule 343-3.1(2).

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

David E. Linquist
DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Richard D. Crowl
Attorney at Law
201 First National Bank Bldg.
P.O. Box 457
Council Bluffs, Iowa 51502

Mr. James E. Thorn
Attorney at Law
Fifth Floor Park Bldg.
P.O. Box 398
Council Bluffs, Iowa 51502-0398

001666
001665

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY TEEL,

Claimant,

vs.

HAROLD R. McCORD,

Employer,

and

FARM BUREAU MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 411444

D E C I S I O N

O N

R E M A N D

STATEMENT OF THE CASE

This case has been remanded by a district court decision filed October 23, 1985. The district court remanded this case:

> ...for a determination of the interest award at the rate of 10% on all weekly benefits due to the claimant commencing with the first week of permanent partial disability which was due at the termination of the initial healing period on May 7, 1974 and on all weekly compensation for permanent partial disability due each week thereafter except for those times during which he was paid healing period benefits, until the full 150 weeks of compensation had been paid. (Pages 5-6).

The district court decision was subsequently affirmed by the supreme court. The supreme court sets out a brief procedural history of this case at the beginning of its decision:

Gary Teel, a truck driver employed by Harold R. McCord, was severely burned while refueling a truck on February 4, 1974. Pursuant to a memorandum of agreement, he received weekly healing-period payments from his employer until he returned to work on May 7. Over a year later, however, Teel underwent surgery to alleviate the disability that resulted from his burns, and again was unable to

work. He again received weekly payments until his return.

In 1976 Teel petitioned the industrial commissioner to determine the nature and extent of his permanent partial disability. Two years passed, and then Teel underwent the first of several more operations. Following each one he received weekly payments for the varying periods of time he was unable to work. In 1980, after the last operation, the extent of his disability finally became known. He returned to work for good on February 14, 1981.

In 1982 a hearing was held on the petition he filed in 1976. On September 30 a deputy industrial commissioner awarded him 150 weeks of compensation for a permanent partial disability, with interest. The employer and his insurer, Farm Bureau Mutual Insurance Company, then sought a declaratory judgment on the date from which the interest was to accrue. Another deputy industrial commissioner held that it accrued from the date of the award: September 30, 1982. This rule was affirmed on appeal to the industrial commissioner. The district court reversed this ruling, however, holding that the interest accrued from the date Teel returned to work after his injury: May 7, 1974. The court remanded the case to the commissioner. He was instructed to determine the amount of interest due Teel, starting with the first week he returned to work, and excluding those weeks he received healing-period payments. From this judgment the employer and insurer have now appealed. See generally Iowa Code § 17A.20(1985). We affirm.

Teel v. McCord, 395 N.W.2d 405, 406 (Iowa 1986).

The record on remand consists of the review-reopening decision and the filings and stipulations of the parties in the declaratory proceeding.

ISSUE

The issue on remand is the amount of interest due to the claimant commencing with the first week of permanent partial disability which was due at the termination of the initial healing period on May 7, 1974 and on weekly compensation for permanent partial disability due each week thereafter, except for those times during which he was paid healing period benefits, until the full 150 weeks of compensation had been paid.

REVIEW OF THE EVIDENCE

In a December 2, 1983 letter to Deputy Industrial Commissioner Moranville which was filed with this agency on December 5, 1983, defendants stipulated the following with regard to claimant's post-accident work record: "That the work record of the claimant, post-accident, regarding healing period is the same as set forth by attorney Cosgrove in his Exhibit "A", attachment to his letter dated September 1, 1983, a copy of which is attached hereto."

The exhibit A referred to in this stipulation states:

WORK RECORD OF THE CLAIMANT - POST-ACCIDENT

The employer furnished, at the time of the hearing, an exhibit reflecting the amounts of healing period benefits from the time of the accident of February 4, 1974, to February 13, 1981. There was no claim for any healing period benefits after February 13, 1981. That exhibit reflected as follows:

> Claimant was unable to work during the following periods and received benefits as shown for each period. During the interval of time between any period listed here, the claimant was engaged in some sort of employment on a full-time basis.
>
> 2-4-74 to 5-7-74...
> 9-24-75 to 11-12-75...
> 2-23-78 to 5-14-78...

The review-reopening decision awarded benefits at the rate of $84 per week.

APPLICABLE LAW

The applicable law is set out in the statement of the case portion of this decision.

ANALYSIS

Using the stipulated periods of post-accident work the 150 weeks is calculated as follows:

Times Claimant Worked receiving no healing period		Number of Weeks
5-7-74 to 9-24-75		72.286
11-12-75 to 5-8-77		77.714
	Total	150

The 1987 Guide to Iowa Workers' Compensation Claim Handling

describes how to compute interest on late payments:

> Three steps are usually necessary to compute the interest due on past due weekly benefits.
>
> In the first step the principal changes from week to week, while in the second step, the principal remains constant because all payments are accrued.

Step 1 -- compute the interest while the benefits are payable by applying the following instructions to the 10% interest table on page 141 of this booklet:

Locate the number of weeks during which the benefits are payable in column A.

Locate the interest multiplier from that line in column B.

Multiply the weekly benefit amount by the interest multiplier to determine the interest payable.

Example: 52 weeks at $200.00 per week
interest multiplier is 2.55
$200.00 x 2.55 = $510.00 of interest

(Guide to Iowa Workers' Compensation Claim Handling 1987, pages VI and VII).

Applying this step to the facts in this case, the interest while the benefits are payable is calculated as follows (the number of weeks will be rounded to the next whole number):

Number of Weeks	Rounded	Interest Multiplier	x	Rate	=	Interest
72.286	72	4.9154	x	84	=	$412.89
77.714	78	5.7750	x	84	=	485.10
				Total		$897.99

Step 2 -- compute the interest from the end of the period during which benefits are payable until the date the benefits are actually paid by using the following formula:

I = P x R x T
I = interest
P = principal--total number of weeks/days of compensation due multiplied by the compensation rate

R = rate of interest (10%)
T = time--number of weeks from end of period during which benefits are payable until date of payment, divided by 52

(Ibid., page VII).

The principal is calculated as follows:

Number of Weeks	x	Rate	=	Principal
72.286	x	84	=	$ 6,072.02
77.714	x	84	=	6,527.98
Total 150	x	84	=	$12,600.00

The principal ($12,600) was paid by defendants on March 29, 1983. The interest after the benefits are due through March 29, 1983 is calculated as follows:

Principal	x	Interest Rate	x	Time in years	=	Interest
6,072.02	x	.10	x	392/52	=	$4,577.37
6,527.98	x	.10	x	307.429/52	=	3,860.19
				Total		$8,437.56

Step 3 -- add the two types of interest together.

(Ibid., page VII).

The amount of interest that was due on March 29, 1983 is $897.98 + $8,437.56 = $9,335.54. Defendants owe this amount plus interest at the rate of 10 percent per year until it is ultimately paid.

FINDINGS OF FACT

1. Claimant's rate of compensation is $84 per week.

2. Claimant was awarded 150 weeks of permanent partial disability benefits in the review-reopening decision filed September 30, 1982.

3. Claimant worked from May 7, 1974 through September 24, 1975 and was not paid permanent partial disability benefits for this period until March 29, 1983.

4. Claimant worked from November 12, 1975 through May 8, 1977 and was not paid permanent partial disability benefits for this period until March 29, 1983.

5. On March 29, 1983, claimant was paid $12,600 for the 150

weeks of permanent partial disability he was awarded.

6. On March 29, 1983, $9,335.54 in interest had accrued on the 150 weeks of permanent partial disability awarded in the review-reopening decision.

CONCLUSION OF LAW

Defendants owed claimant $9,335.54 in interest on March 29, 1983 for the 150 weeks of permanent partial disability benefits awarded to claimant.

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant nine thousand three hundred thirty-five and 54/100 dollars ($9,335.54) plus interest at the rate of ten percent (10%) per year from March 29, 1983 until it is ultimately paid.

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

David E. Linquist
DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Joe Cosgrove
Attorney at Law
813 Frances Building
Sioux City, Iowa 51101

Mr. Robert Laubenthal
Mr. Curtis Hewett
Attorneys at Law
370 Midlands Mall
P.O. Box 249
Council Bluffs, Iowa 51502

001672

FILED

APR 15 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RAMON TENEYUQUE, Claimant, vs. SIVYER STEEL CORP., Employer, and AETNA CASUALTY & SURETY, Insurance Carrier, Defendant.	FILE NO. 789389 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 Ramon Teneyuque, claimant, against Sivyer Steel Corporation, employer, and Aetna Casualty & Surety Company, insurance carrier, defendants, for benefits as the result of an injury that occurred on February 25, 1985. A hearing was held in Davenport, Iowa on February 19, 1988 and the case was fully submitted at the close of the hearing. The evidence consists of the testimony of Ramon Teneyuque (claimant), Juanita Teneyuque (claimant's wife), and joint exhibits A through I.

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, 1985, that arose out of and in the course of employment with employer.

That the injury was the cause of temporary disability and that claimant was paid temporary disability benefits for one and one-sevenths weeks from March 3, 1985 to March 11, 1985 and that temporary disability is no longer an issue in this case.

That the commencement date for permanent partial disability benefits, in the event such benefits are awarded, is to be March 11, 1985.

That the rate of compensation in the event of an award is $335.05 per week.

That the provider of medical services and supplies would testify that their charges are fair and reasonable and defendants are not offering contrary evidence.

That defendants make no claim for employee nonoccupational group plan benefits or permanent partial workers' compensation benefits paid prior to hearing.

That there are no bifurcated claims.

ISSUES

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

Whether the injury was the cause of permanent disability.

Whether claimant is entitled to permanent partial disability benefits; and if so, the nature and extent of benefits, to include whether claimant is entitled to scheduled member benefits or industrial disability benefits.

Whether claimant is entitled to certain medical expenses, more specifically the charges of Albert Zimmer, M.D., and Mercy Hospital.

SUMMARY OF THE EVIDENCE

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

Claimant is age 43 and has been employed by employer for 14 years. He is currently employed as an arc air operator melting steel with a torch. This job requires him to wear goggles with straps which must fit very tightly on his nose to keep dirt, smoke and flying sparks away from his eyes.

On February 25, 1985, while operating an electric hoist to move two castings, one hook came out of the hole and caught on the bottom of the rail. When it came loose, it sprang up and struck claimant a very hard blow in the nose. Claimant could feel blood in his throat when he tilted his head back. He went to First Aid and was taken to the doctor later that night. The doctor prescribed pain pills and sent him back to work the following day. Claimant continued to do his regular job. The goggles hurt his nose real bad and the pain pills did not work.

Claimant said that he continued to complain to employer about his pain and was sent to a specialist who performed

surgery on his nose. He was off work several days. He returned to work on March 11, 1985 and has continued to suffer a great deal of pain in his nose. The pain pills do not alleviate the pain. Claimant said that the nose specialist said that the pain was from scars from the operation and that there was nothing more he could do about this pain. Claimant said that he then sought out his own personal physician.

Claimant testified that the goggles still press down and smash his nose. This is because the goggles must be worn very tightly to be effective in keeping dirt, smoke and sparks away from his eyes. The pressure of the glasses against his nose causes pain in his nose, down the front of his face on both sides, up into his head and even in the back of his head. The tip of his nose is still sore to any slight touching of any kind. He can no longer dry his face with a towel in the normal manner by wiping because the tip of his nose is extremely pain sensitive. He must very carefully blot it dry by barely touching it. Cold weather outdoors against his nose also causes pain.

Claimant testified that his personal physician said that the nerve is smashed and there is no surgery or medical treatment to eliminate or reduce the pain. The company nurse told him that there is nothing more the company can do and that if he needed additional care he would have to pay for his own doctor.

Claimant testified that he is earning less now than at the time of the injury but the reason was due to an ecomonic decrease in the rate of piece work. It was not due to the injury. Claimant said that he has been performing the same job that he was performing at the time of the injury.

Claimant's wife corroborated claimant's testimony that the injury was exceptionally painful. She could see his nose was physically smashed down at the time of the injury. His eyes turned black. He was unable to eat and went to bed but had trouble sleeping due to the pain. He also had trouble breathing. Even after the surgery he continued to have severe pain and trouble sleeping. The pain causes him to lay down more frequently which he did not formerly do.

B. E. Hoenk, M.D., diagnosed a displaced and depressed fracture of the nasal bones on March 1, 1985. Dr. Hoenk performed outpatient surgery on the same date (Exhibit A). Claimant was released to return to work on March 11, 1985 (Ex. B). Dr. Hoenk reported on March 29, 1985, that he performed a closed reduction of a depressed and displaced nasal fracture under general anesthesia at Mercy Hospital on March 1, 1985. Claimant's post-operative course was not remarkable. Claimant exhibited an excellent cosmetic appearance along with good airways and was released with regard to his nasal fracture (Ex. C).

The office records of Dr. Hoenk (ENT Associates) disclosed that claimant was seen by both Dr. Hoenk and W. S. Barker, M.D., in that office. Claimant was seen again on March 19, 1985, after his surgery, complaining of headaches and pain in the top of his head. His ENT examination was normal. Claimant was told to see his family doctor regarding any further evaluation for these headaches (Ex. F, page 2).

On August 12, 1985, claimant complained again to ENT Associates about sensitivity around the tip of his nose. Claimant was examined and the physical condition of his nose was normal. Claimant was reassured that no therapy was needed (Ex. F, p. 2).

On October 15, 1985, claimant returned to ENT Associates. He was satisified with the physical appearance of his nose but complained of pain in the tip of his nose. His physical examination again was essentially normal. The office notes added, however, that the pain etiology is possible neuralgia (pain along the route of a nerve) secondary to the crushing effect of the initial injury (Ex. F,, p. 3).

On October 28, 1985, Dr. Barker recorded pain around the tip of the nose elicited by simply brushing the skin lightly. Pressing deeper did not decrease the discomfort. Physical examination of the nose again was normal. Dr. Barker speculated that possibly claimant has a neuralgia or neuritis of the anterior ethmoidal nerve. He prescribed a medication and stated that if it was not successful then he could not suggest any other treatment (Ex. F, p. 3). Dr. Barker wrote as follows on November 13, 1985:

> It is my impression that the physical examination was completely normal with the exception of some slight irregularity detected by palpation on the nasal pyramid. The nasal fragments were in good re-alignment but because of the unusual pain he was experiencing in the lower part of his nose, Dilantin 100mg three times daily for twenty days was prescribed on a one time basis. No future treatment was recommended by me.
> (Ex. D)

Dr. Barker reported again on May 20, 1986, as follows:

> Enclosed is a recent letter I sent to Mr. Teneyuque's attorney. I'm not sure what PTD is but if it refers to permanent disability I would say there should be none. The patient has not been seen by me since 10-28-85. He was originally seen by Dr. Hoenk, now retired, on 3-1-85 for his nasal fracture.
> (Ex. F)

Dr. Barker made no reference to or expressed any familarity with the AMA Guides.

Albert Zimmer, M.D., testified by deposition that he is a board certified otolaryngologist who has practiced in ear, nose and throat for 30 years (Ex. H, pp. 3 & 4). He first saw claimant on January 21, 1986, complaining primarily of pain in the tip of his nose. There was a scar two centimeters long on the right side of his nose. The nose was symmetrical and not extremely crooked. It looked different than it looked in pictures taken prior to the injury. The nose had a satisfactory appearance after the injury but appeared flatter and less protruded. The nasal septum was irregular but did not block the airway on either side. Claimant described to the doctor that he had a continuous pain like a burning sensation that was accentuated by cold weather or by touch. Simply touching his bed sheet caused discomfort to his nose (Ex. H, pp. 6-8).

Dr. Zimmer believed that there was damage to the cutaneous nerves, small sensory nerves in the skin, from scar tissue putting pressure or irritation on the nerve fibers (Ex. H, p. 8). The doctor said that his objective findings were the scar tissue but he also said that he accepted and believed that claimant's subjective symptoms were true because the pain was continuous, it was located in the area of the injury and was made worse by touch or cold (Ex. H, pp. 9 & 10). The doctor acknowledged that claimant's complaints could not be verified independently (Ex. H, p. 24). X-rays showed no evidence of fracture to the nose in the nasal bones. Subsequent x-rays of the sinuses disclosed no infection, tumor or anything gross anatomically that would be contributing to his symptom (Ex. H, p. 11).

Dr. Zimmer acknowledged that claimant's case was unusual. He had not encountered one like it before. A more common complaint would have been numbness and tingling because of the interruption of the nerve pathways, but it is certainly conceiveable that in some instances pain could also occur (Ex. A, p. 12). The doctor said that he believed the patient's complaints (Ex. H, pp. 9 & 12). He said that the type of surgery that claimant had and the type of pain he was feeling was consistent with a blow to the nose (Ex. H, pp. 12 & 13). He said the injury was the cause of the pain (Ex. H, p. 17). Additional surgery would not correct but might only make it worse by causing more scar tissue (Ex. H, p. 18). Dr. Zimmer summarized his opinion in a letter dated January 8, 1987 as follows:

> I saw Mr. Ramon Teneyuque for the first time on January 21, 1986, and he was most recently seen on December 9, 1986. He gave a history of an accident in March of 1985. He had reconstructive surgery performed for this injury. He has a persistant complaint of pain, tenderness, and altered sensitivity

to touch in the nose. This is much worse in cold weather. His nasal septum is irregular, but the airway is satisfactory. His external nose is different from his pre-injury appearance. It is symmetrical and quite acceptable in appearance. There is some small fine scarring on the right side of his nose.

I feel that a 10% loss is a reasonable estimate, since he will probably have pain and altered sensation in his nose for the remainder of his life. I feel that this does constitute a permanent partial disability. The question of whether this is a 10% loss of his whole body is difficult to answer, however I feel that permanent persistant pain will affect ones attitude and therefore would be considered a 10% loss of the whole body. Facial x-rays, including sinuses were normal, and a copy of these are included.
(Ex. I)

Dr. Zimmer granted that the figure of 10 percent was just a guess. He described it as a reasonable approximation on his part. He acknowledged that he did not use the AMA Guides and that he has never used them before (Ex. H, pp. 14-16). Dr. Zimmer said that the basis for his impairment rating was that chronic pain decreases the enjoyment of life and causes a distraction to activities which require concentration (Ex. H, p. 17). Similarly, the pain would distract his concentration to do his job (Ex. H, p. 25).

Dr. Zimmer conceded to defendants' counsel that Dr. Hoenk has never mentioned a laceration of the nose in his notes (Ex. H, p. 19). Dr. Zimmer also admitted that a closed reduction, which is what claimant received, means that the reconstructive surgery did not involve any incision into the skin at all, but rather an elevation of the depressed parts. There is no suturing to be done. There was no specific repairing of a rent or laceration of the nose (Ex. H, pp. 19 & 20). Looking at the AMA Guides, Dr. Zimmer granted that claimant did not have dyspnea or any of the obstructions in Table 5 on page 160 that allow an impairment rating for air passage defects (Ex. H, pp. 26-28; Ex. 6, p. 4). Dr. Zimmer said he was looking at class one on page 159 which made an allowance for visible scars and abnormal pigmentation, but granted that claimant did not suffer any functional impairment (Ex. H, pp. 29 & 30).

APPLICABLE LAW AND ANALYSIS

Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is

used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

Iowa Code section 85.34(2) t. & u. provide as follows:

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

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).

As to Iowa Code section 85.34(2) t., claimant did prove there is a two centimeter scar on the right side of his nose. He did not prove that this scar was caused by this injury. Claimant did not testify that this scar was specifically caused by this injury. The office notes and correspondence from Dr. Hoenk, the treating physician and his associate and successor, Dr. Barker, do not mention either a scar or laceration on the nose. Closed reduction did not involve incision, excision or suturing.

Even assuming that claimant did receive the scar from this injury, claimant did not demonstrate a disfigurement of the face or head which will impair the future usefulness and earnings of the employee in his occupation in which he was engaged at the time of receiving the injury or in most other occupations. Claimant returned to the same job and has performed the same work satisfactorily since March 11, 1985. His pay is less but claimant testified that this was due to a change in the rate for piece work and not due to the injury.

Even if the injury were found to be a cause of permanent disability to the body as a whole under Iowa Code section 85.34(u), claimant would not be entitled to permanent partial disability benefits because he has not demonstrated any loss of earning capacity. The briefness of his healing period, his return to work at the same job for the same pay for his employer of the last 14 years tends to negate any loss of earning capacity, but on the contrary would indicate that claimant is rather secure in his job. No doctor has placed any restrictions or limitations on claimant's performance of his regular job. The loss of earning capacity is a reduction in value of the general earnings capacity of the individual rather than the precise loss of wages or earnings in any specific operation. Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516 (Iowa App. 1977) (100 A.L.R. 3d 143). In this case it definitely appears that claimant returned to his former employment without any loss of earnings or employment status of any kind. Mason v. Armour-Dial, Inc., I Iowa Industrial Commissioner Report 227, 229 (1981). There is no showing that claimant is foreclosed from performing any other job activity on account of this injury. Michael v. Harrison County, Thirty-Fourth Biennial Reports of the Industrial Commissioner 218, 220 (App. Decn. 1979).

The only industrial disability factor that Dr. Zimmer mentioned in his deposition was the fact that claimant's concentration to do his work might be distracted by the pain. However, the actual evidence is that claimant has been able to perform his job satisfactorily, although with much difficulty in spite of the pain. The injury occurred on February 25, 1985 and the hearing was held on February 19, 1988. Therefore, claimant has been performing his job satisfactorily for approximately three years since the injury.

In conclusion, it is found that claimant did not sustain the burden of proof by a preponderance of the evidence that the injury was the cause of permanent disability. Claimant did not demonstrate that he is entitled to benefits under either Iowa Code section 85.34(2) (t.) or (u.) for either scheduled member or industrial disability benefits.

FINDINGS OF FACT

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

That claimant did not prove that the injury was the cause of the scar on his nose or any other facial disfigurement.

That claimant did prove that he suffers pain and discomfort on the tip of his nose but he did not prove that the pain and discomfort reduced his earning capacity.

That Dr. Zimmer was not an authorized physician but instead was a physician of claimant's own choice.

CONCLUSIONS OF LAW

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

That claimant did not sustain the burden of proof by a preponderance of the evidence that the injury of February 25, 1985 was the cause of any permanent disability.

That claimant did not sustain the burden of proof by a preponderance of the evidence that he is entitled to either scheduled member or industrial disability benefits.

That claimant did not prove that he was entitled to medical benefits for the evaluation and treatment by Dr. Zimmer who basically examined and evaluated claimant but did not treat the condition in any measureable degree.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from this proceeding.

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.

001681

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

Walter R. McManus

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. David A. Millage
Attorney at Law
1989 Spruce Hills Drive
Bettendorf, Iowa 52722

Mr. Larry D. Shepler
Attorney at Law
600 Union Arcade Bldg.
111 East Third Street
Davenport, Iowa 52801-1550

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT E. THOMAS, Claimant, vs. SIOUX CITY STOCKYARDS CO., Employer, and ZURICH-AMERICAN INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 791130 A R B I T R A T I O N D E C I S I O N

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Robert E. Thomas, claimant, against Sioux City Stockyards Co., employer, and Zurich-American Insurance Co., insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained March 23, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner December 3, 1985. The record was considered fully submitted at the close of the hearing. The record in this case consists of the testimony of the claimant, Harry White, Bruce Gunsolly, Herb Fischer, Mae Prather, and Rodney Livings; claimant's exhibits 1 through 24, inclusive, and defendants' exhibits A through E, inclusive.

ISSUES

Pursuant to the prehearing report and order submitted and approved December 3, 1985, the following issues are presented for determination:

1. Whether claimant's work injury is the cause of the disability on which claimant now bases his claim;

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

3. The claimant's appropriate rate of compensation.

At the time of hearing, defendants attempted to raise the issue of future medical benefits under Iowa Code section 85.27, which issue was not raised at the time of prehearing, was not on the hearing assignment order, and was not added to the hearing assignment order by a request to amend the same. Pursuant to the industrial commissioner's decision in Joseph Presswood v. Iowa Beef Processors, (Appeal Decision filed November 14, 1986), holding an issue not noted on the hearing assignment order is waived, the undersigned has no jurisdiction to consider the issues surrounding Iowa Code section 85.27.

FACTS PRESENTED

Claimant testified he began working for defendant employer in approximately 1981 and that he has worked there as a night yard man earning $5.25 per hour, a day yard man earning $5.00 per hour, a loader-operator earning $6.75 per hour, and a relief scalemaster earning $7.03 per hour. Claimant admitted to being involved in a 1980 car accident wherein his chest hit the steering wheel and his knee hit the dashboard and a 1983 incident at work when he was kicked in the left hip by a steer. Claimant denied any neck or back pain as a result of either incident maintaining that prior to his work injury of March 23, 1985, his activities were not limited in any way.

Claimant sustained an injury which arose out of and in the course of his employment March 23, 1985 when he fell approximately 15 to 20 feet off of a flatbed semi while trying to pull off a bale of hay which then hit him on the top of his head. Claimant thought he was unconscious for a minute or two and testified that his neck was in "real bad pain," that he drove himself home and that thereafter his wife took him to the Marion Health Center emergency room. Claimant saw the company doctor (Morgan) the following Monday and was given a cervical collar which he wore continually for the next year and periodically since then. After approximately six weeks when he did not feel his pain was subsiding, claimant was referred to Alan Pechacek, M.D., with whom he has regularly treated since. Claimant explained he was given a TENS unit, medication and about six months of physical threrapy, which provided only temporary relief as he continued to experience pain in his neck and lower back. Claimant testified that Dr. Pachacek released him to return to work in August 1986, but that "no way" could he return to work at the stockyards. Claimant explained that since his release to return to work, he has worked for Domino's Pizza first as a delivery person and then as a manager in training, as an assistant manager for Scotty's Restaurant, and that he is currently employed at Breaman Paper Company earning $4.25 per hour as a salesperson and delivering products.

Claimant stated he is still under medical care although he has not seen Dr. Pachacek since approximately August 1987, and

that he did not know if he will be going to his next appointment. He described his current condition as basically the same as it has been in the past--not necessarily worse but not necessarily better. Claimant is not currently on any prescribed medications, takes Tylenol as needed and does no particular exercises. Claimant acknowledged he attended a football game October 23, 1987 with a friend. He described wearing pants, a shirt, a sweater, and a coat of tan or gray color. Claimant testified that the seats in the stadium had no back support and that it was therefore necessary for him to move positions every so often and to get up and walk around. Claimant acknowledged that during the course of what he described as an exciting game, he may have jumped up, extending his arms over his head, but that he "paid for it" suffering pain as a result.

Harry White testified he was a high school classmate of claimant and attended the football game with claimant in October 1987. White stated that he sat next to claimant and that claimant had to move his whole body to look in either direction since he could only move his head a slight amount. White recalled that they had to walk around at halftime because claimant complained of headaches and backaches and that although they went out after the game for a beer, they had to go home between 10:00 and 10:30 p.m. because of claimant's complaints of pain. White also testified he lived with claimant and claimant's family from March through May 1986 during which time claimant did no lifting or yard work.

Bruce Gunsolly testified he is the manager of the Domino's Pizza establishment which employed claimant and that he was responsible for training claimant. He described claimant's job there as pizza making and general cleanup with some driving (delivery) and lifting of dough that comes in trays. Gunsolly explained he thought claimant performed his job satisfactorily in the morning but that his condition deteriorated as the day wore on and that "practically every day" it was necessary for claimant to sit down and rest. Gunsolly explained it was his understanding that claimant was discharged from this employment because of an unsatisfactory attendance record and because he could not keep up with the management training program although it was neither his responsibility nor did he have the authority to discharge claimant.

Herb Fischer testified he has known claimant for about four years and was regularly able to observe him at family gatherings. Fischer explained that before claimant's injury, claimant was able to assist in a landscaping project with no evidence of discomfort but that since his injury, claimant appears to be in discomfort while sitting in a chair, complains of headaches and takes aspirin. Fischer explained he and claimant are part of a card group which meets about once per month for five hours and that it has been his observation that claimant has the ability

to move his neck approximately 45 degrees but that (as a general rule) claimant moves his back rather than turn his head.

Mae Prather testified she is currently employed as a rehabilitation specialist with International Rehabilitation Associates and was retained by defendants in this case to work with claimant. She explained her goal originally was to return claimant to the same job he held at the time of his injury, believing that that was claimant's goal as well, but that that goal had to be abandoned when it was determined that claimant was not physically capable of returning to that position. Prather opined that in order for claimant to be able to perform the sedentary work which would be within his restrictions, he may require some additional education since claimant has a lack of transferable skills. Prather closed claimant's file in October 1986 once claimant secured employment but reopened it in the spring of 1987. Prather stated that she is still providing services to claimant as of the time of the hearing, but that claimant was not available for home visits. She opined that the results of the MMPI may be correct in that claimant may be internalizing problems which, as a consequence, leads to physical symptoms.

Rodney Livings testified he is a vice president of defendant employer, that during the second quarter of 1985 claimant was earning $6.79 per hour as a loader-operator and that at the time of his injury, claimant was performing the job of a loader-operator.

William P. Isgreen, M.D., specialist in neurology, testified he first saw claimant April 30, 1986 with a history of pain in his neck and shoulders (dorsal area of the spine) from the date of his work injury to present. Dr. Isgreen conducted a two-part examination at that time: A general examination which was normal and a neurological examination which disclosed an individual with a normal posture to the neck and spine and no area of apparent knotting or trigger sensitivity but a great deal of discomfort on palpation. Dr. Isgreen stated there was no sensory abnormality, no reflex alterations, and no evidence of atrophy (meaning loss of bulk) in any of the muscle groups that could be reasonably attributed to any damage in the neck with the strength intact in the arms and legs. He noted claimant's volitional movements of the neck were limited at that time to about five degrees in all of the cardinal planes explaining:

> A. ....The cardinal planes would be lateral movement, that is, tipping the head toward a shoulder, rotation of the head toward the shoulder around the spine, and then putting the chin on the chest, or looking up at the ceiling.
>
> Q. Now from a neurological standpoint, what's significant about the patient being unable to

perform such a function?

A. Well, one begins to question, Mr. Deck, that sort of restriction of movement, because it's really a nonphysiologic sort of response. People whose spines are fused can have oftentimes much better mobility than five degrees.

> It indicates a reluctance or an unwillingness or a cooperation problem on the part of the patient more, I felt at that time, than evidence of structural or physiologic damage.

(Defendants' Exhibit E, page 12)

When Dr. Isgreen could not find any objective viable abnormalities on examination, he diagnosed claimant as having a "so called functional or characterological cervical syndrome" meaning that the perpetuation of the complaints was better accounted for on psycosocial and characterological elements than on any structural abnormalities. Dr. Isgreen ordered hospitalization for the purposes of doing a myelogram, CT scan and a personal profile (Minnesota Multiphasic Personalty Inventory or MMPI), the latter in order to see if his notion of characterological problems or conflicts were matched by the results of the test. The cervical myelogram showed:

> Spot films of the lumbar and lower dorsal areas are unremarkable. In the neck there is good filling of the cervical sac. Chord shadow is normal in width. Nerve root sheaths appear to be fill well without evidence of significant defect. The area of C7-D1 is a little light but we see this pretty well on the oblique films. No significant myelographic defects are identified. Crosstable lateral film again shows the angulation of the spine of C3. The appearance almost suggests attempted or partial fusion of the spinous process of C3 and C4. Flexion and extension series would be helpful or perhaps lateral tomograms to better evaluate this.
>
> CONCLUSION: 1. Cervical myelogram appears within normal limits.
>
> 2. The appearance of the spinous process of C3 may well represent attempted fusion of the C3-4 spinous processes.

(Claimant's Exhibit 5)

The cervical spine showed:

Questionable deformity of articular pillars of C3 with some posterior wedging. Could be traumatic or developmental. This includes the spinous process of C3. Questionable deformity of articular pillars of C6 which may be developmental.

(Cl. Ex. 5)

The CT scan of the cervical spine revealed:

Contrast is seen in the thecal sac. Chord shadow is unremarkable. Patient is slightly obliqued in the scanner. Some of this may be muscle spasm or old deformity as there is some scoliosis or tilt seen on the plain films on the AP view. We do not identify any definite evidence of a herniated disc. No destructive processes are identified.

(Cl. Ex. 5)

The MMPI was administered by James R. Hairston, Ph.D., Department of Psychological Services, Marion Health Center, who concluded:

This personality assessment is based primarily on the claimant's voluntary responses to the test items as they appear on the Minnesota Multiphasic Personality Inventory (MMPI).

Profile. The most elevated two-point clinical code (1/3) within Mr. Thomas' personality profile suggests that many of his efforts are ineffectively directed toward trying to ward off anxiety. This client is using somatic complaints to avoid thinking of or dealing with psychological problems. This client may be converting his psychological problems into physical complaints that localize the difficulty outside of himself. He may be overlay [sic] pessimistic, whinny, and complaining. Depression and anxiety are not overtly expressed, no matter how concerned the client is about poor physical functioning. Narcissistic and dependent features are likely to be seen. This client lacks insight into his own behavior and is very resistant to interpretations that there could be psychological involvement in his physical complaints. He is more likely to show hypochondriacal features than hysterical features. His physical complaints are usually nonspecific and vague and likely to involve backaches, gastrointestinal complaints and so on.

(Def. Ex. C)

Dr. Isgreen felt Dr. Hairston's interpretation of the MMPI confirmed his initial diagnosis of cervical pain syndrome felt largely to be functional and on May 16, 1986, Dr. Isgreen wrote:

> [T]he neck x-rays present a curious problem. Initially they were read as normal, but there is no question that there is a mild abnormality there. It's not dramatic, but there is abnormality in the spinous proces [sic] of C3.
>
> The fall and the description on the part of the man certainly fits spinous process injury, and it could well be that we are seeing attempted fusion of the C3 to the C4 spine, as well as some mild compression of the C3 pillars.
>
> According to the AMA Guidebook of 1984, defect in one of the posterior elements is worth three per cent to the body as a whole. If we are generous to the man, we will give him a defect of two of the posterior elements, and add those together and get six per cent. One might allow another one or two per cent for what may be some compression at the C6 pillar, but this is a bit chancy.
>
> The bottom line then is a permanent-partial impairment number of about seven to eight per cent to the body as a whole.
>
> ....
>
> There are no further neurodiagnostic studies that I would suggest. There is nothing in the way of further treatments that I have to offer. Nor can I think of anything that would be effective at this point in time.
>
> Because of the x-ray picture, it probably is not a bad idea to get him out of the labor arena and into something a little more sedentary.

(Cl. Ex. 6)

Explaining the impairment rating and his recommendation, Dr. Isgreen testified:

> Q. I want you to assume that Dr. Pechacek has rejected the disability determination based upon X-ray findings and instead bases his opinion on range of motion of the neck.
>
> I would ask you: Have you based your opinion

and diagnosis on range of motion as a small criterion for disability?

A. I have not.

Q. Why not?

A. Because I did not feel that the range of motion was physiologically reproducible and explainable on a structural basis.

....

Q. Doctor, what do you mean by "the labor arena"?

A. Well, I felt that given the configuration of the neck and the possibility that it could have been traumatically induced, that repeated neck movement in the work place, particularly heavy labor, may be productive of symptoms which would interfere with his usual and customary activities.

(Def. Ex. E, p. 41, 56)

On the request of claimant's counsel, William S. Thoman, M.D., of the Sioux City Radiological Group, reviewed claimant's x-rays and films of myelography in order to render an opinion with regard to the etiology of any defects found in the films. Dr. Thoman stated:

The subluxation at the level C3/4 could be either a developmental defect or induced by trauma. I do not believe the 1970 x-rays, taken when the patient was 8 years old, are helpful in making that determination. Certainly the condition could be a direct result of the patient having fallen approximately 20 feet onto a hard surface with a bale of hay then striking him on the head. Given that history, my opinion would be that there was ligamentous injury as a result of the fall which is the reason for the subluxation of C3 on C4.

(Cl. Ex. 11)

Medical records of Alan Pechacek, M.D., reveal claimant was first seen May 14, 1985 and was regularly treated through August 11, 1987 without any significant improvement, as entry after entry states claimant continues to do about the same. In July 1986, Dr. Pechacek wrote:

I do not believe that Mr. Thomas has achieved a point of maximum recovery. He's not shown any

trends towards additional improvement for a long time.

So far as an impairment determination is concerned, I have done one based on his most recent office visit of July 7, 1986. My determination is based on the AMA Guides to the Evaluation of Permanent Impairment, and on Mr. Thomas's [sic] neck range of motion. I belive that Dr. Isgreen's determination was based on x-ray findings. At least that was my impression based on the information shown me by Mr. Thomas. Since it is likely that the abnormalities seen on his x-ray studies are the result of a congenital-developmental process, rather than being the result of his cervical spine trauma, I don't think that it's appropriate to use the x-rays for criterion for determination of his impairment. Therefore, I have based my determination on his limited neck motion. On that basis, I feel that Mr. Thomas has a 19% impairment of the whole person.

(Cl. Ex. 9)

Claimant was to return to see Dr. Pechacek three months after his last visit on August 11, 1987; however, Dr. Pechacek's last entry in his medical records states:

10-24-87 On Friday, October 23, 1987, I attended a football game between Sioux city Heelan and Sioux Falls O'Gorman at Memorial Field in Sioux City. I was standing on the top row of seats towards the west end of the north bleachers. At half-time, I observed Mr. Thomas, the patient, walk across from east to west at the bottom of the bleachers, approximately 20-25 rows below me. There was no trouble with visibility, and having seen the patient 24 times in the office since May of 1985, I had no difficulty recognizing who the patient was. Also, someone in the stands sitting near me said something to that affect[sic] that "there goes Bob Thomas," thereby further confirming my identification of the patient. I noted that as he walked across in front of me that he was walking quite naturally and was able to turn his head towards each side looking towards the field or towards the stands. I observed him walk to the end of the bleachers and then go across the west end of the field to the south bleachers and take a seat about the 8th to 10th row on about the 30 yeard line. He was seated toward the west end of the south bleachers. I was somewhat surprised to see the patient at a football

game on a cool chilly October evening. At the start of the game it was cold and the temperature was probably in the upper 40's or near 50. As the evening and the game progressed, it became colder such that by the end of the game the temperature was probably in the middle to upper 30's or close to 40. The patient was wearing a medium weight jacket, taupe in color, somewhat similar in appearance to corduroy material. He had no hat or gloves. I make this point because usually with the type of problems that Mr. Thomas complains of have increased discomfort in their neck muscles when exposed to cold.

I then decided that I would pursue this further and crossed over the west of the football field to the south bleachers. I re-identified where he was sitting. I then took a seat about 7 rows above him and in a position where I could have an unobstructed view of the patient. I observed him directly thru the entire third quarter of the ball game, which took approximately 30 minutes to play. He was sitting with a friend wearing a dark blue jacket that was seated to his left. I noted that during the course of my observations that the patient moved his head and neck quite easily. His head posturing was quite normal and natural. His movements were quite easy on turning side to side or looking around. He was able to apparently joke and laugh with his friend. Since his friend was seated to his left, the patient more often turned his head to the left than to the right. However I observed no difficulty in the patient's head and neck movements that would indicate any apparent neck pain, stiffness, or difficulty during motion. His movements were natural, smooth, and without apparent problems. Also, he was able to sit throughout the time period of observation without any support to his lower back. He had no observable problems with sustained sitting without back support, and showed no movements that indicated that he was suffering from any mid to lower back pain, something that he has complained about repeatedly on his visits. He sat without any unusual posturing, changes in position or posturing nor contorting that would indicate that he was experiencing any pain.

I later moved down lower in the stands to where I was sitting a few rows in front of him, but could still turn easily and observe him. Again, I did not observe any abnormal positioning of his head,

neck, or back and any restriction or apparent painful movement. I then walked up the bleachers in front of and beside him to sit a few rows above him. As I came up in front of him, he probably did see me but avoided eye contact and did not acknowledge me verbally or visually. He adopted the same head neck attitude that he usually displays in the office holding his head directed straight forward. His face was expressionless. He tended to look down with his eyes. After I moved beyond him up into the stands, I then observed him further and again noted no apparent difficulties with his posture or movements of his head, neck, or back. At one time during the game something happened such as a fumble recovery by Heelan. The patient was noted to cheer by partially rising up out of his seat suddenly and raising his right arm with a clenched fist, an obvious movement of cheering for Heelan. This movement was made quite naturally and without any difficulty. This is interesting because the patient indicates in the office he is unable to raise his arms much more than about 135-140°. When in the office he displays marked difficulty to raise his shoulders and arms. This movement that he made at the football game was much higher than he has ever shown in the office. After deciding that I had observed him long enough to satisfy myself, I then walked back down by him. As I stepped by him I looked back to my left looking directly at him. Again his eyes dropped down, his face became expressionless, and his head was held straight ahead, the same positioning and attitude that he usually displays in the office. Again eye contact and acknowledgement of my presence did not occur. I then discontinued my observations and went on about my way.

What I observed during this time was in complete contradistinction to what the patient complains about and displays while being seen in the office. I had observed him for probably 45 minutes or more period of time. Based on my observations at the football game, I believe that Mr. Thomas is malingering and faking his symptoms and signs for some other purpose.

(Cl. Ex. 3)

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 March 23, 1985 is causally elated 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).

ANALYSIS

It is not disputed that claimant sustained an injury March 23, 1985 which arose out of and in the course of his employment or that the injury was the cause of temporary disability during a period of recovery. The essential question presented for resolution is whether, and to what extent, the injury caused a permanent disability to claimant. As stated above, the question of causal connection is essentially within the domain of expert testimony. It is accepted claimant was asymptomatic of back and neck pain prior to March 23, 1985 which may have impaired or interfered with his ability to perform his laborer's job with defendant employer. By the very meaning of the phrase, a person with a permanent impairment can never return to the same physical condition he or she had prior to the injury. It is possible, based on the evidence contained in the record, claimant may have sustained some permanent impairment as a result of the work injury and that he may never return to the same physical condition he was in prior to the injury. Dr. Isgreen, at least, states claimant should remove himself from the labor arena and move into more sedentary work which would tend to establish claimant has some permanent work restrictions. However, in light of claimant's questionable credibility, it is impossible to determine the extent of claimant's permanent disability.

Functional impairment is an element to be considered in

determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963).

Dr. Pechacek, the treating physician in this case, originally rated claimant as 19 percent permanently partially impaired based on claimant's subjective representation of his neck range of motion specifically rejecting the x-ray findings and stating that it is likely the abnormalities seen thereon were the result of a congenital-developmental process rather than the result of the trauma of the work injury. Yet, Dr. Pechacek recants this opinion after observing claimant at a football game. There is no question it was claimant Dr. Pechacek was observing and that his observations were accurate for Dr. Pechacek had no reason to misrepresent what he observed while a myriad of reasons may be offered for claimant's representations or misrepresentations of the state of his physical health. Even accepting claimant's testimony that he "paid for it" the following day, the fact remains claimant could move his neck and his arms above his head while representing to his physicians an absolute inability to do so while under their care. Indeed, at the time of hearing, almost three years after his injury, claimant continued to use his whole body to turn rather than move his neck at all. One is struck by Dr. Isgreen's statement in his deposition:

> Q. Doctor, I note that your exam was approximately twelve to thirteen months following the injury in March of 1985.
>
> Was that significant, in your opinion?
>
> A. Well, one would have expected -- it's a reasonable expectation that any musculoskeletal ligamental strain would have resolved itself better than it did. One could take a heart out and put another heart in and have a more functioning individual than -- with less symptoms than Mr. Thomas after better than a year's time for rest and recovery and recuperation.

(Def. Ex. E, pp. 15-16)

Dr. Pechacek leaves us with the opinion claimant is malingering and faking his symptoms and signs for some other purpose. Dr. Isgreen, on the other hand, rates claimant as seven to eight percent permanently partially impaired based on the objective findings of the myelogram and CT scan. Dr. Isgreen specifically rejects considering range of motion because of claimant's limited mobility. However, while Dr. Isgreen may be willing to give

claimant "the benefit of the doubt" by stating claimant's spinous process injury is related to the 1985 fall, the law of workers' compensation in Iowa deals in burden of proof rather than benefit of the doubt. As stated above, a possibility is insufficient; a probability is necessary. Further, nowhere in either Dr. Pachacek's or Dr. Isgreen's notes or deposition is any referance made to claimant's 1980 auto accident or 1983 work injury. A question arises as to whether or not a complete and accurate history was given to the physicians by claimant. There are, finally, the opinions of Dr. Thoman who causally connects claimant's fall to what is viewed on the x-ray films but provides no restrictions, limitations or impairment and Dr. Shenk who conducted the test who opines the conditions viewed may be the result of trauma or may be developmental.

Claimant asks us to believe his earning capacity has realistically been reduced by at least 57 percent. ($7.00 per hour to $4.00 per hour. (See page 4 of claimant's Post-hearing Brief and Argument) If one were to believe all of claimant's symptoms, this figure may, in fact, be realistic. However, it is simply impossible to believe all or indeed any of claimant's subjective representations of pain and range of motion in light of the medical testimony and claimant's own personal conduct. It is only at the point at which disability can be determined that a disability award can be made. While claimant may have sustained some permanent disability as a result of the work injury of March 23, 1985, claimant has failed to present sufficient credible evidence on which an award of permanent partial disability benefits may be predicated. In other words, because of the serious questions surrounding claimant's credibility, it is impossible to determine the extent of whatever any permanent partial disability may be. There are many elements to consider in making a determination of industrial disability not the least of which involve consideration of claimant's subjective complaints, physical status, abilities and inabilities. The industrial commissioner has said many times an award of industrial disability cannot be based on mere speculation. See e.g. Umphress v. Armstrong Rubber Co. (Appeal Decision filed Agusut 27, 1987). If claimant is not being truthful in representing this subjective status and it is concluded he is not, it is impossible to determine what is claimant's true loss of earning capacity as a result of the work injury. To make such a decision would place the undersigned in the position of relying on mere speculation. Claimant, therefore, will take nothing further as a result of these proceedings.

FINDINGS OF FACT

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

1. Claimant sustained an injury which arose out of and in

the course of his employment March 23, 1985 when he fell approximately 15 to 20 feet off of a flatbed semi while trying to pull off a bale of hay which hit him on the top of the head.

2. Since that date, claimant perceives persistent neck and back pain, extreme limitation of neck motions, and notes little to no improvement in his condition.

3. Claimant's treating physician, Alan Pachacek, M.D., rejects claimant's symptoms opining claimant is malingering and faking his symptoms and signs for some other purpose.

4. Claimant's evaluating physician, William Isgreen, M.D., rejects claimant's limitation of neck motion as a result of characterological or psychosocial elements rather than as a result of structural abnormality and opines claimant's condition, as viewed on the x-rays and films, may be the result of trauma or may be developmental.

5. Notwithstanding his representation to the contrary, claimant does have the ability to move his neck and wave his arms.

6. Claimant was not a credible witness.

7. Claimant has been advised to leave the labor arena and secure more sedentary work.

8. Claimant may have sustained some permanent impairment as a result of the work injury.

9. Claimant failed to present credible evidence which would support an award of industrial disability.

CONCLUSION OF LAW

Wherefore, based on the principles of law previously stated, the following conclusion of law is made:

Claimant has failed to establish his work injury is the cause of any ascertainable permanent disability.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing further from these proceedings.

Costs are assessed against claimant pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 31st day of March, 1988.

Deborah A. Dubik
DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. G. Daniel Gildemeister
Attorney at Law
605 Davidson Building
Sioux City, Iowa 51101

Mr. Paul W. Deck, Jr.
Attorney at Law
635 Frances Building
Sioux City, Iowa 51101

FILED

APR 11 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHERYL A. THOMPSON, Claimant, vs. MARSHALL & SWIFT, INC., Employer, and U. S. INSURANCE GROUP, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 784394 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 Cheryl A. Thompson against Marshall & Swift, Inc., her employer, the U. S. Insurance Group, the employer's insurance carrier, and the Second Injury Fund of Iowa. The case was heard and fully submitted on September 18, 1987 at Des Moines, Iowa. The record in this proceeding consists of testimony from Cheryl A. Thompson, Carol Keel, Robert Thompson, Cecilia Blaskovich, Steven Karabatsos and Linda Rezab. The record also contains joint exhibits 1 through 23, 27 and 28, claimant's exhibits 24, 25, 26, 29, 30 and 31 and defendants' exhibits A, B, C and D.

ISSUES

The issues presented by the parties at the time of hearing are determination of claimant's entitlement to compensation for healing period, determination of claimant's entitlement to compensation for permanent partial disability, section 85.27 benefits, interest and costs. The major issue in the case is whether the injury that claimant sustained on January 8, 1985 is a scheduled member injury to the arm or an injury to the body as a whole. A further issue for determination is the liability, if any, of the Second Injury Fund of Iowa.

It was stipulated that claimant sustained an injury on January 8, 1985 which arose out of and in the course of her employment with the employer and that the injury is a cause of temporary disability during a period of recovery and of permanent disability. It was stipulated that, in the event of an award, the rate of compensation is $112.02 per week. With regard to the disputed medical expenses, which are $712.70 from the Mayo Clinic, it was stipulated that the provider of the services would testify that the treatment was reasonable and necessary treatment for the work injury and that the fees charged were reasonable. Claimant also seeks authorization for pain clinic services. It was further stipulated that claimant has been paid healing period compensation from January 9, 1985 through January 7, 1986 and 75 weeks of compensation for permanent partial disability commencing January 8, 1986 at the correct rate.

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.

Cheryl A. Thompson is a 23-year-old married woman who graduated from high school in 1982, but has no further formal education. She testified that, while in high school, she obtained A's and B's. While in high school, claimant worked as a waitress. After graduation, she worked for a film developing company. She commenced employment with Marshall & Swift, Inc. in May, 1983. Claimant testified that she had been earning $4.45 per hour in the photography business, but took a cut in pay to $4.00 per hour in order to work days at Marshall & Swift.

In 1980, claimant injured her left hand and wrist while working as a waitress. She was taken off work, treated, recovered and returned to work. No permanent impairment was anticipated (exhibit 1, pages 1-3). Claimant testified that she currently has no problems with her left hand and wrist.

Claimant testified that she fractured and dislocated her left knee while in high school gym class. She saw Wayne E. Janda, M.D., on April 30, 1981 and was treated with a cast and a knee immobilizer. Claimant continued to have difficulty with the knee (exhibit 1, pages 3-5). On September 16, 1982, Dr. Janda performed surgery on the knee consisting of arthrotomy of the left knee, shaving and drilling of the patella, lateral retinacular release and medial quadriceps plasty (exhibit 1, page 6). After an extended period of recovery, claimant was released to return to work on January 19, 1983. Her final follow-up visit was on

February 16, 1983 when it was noted that her knee pain had disappeared, knee motion was good and the kneecap was stable, but claimant continued to exhibit below normal extension of the knee due to weak quadriceps (exhibit 1, page 8).

Claimant testified that her left knee is now weaker than the right and that she must watch it closely when turning sharply, but that it is otherwise pretty much normal. She stated that the knee did not prevent her from working at Marshall & Swift. She testified that the injury she sustained to the knee in November, 1985, did not produce any permanent change in the condition of the knee.

Claimant denied having any prior injuries to her right arm or shoulder, except for an occasion in 1982 when she bumped her shoulder on a door knob. Claimant stated that it resolved completely in approximately three days.

Claimant testified that she was hired at Marshall & Swift to work on the eight roll flat iron, but that at times she also worked in other departments. She stated that she worked 40 hours per week and liked her job.

During the morning of January 8, 1985, claimant was feeding towels into the ironer when the machine pulled her arm into the beater bar mechanism. Her arm was caught between the moving beater bar and the stationary bar, but her hand was not pulled into the roller mechanism. Claimant shut off the machine, released herself from it, reported the injury and was taken to North Iowa Medical Center where she was examined and treated by E. D. Kennedy, M.D. (exhibit 2).

Claimant testified that she remained off work until January 10 when she was called in. She stated that she tried to work, but began developing sharp, shooting pains in her shoulder and clawing of the fingers of her hand. She was then permitted to see Dr. Janda.

Claimant went to the St. Joseph Mercy Hospital Emergency Department where Dr. Janda examined her and diagnosed an anterior compartment syndrome and carpal tunnel syndrome. Emergency decompression surgery by fasciotomy of the anterior compartment and carpal tunnel release was performed (exhibit 1, pages 8 and 9; exhibit 3, page 1). Claimant was discharged from the hospital on January 17, 1985 (exhibit 3, page 3).

During the following weeks, claimant developed increasing pain and swelling in the hand and arm which was initially thought to be an infection. Elbow and shoulder motion was also painful and guarded. Claimant was again hospitalized from February 6 until February 14, 1985 where she was diagnosed as having a reflex sympathetic dystrophy secondary to the work

injury (exhibit 1, page 10; exhibit 5).

A period of recuperation involving treatment with medication and therapy followed. Dr. Janda noted satisfactory progress until April 12, 1985, at which time claimant had discontinued her medications due to pregnancy. At that time, Dr. Janda noted that she had limitation of right wrist and shoulder motion. He recommended that she enter physical therapy and that she contact the employer about light-duty or part-time work (exhibit 1, page 12). At her next visit on April 24, 1985, claimant's condition had deteriorated (exhibit 1, page 12). Over the next few weeks, she alternated between progress and deterioration.

Sant M. S. Hayreh, M.D., examined claimant on June 7, 1985. He indicated that claimant exhibited restricted motion of the right wrist, but that the right shoulder and elbow movements were full, free and painless. Dr. Hayreh noted sensory and strength abnormalities in claimant's right wrist and hand. An EMG indicated that claimant's carpal tunnel syndrome had progressed (exhibit 1, page 14; exhibit 6).

Claimant continued to be symptomatic and to treat with Dr. Janda. On July 22, 1985, active range of motion of her right shoulder was reported to be abduction 90 degrees, flexion 90 degrees, extension 35 degrees, internal rotation 65 degrees and external rotation 60 degrees (exhibit 1, page 16).

Bio-feedback therapy was attempted without success. Claimant participated in physical therapy where she demonstrated 110 degrees of shoulder abduction and generally increased mobility (exhibit 1, page 17).

A referral was made for an assessment to be performed by James H. Dobyns, M.D., a hand surgeon at the Mayo Clinic. The first visit was on August 29, 1985, the second on September 19, 1985. Dr. Dobyns diagnosed pain dysfunction syndrome, right upper limb with multiple factors including (1) autonomic dysfunction, (2) musculoskeletal triggers including the flexor muscles and tendons of the volar forearm and the volar wrist capsule, (3) multiple peripheral nerve neuralgia including both the median and ulnar nerves, (4) persistent swelling, some generalized but also some localized and even compartmental swelling in the thumb intrinsic compartment, and (5) severe muscle alienation, co-contraction and inhibition. At the first visit, it was recommended that claimant be referred to the hand therapy department for a review and treatment program and also to the pain clinic for consideration of sympathetic blocks and other treatments as they may indicate.

The pain clinic recommended a series of stellate blocks co-ordinated with physical medicine treatments. It was noted that claimant's shoulder dysfunction had increased considerably between the two visits. Dr. Dobyns detected a considerable

degree of conversion, hostility and panic in claimant's reactions. He recommended that her workers' compensation claim be settled and that she be placed in the pain management center program (exhibit 7).

Claimant continued in Dr. Janda's care through the end of 1985. Her treatment consisted primarily of therapy and medication. Claimant reinjured and severely sprained her left knee on November 4, 1985. A week later, the knee appeared to have improved considerably and no further indication appears in the record of continuing complaints from or treatment for that incident (exhibit 1, pages 19-21).

Claimant made a brief, unsuccessful attempt to return to work on November 21, 1985. She worked approximately four hours. The following day, she returned to Dr. Janda in acute distress (exhibit 1, page 22).

A psychological evaluation of December 5, 1985 found that claimant was becoming significantly depressed, but no particular course of treatment was recommended (exhibit 9).

Dr. Janda left the Mason City area and, in January, 1986, claimant's care was transferred to Thomas F. DeBartolo, M.D., who examined her and diagnosed her condition as reflex sympathetic dystrophy. His initial notes indicate that claimant's shoulder abducted only 60 degrees. Her internal and external rotation appeared to be the same as what had been observed at the Mayo Clinic on September 19, 1985 (exhibit 10, page 2).

Stellate ganglion blocks were administered which provided temporary relief. On February 7, 1986, Dr. DeBartolo recommended that claimant be hospitalized for a continuous stellate ganglion block. The workers' compensation rehabilitation specialist objected, however, and required a second opinion (exhibit 10, pages 4 and 5). Claimant returned to the Mayo Clinic on March 3, 1986 and was seen by Dr. Dobyns. The suggested procedure was confirmed. It was also indicated by one of the Mayo Clinic physicians that claimant's shoulder pain was myofascial in nature and should resolve with proper physical therapy (exhibit 11). The continuous blocks were administered, but with only temporary success (exhibit 23, page 72).

Over the spring and summer of 1986, claimant's care was transferred to the Mayo Clinic and additional blocks and trigger point injections were administered (exhibits 12, 13 and 15). In a report dated August 27, 1986, Dr. Dobyns concluded that a sympathectomy was not indicated, that claimant's status had been unchanged for the past year and that maximum healing had probably occurred. He rated claimant as having a 30% permanent partial impairment of the right upper limb, including the shoulder and shoulder girdle, which was equivalent to a 23% impairment of the

whole body. He indicated that any job she might consider should be a one-handed job. His final diagnosis was that she had pain dysfunction syndrome of the right upper limb with multiple factors including musculoskeletal trigger areas, peripheral nerve trigger areas, chronic recurrent swelling and chronic pain behavior including motor co-contraction and inhibition, motor and sensory alienation. Dr. Dobyns again recommended pain management center treatment in an effort to teach claimant new patterns of function and adjustment. He indicated that any job she might consider should be a one-handed job (exhibits 15 and 20).

Claimant had fallen on her right arm in early August, 1986, but Dr. Dobyns indicated that the fall actually increased the range of motion of her wrist and that it did not significantly affect her disability (exhibits 14, 15 and 20).

A second unsuccessful attempt to resume employment was made in October, 1986. Claimant complained of increased symptoms and, on the advice of Dr. Dobyns, the attempt was discontinued (exhibit 10, page 8; exhibit 20).

Claimant was evaluated by Warren N. Verdeck, M.D., on October 28, 1986. Dr. Verdeck diagnosed claimant as having a post-traumatic reflex sympathetic dystrophy of the right upper extremity. His evaluation showed right shoulder range of motion to be 60 degrees for abduction, forward flexion and internal rotation. External rotation was 15 degrees. Dr. Verdeck agreed with the 30% permanent partial disability rating of the extremity that was assigned by Dr. Dobyns. He felt that the problem in claimant's shoulder was causally connected to the work injury (exhibits 16 and 19).

John R. Walker, M.D., evaluated claimant on November 3, 1986. He rated claimant as having a 10% permanent partial impairment of the left lower extremity and a 40% permanent partial impairment of the right upper extremity. When examining claimant's right shoulder, he found full, normal flexion, extension, internal rotation and external rotation. He found abduction to be unexplainedly limited to 90 degrees. Dr. Walker felt that claimant had a tremendous psychiatric overlay. He indicated that she probably had some impairment of the shoulder, but was unable to determine how much, if any (exhibits 17 and 18).

Exhibit 23 is the deposition of Thomas F. DeBartolo, M.D., taken September 14, 1987. Dr. DeBartolo is an orthopaedic surgeon who specializes primarily in hand surgery. Dr. DeBartolo became involved in claimant's care in January, 1986 and has remained involved since that time.

Dr. DeBartolo diagnosed claimant's condition as a reflex sympathetic dystrophy. He stated that it is a poorly understood

condition that is associated with trauma. Once it develops, it is manifested by constant pain, swelling, limitation of motion or stiffness and also with certain vasal motor changes which can include an altered sweat pattern, a nonphysiologic sense of numbness, increased hair growth, changes in skin coloration and changes in bone mass. He stated that it occurs as part of the normal response of the autonomic nervous systems to an injury, but then for some reason the process does not reverse itself, leaving excess fluid, swelling and stiffness (exhibit 23, pages 61-63). Dr. DeBartolo has observed increased sweating and swelling in claimant's right upper extremity. He stated that she has developed a hand-shoulder pain syndrome and that patients with reflex sympathetic dystrophy do not necessarily improve or recover with the passage of time (exhibit 23, pages 25-33).

Dr. DeBartolo testified that claimant's condition has been essentially stable since he began treating her in January, 1986. He testified that, after the nerve blocks had been administered, there was no further treatment to offer. He indicated that the decision to proceed no further toward surgery or other aggressive treatment was made in the summer of 1986 as shown in Dr. Dobyn's report of August 27, 1986 (exhibit 23, pages 39, 73-75).

Dr. DeBartolo has not rated claimant's permanent partial disability, but stated that, when he first examined her, she had limited shoulder motion and diffuse tenderness in her shoulder. He felt that claimant has permanent impairment in her right upper extremity and shoulder. Dr. DeBartolo stated that the shoulder pain and limitation is related to the reflex sympathetic dystrophy and not directly to the injury itself. He stated that his opinion is that it would have made no difference regarding whether or not claimant's shoulder was twisted in the original trauma. Dr. DeBartolo stated that any permanent impairment in claimant's right upper extremity or shoulder is due to the work injury of January, 1985 and that she has no permanent impairment from the fall that occurred on or about July 31, 1986 (exhibit 23, pages 14, 66, 67, 70, 71, 90 and 91).

Dr. DeBartolo stated that claimant's neck complaints are not a structural or physiological problem, but that they are related to her posture (exhibit 23, page 79).

Dr. DeBartolo indicated that pain management center treatment may be advisable, dependent upon claimant's success in returning to employment. He stated that the bottom line regarding her physical restrictions is that she have a one-armed job which involves minimal use of the right upper extremity (exhibit 23, pages 76 and 77).

Claimant testified that she has had discomfort in her shoulder ever since the injury happened, but that, initially, the severe pain was in her wrist and forearm. She stated that

the pain in her shoulder joint is located in the front of the shoulder and also in the back of the shoulder-blade.

Claimant testified that she can briefly perform some activities with her right hand such as writing, but that she has difficulty holding and carrying things in the right hand. She stated that she is unable to lift her arm above her shoulder, but that she does have some motion of the right shoulder. Claimant stated that her automobile is a standard shift and that she uses her left hand, rather than the right, to shift the gears when she drives by herself.

Claimant testified that she wants to retain her job and desires to continue to work. She stated that the prior attempts to resume employment in 1985 and 1986 produced severe pain and that she was therefore unable to follow through with them.

Claimant testified that she began the process of attempting to resume employment in early 1987. In late March, the employer sent a letter inviting her to return to work, but it was necessary to get a doctor's report as to restrictions before she could actually return to employment. Claimant stated that she did return to work on July 17, 1987 and had continued to work up until the time of hearing. She stated that she still has stabbing pain in the front and back of her shoulder and numbness in her wrist and that she has had problems performing the job. She stated that she has pain going down from the shoulder joint to the elbow and constant numbness in her fingers. Claimant stated that she now works four hours per day and has tried to move up to six hours, but that the doctor advised her to remain at four hours until she gets along better. She stated that she would like to work up to eight hours per day and work full-time, if she could.

Claimant testified that the Mayo Clinic bill shown in exhibit 24 was incurred for treatment of her right arm and shoulder. Claimant stated that, at times, both she and the insurance carrier have resisted a pain management clinic program, but that she would now like the opportunity to try the program.

Carol Keel, claimant's mother, testified that she has been in regular contact with claimant ever since the injury occurred. She stated claimant had no problems with her right hand or arm before January, 1985, but since then she has never observed claimant carry anything with her right arm. Keel stated that claimant can hold a pencil and write for a short time, but that, in general, claimant does not use her right arm and carries it close to her body, a position which claimant has indicated is the most comfortable for her. Keel stated that, since the accident, both she and her husband have observed the claimant frequently and have never seen her use her right arm any differently than the use that has been represented at the hearing.

Robert Thompson, claimant's husband, testified that, prior to the injury, claimant was unrestricted in her activities, but that, since the accident, she uses her right arm very little. He stated that she cannot move the arm above shoulder level and that she does not throw anything with it. He stated that she can lift about a pound and can write with it a little bit. He corroborated claimant's complaints regarding the location and nature of her pain and discomfort.

Cecilia Blaskovich, the owner and manager of the private rehabilitation firm Medisult Ltd., and also a registered nurse and certified insurance rehabilitation specialist, testified at the hearing. Blaskovich was involved in arranging claimant's most recent return to work and in working with the employer to modify the job in an attempt to make it suitable for claimant.

Steven Karabatsos, the plant manager at the Mason City Marshall & Swift laundry, testified. Karabatsos stated that he has been with the company 17 years in a variety of positions, having started in a part-time position and, through a series of promotions, moved through every job in the plant to his current position.

Karabatsos testified that he was upset with the prior rehabilitation consultant, IntraCorp, because they did not have a representative present when claimant attempted to return to work in 1985. Karabatsos stated that they have tried to do everything that claimant, the rehabilitation consultant or her doctor have requested in adapting the job to one that claimant can perform.

Karabatsos stated that, when claimant initially returned to work, it was for two hours per day and that it is now at four hours per day. He stated that full-time work is available to claimant whenever she is ready for it. He stated that there is no plan to terminate claimant's employment.

Linda Rezab, claimant's direct supervisor at the time of injury and presently, testified that she has observed claimant at work and that claimant has mentioned being uncomfortable, but that the company has tried to do whatever the doctors wanted in order to enable claimant to resume employment.

Claimant stated that she was earning $4.00 per hour at the time of injury, but that she is now paid $4.20 per hour.

APPLICABLE LAW AND ANALYSIS

From the stipulations and the evidence, it is clear that claimant sustained serious injury on January 8, 1985 which arose out of and in the course of her employment.

The first issue to be determined is claimant's entitlement to compensation for healing period as provided by Iowa Code section 85.34(1). The claimant's first actual, successful return to work was on July 17, 1987. In view of the fact that she essentially has little industrial use of her right hand, claimant will probably never be medically capable of returning to employment substantially similar to that in which she was engaged at the time of injury. Therefore, the healing period is terminated in this case by the time at which it was medically indicated that further significant improvement from the injury was not anticipated. The healing period generally terminates at the time when the attending physician determines that the employee has recovered as far as possible from the effects of the injury. Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 65 (Iowa App. 1981). The healing period ends at the time that the doctor makes the determination that no further improvement is forthcoming. It is not judged by hindsight in looking back to the point at which improvement ceased to occur. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984). This case presents an extended healing period. Claimant was in various forms of therapy. In late 1985, Dr. Dobyns recommended stellate block therapy. The employer and insurance carrier hesitated for a considerable amount of time before allowing that therapy to occur. It was only after the nerve block therapy had proven unsuccessful and it was determined that a surgical sympathectomy was not advisable that the physicians finally concluded no further improvement in claimant's condition would be forthcoming. That determination was made, as shown by exhibit 15, on August 27, 1986. The healing period is therefore determined to run from the date of injury through August 27, 1986. It is also at that time that the first permanent partial impairment rating was given.

The next issue to be determined is the nature and extent of claimant's permanent partial disability. The first issue to be addressed is whether the injury is limited to a scheduled member or whether it extends into the body as a whole.

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).

Where an injury is limited to a scheduled member, the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (1983).

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). Impairment of the shoulder is considered to be impairment of the body as a whole. Alm v. Morris Barick Cattle Co., 240 Iowa 1147, 38 N.W.2d 161 (1949).

For injury resulting from trauma limited to a scheduled member, as occurred in this case, to be compensated industrially, the claimant must prove (1) that there is some physical injury, derangement or anatomical change that is not limited to a scheduled member, (2) the existence of physical impairment or functional disability that is not limited to the use of the scheduled member, and (3) that the changes were proximately caused by the injury to the scheduled member. Complaints of pain and discomfort, without corroborating, objective physical findings, are not sufficient. Lauhoff v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Schell v. Central Engineering Co., 232 Iowa 421, 426, 4 N.W.2d 657 (1946).

The physicians in this case, with the possible exception of Dr. Walker, have all found that claimant's range of motion of her right shoulder is limited. Claimant has made complaints of pain, discomfort and limitation affecting her right shoulder. Dr. DeBartolo indicated that the shoulder complaints were part of the reflex sympathetic dystrophy with which claimant is afflicted. The Mayo Clinic indicated that claimant's right shoulder pain appeared to be myofascial in origin and that it should resolve with proper shoulder exercises and physical therapy, possibly in combination with some trigger point injections (exhibit 11). A neurology consultation by Keith Campbell, M.D., (found at the second page of exhibit 15), indicates that an examination of claimant had been incomplete because of her inability or unwillingness to move the shoulder. The record clearly shows some problem between claimant and Dr. Walker with regard to movement of her right shoulder. There are some unexplained variances in the range of motion studies which are found in the record. Dr. Hayreh, on June 10, 1985, found claimant's right shoulder motions to be full, free and painless (exhibit 6, page 1). Two weeks later, on June 24, 1985, Dr. Janda found her to have good motion of the right shoulder with slight pain. Three days later, on June 27, 1985, right shoulder joint motions were painful and guarded (exhibit 1, page 15). On July 22, 1985, Dr. Janda found the motion for abduction, forward flexion, internal rotation and external rotation to be 93 degrees, 93 degrees, 65 degrees and 60 degrees, respectively (exhibit 1, page 16). On August 8, 1985, Dr. Janda found that claimant's shoulder was mobilizing with therapy (exhibit 1, page 17). On September 19, 1985, Dr. Dobyns found claimant's abduction and forward flexion to be 90 degrees each. He noted that, for

internal rotation, she could move her hand to the lumbosacral area and that, for external rotation, she could move her hand to the back of her head (exhibit 7, pages 2 and 3). On October 29, 1985, Dr. Janda found abduction and forward flexion to be 90 degrees each and internal rotation and external rotation to be 45 degrees each (exhibit 1, page 20). When Dr. DeBartolo first examined claimant on January 14, 1986, abduction had reduced to only 60 degrees, but forward flexion had increaded to 120 degrees. Internal rotation and external rotation were again characterized by putting the hand to the lumbosacral area and back of head, respectively (exhibit 10, page 2). Claimant was next evaluated by Dr. Verdeck on October 28, 1986. On that date, abduction was again 60 degrees. Forward flexion had decreased to only 60 degrees. Internal rotation had increased to 60 degrees, but external rotation had decreased to 15 degrees (exhibit 16). When claimant was evaluated by Dr. Walker on November 3, 1986, approximately five days later, Dr. Walker found forward flexion, internal rotation and external rotation to all be full and normal, but he found abduction to be 90 degrees. This represents an increase of 30 degrees abduction and remarkable other improvement from what Dr. Verdeck had found less than one week earlier. Dr. Walker indicated that it would be unusual to have limited abduction when the other motions were not limited (exhibit 17). Having observed claimant's appearance and demeanor at hearing, the variances in the range of motion studies for her shoulder and the indications from Dr. Walker, there is every reason to be skeptical of claimant's testimony regarding her shoulder complaints. Even Dr. Walker, however, opined that the shoulder is probably limited (exhibit 18). The record shows unexplainable results from nerve block therapy. The record contains a number of references to psychiatric problems and overlays. Ample basis exists to be suspicious of the credibility of claimant's complaints. Claimant has, nevertheless, been treated and evaluated by three eminently qualified orthopaedic surgeons, namely, Drs. DeBartolo, Dobyns and Verdeck as well as others having a lesser role in the case. Claimant has apparently convinced all of them of the validity of her shoulder complaints. There is not a single medical professional who has stated that, within a reasonable degree of medical certainty, the injuries do not extend into claimant's shoulder. Accordingly, testimony from Dr. DeBartolo, which attributes the shoulder complaints to the reflex sympathetic dystrophy, a diagnosis which has been embraced by essentially all the physicians, is accepted as being correct. Claimant's disability should therefore be evaluated industrially under the provisions of Iowa Code section 85.34(2)(u).

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to

mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963).

Post-injury earnings create a presumption of earning capacity comensurate with the earnings, but they are not synonymous with earning capacity. 2 Larson Workmen's Compensation Law, section 57.21 and section 57.31; Michael v. Harrison County, 34th Biennial Report 218 (1979).

Industrial disability in a workers' compensation case is a concept that is quite similar to impairment of earning capacity in a tort case. Impairment of physical capacity creates an inference of lessened earning capacity. The basic element to be determined, however, is the reduction in value of the general earning capacity of the person rather than the loss of wages or earnings in a specific occupation. Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa App. 1977) 100 A.L.R.3d 143.

Claimant is young and intelligent, but her entire employment history has involved physical, rather than mental, exertion. The loss of use of a very substantial part of her dominant right hand is a severe loss, even though her current rate of earnings is higher than the rate which was in effect at the time of injury. Claimant does have a 30% functional impairment of the right upper extremity, which is equivalent to a 23% impairment of the body as a whole. She has a symptomatic reflex sympathetic dystrophy which produces pain and other problems in addition to the loss of range of motion. As a practical matter, she has essentially no practical, industrial use of her right hand and arm. Drs. Dobyns and DeBartolo have restricted her to one-armed work. When all the material factors of industrial disability are considered, it is found that claimant has a 50% permanent partial disability when the impairment of her right upper extremity, including the shoulder, and her left lower extremity are all considered.

When considering the evidence, it becomes apparent that the recent injury to claimant's left leg was a temporary aggravation. It resolved promptly with conservative treatment. The permanent impairment of the leg, as found by Dr. Walker, is related to the high school injury and the resulting surgery which were clearly a more serious injury. The compensable value of a 10% permanent

partial disability of a leg under section 85.34(2)(o) is 22 weeks of compensation. Clearly, the bulk of claimant's permanent partial disability resulted from the injury to her right hand. It is determined that the injury of January 8, 1985 produced a 45% permanent partial disability which requires the employer to pay 225 weeks of compensation. After deducting 22 weeks, which represents the compensable value of the preexisting leg impairment, the second injury fund is responsible for payment of three weeks of compensation for permanent partial disability. Second Injury Fund v. Mich Coal Company, 274 N.W.2d 300, 304 (Iowa 1979); Fulton v. Jimmy Dean Meat Co., file number 755039, Appeal Decision, July 23, 1986.

With regard to exhibit 24, the charges from Mayo Clinic in the amount of $712.70, the tests and examinations are clearly shown to be those that were performed as part of the procedures necessary to determine whether sympathectomy surgery was warranted. The reasonableness of the treatment is supported by exhibit 15 and the stipulations made by the parties. Defendants are therefore responsible for payment of the bill under the provisions of section 85.27 of the Iowa Code.

Claimant, as a successful party, is entitled to recover costs in accordance with Division of Industrial Services Rule 343-4.33. Claimant is also entitled to recover interest on any amounts of weekly compensation that were not paid at the time the same came due under the provisions of Code sections 85.34(2) and 85.30. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). The fact that some degree of permanent disability resulted from the injury was obvious.

FINDINGS OF FACT

1. On January 8, 1985, Cheryl A. Thompson was a resident of the state of Iowa, employed by Marshall & Swift, Inc. in Mason City, Iowa.

2. Thompson was injured on January 8, 1985 when her right hand and forearm was pulled into an ironer machine. The initial trauma did not include the shoulder.

3. During the weeks and months that followed, claimant developed a reflex sympathetic dystrophy of the right upper extremity which, in turn, produced impairment in claimant's right shoulder.

4. Reflex sympathetic dystrophy is a disorder of the autonomic nervous system and, as indicated by Dr. DeBartolo, is not a problem that is limited to the right arm, but extends into the shoulder.

5. Following the injury, claimant was medically incapable

of performing work in employment substantially similar to the work she performed at the time of injury from January 8, 1985 until August 27, 1986 when her recovery and treatment had progressed to the point it was medically indicated that no additional treatment options remained and that further significant improvement from the injury was not anticipated.

6. Cheryl A. Thompson is a 23-year-old married woman who graduated from high school, but has no further formal education or vocational training.

7. Claimant was earning $4.00 per hour at the time of injury, but now earns $4.20 per hour.

8. All the medical care that claimant has received was reasonable treatment for the injury and the expenses charged for that treatment were fair and reasonable, including in particular the $712.70 charged by the Mayo Clinic as shown in exhibit 24.

9. Claimant has a 30% permanent functional impairment of the right upper extremity, including the shoulder, which is equivalent to a 23% permanent partial impairment of the whole person.

10. Claimant had a preexisting 10% permanent functional impairment of her left lower extremity prior to the time she commenced employment with Marshall & Swift, Inc.

11. Claimant currently has a 50% overall loss of earning capacity, of which 45% was produced by the injuries she sustained on January 8, 1985. The other 5% is related to the preexisting impairment of her left leg.

CONCLUSIONS OF LAW

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

2. The permanent partial disability resulting from the injuries claimant sustained on January 8, 1985 extends into the body as a whole and her disability should be compensated industrially under the provisions of section 85.34(2)(u) rather than as a disability to a scheduled member under section 85.34(2)(m).

3. Claimant has a 50% permanent partial disability when the same is evaluated industrially.

4. Claimant has a 45% industrial disability that was proximately caused by the injuries she sustained on January 8, 1985. The other 5% was proximately caused by the high school injury to her left knee.

5. The employer and its insurance carrier are responsible for payment of 225 weeks of compensation for permanent partial disability, less credit for the 75 weeks previously paid.

6. The Second Injury Fund of Iowa is responsible for payment of three weeks of compensation for permanent partial disability.

7. The employer and insurance carrier are responsible for payment of healing period for 85 2/7 weeks of compensation commencing January 8, 1985 and ending August 27, 1986.

8. The employer and insurance carrier are responsible for payment of claimant's remaining unpaid medical expenses at the Mayo Clinic in the amount of $712.70.

ORDER

IT IS THEREFORE ORDERED that the employer and insurance carrier pay claimant eighty-five and two-sevenths (85 2/7) weeks of compensation for healing period at the stipulated rate of one hundred twelve and 02/100 dollars ($112.02) per week commencing January 8, 1985.

IT IS FURTHER ORDERED that the employer and insurance carrier pay claimant two hundred twenty-five (225) weeks of compensation for payment of permanent partial disability at the stipulated rate of one hundred twelve and 02/100 dollars ($112.02) per week payable commencing August 28, 1986.

IT IS FURTHER ORDERED that the employer and insurance carrier receive full credit for the fifty-two (52) weeks of healing period compensation and seventy-five (75) weeks of permanent partial disability compensation that they have previously paid.

IT IS FURTHER ORDERED that all past due, accrued amounts be paid to claimant in a lump sum together with interest at the rate of ten percent (10%) per annum computed from the date each payment came due until the date of actual payment in accordance with section 85.30 of the Iowa Code.

IT IS FURTHER ORDERED that the Second Injury Fund of Iowa pay claimant three (3) weeks of compensation for permanent partial disability at the stipulated rate of one hundred twelve and 02/100 dollars ($112.02) per week payable commencing at the time the employer completes making the permanent partial disability compensation payments provided in this order, which date is computed to be December 20, 1990.

IT IS FURTHER ORDERED that the employer and insurance carrier pay claimant's medical expense with the Mayo Clinic in

the amount of seven hundred twelve and 70/100 dollars ($712.70).

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

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

Signed and filed this 11th day of April, 1988.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert S. Kinsey III
Attorney at Law
214 North Adams
P.O. Box 679
Mason City, Iowa 50401

Mr. Barry Moranville
Attorney at Law
974 73rd Street
Suite 16
Des Moines, Iowa 50312

Mr. Robert D. Wilson
Assistant Attorney General
Tort Claims Division
Hoover State Office Building
Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBI TOALSON, Claimant, vs. PUROLATOR COURIER CORPORATION, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	: : : : : : : : : : : : : : :	File No. 808332 N U N C P R O T U N C O R D E R

Upon examination of the record and the Order set forth on page 18, it is ascertained that the following paragraph was omitted from the Order:

> Attorney Soble pay claimant interest pursuant to section 85.30 on the permanent partial disability benefits secured under the Agreement for Settlement and paid claimant on November 21, 1986 from the date on which the defendant insurance carrier issued the check pursuant to the approved Agreement for Settlement in this matter, that is, June 19, 1986, until the date claimant actually received payment of such benefits, that is, November 21, 1986.

THEREFORE, IT IS ORDERED that the Decision on Attorney Fees filed February 27, 1989 is corrected to so read.

Signed and filed this 16th day of March, 1989.

Helenjean Walleser

HELENJEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Mark B. Abbott
Mr. William E. McNally
Attorneys at Law
617 Brady Street
Davenport, Iowa 52803

Mr. Lawrence J. Lammers
Attorney at Law
701 Kahl Building
Davenport, Iowa 52801

Mr. Greg A. Egbers
Attorney at Law
600 Union Arcade Building
111 East Third Street
Davenport, Iowa 52801-1550

1402.40; 1802; 1803
2505; 3002; 3102
Filed April 4, 1988
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GILBERT JOE TRUMP, Claimant, VS DICKEY TRANSPORT, Employer, and UNITED STATES FIDELITY & GUARANTY, Insurance Carrier, Defendants.	:	File No. 722320 A R B I T R A T I O N D E C I S I O N

1402.40; 1802; 1803

Truck overturn was the cause of claimant's temporary and permanent disability. He was awarded benefits based on treating physician's period of recovery and defendant's evaluating physician's percent of impairment.

2505

Claimant awarded prescriptions and medical mileage. No allowance for mileage for vocational rehabilitiation because sections 85.27 and 85.70 make no allowance for it.

3002

Claimant's attorney correctly calculated rate. ✓ 85.36(6)

3102

Insurance carrier provided serious and beneficial vocational rehabilitation and workers' compensation benefits so claimant could go to school.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GILBERT JOE TRUMP, Claimant, VS DICKEY TRANSPORT, Employer, and UNITED STATES FIDELITY & GUARANTY, Insurance Carrier, Defendants.	:	File No. 722320 A R B I T R A T I O N D E C I S I O N FILED APR 4 1988 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Gilbert Joe Trump, claimant, against Dickey Transport, employer, and United States Fidelity & Guaranty, insurance carrier, defendants, for benefits as a result of an injury that occurred on December 8, 1982. This corrected date of injury was stipulated to by the parties at the time of the hearing instead of December 7, 1982. A hearing was held in Des Moines, Iowa on July 20, 1987 and the case was fully submitted at the close of the hearing. The record consists of joint exhibits B through I, claimant's exhibit one, the testimony of Gilbert Joe Trump (claimant), and Jo Anne Trump (claimant's wife). 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 December 8, 1982 that arose out of and in the course of employment with employer.

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

That the rate of compensation, in the event of an award, is to be based upon a married person with five exemptions.

That all requested medical benefits have been paid except some prescription drugs (Exhibit I) and some mileage expenses (Ex. 1) which were first presented for payment at the time of the hearing.

That defendants claim no credit pursuant to Iowa Code section 85.38(2) for previous benefits paid under an employee nonoccupational group health plan.

That defendants are entitled to a credit for workers' compensation benefits paid prior to hearing for 145 weeks at the rate of $278.62 per week.

That defendants stated on the record at the hearing that the issue of jurisdiction under Iowa Code section 85.71, appearing on the hearing assignment order, was withdrawn by the parties and was no longer an issue in the case.

That the claim for penalty benefits under Iowa Code section 86.13 remains asserted.

ISSUES

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

Whether the injury of December 8, 1982 was a cause of temporary disability during a period of recovery.

Whether the injury of December 8, 1982 was the cause of permanent disability.

Whether claimant is entitled to temporary disability benefits during a period of recovery, and if so, the nature and extent of benefit entitlement.

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

What is the proper weekly rate of compensation in the event of an award.

Whether claimant is entitled to payment for prescription drugs as shown on Exhibit I.

Whether claimant is entitled to payment for mileage expenses as shown on Exhibit 1 for medical treatment and for vocational rehabilitation training.

SECTION 86.13 PENALTY BENEFITS

Claimant's petition claims penalty benefits under Iowa Code section 86.13. This issue was not shown as an issue on the hearing assignment order. It will therefore not be addressed in this decision.

SUMMARY OF THE EVIDENCE

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

Claimant was 33 years old at the time of the injury, married and he is the father of three dependant children. Claimant is a high school graduate and he had completed one year of college prior to the injury. Since the injury, he has completed another year of college and has one year to go in order to obtain an accounting degree. Claimant is presently enrolled in and is attending college.

Past employments include over-the-road truck driving, service station attendant and construction work. Claimant has also performed shop work servicing trucks and he has operated his own over-the-road trucking business as a self-employed individual. Claimant has also been employed as a stock agent selling stocks, a crane operator and as a police officer. Details of his past employments appear at interrogatory number ten (Exhibit C, pages 14 & 15), his employment application with this employer (Ex. D, p. 3) and in a summary he gave to the vocational rehabilitation people (Ex. F, pp. 27, 29 & 30). Claimant started to work for this employer, this last time, in approximately October of 1981 (Ex. D).

At 4 a.m. on December 8, 1982 while hauling a load of fruit baskets claimant hit a patch of black ice, lost control of the truck and turned over in the ditch. The tractor was a total loss. Black ice was described as ice that is the same color as the road. Therefore it is not detectable by looking at it. You don't see it until you are on it.

Claimant testified that he did not receive any emergency medical treatment immediately after the accident. He first became stiff about 7 a.m. Claimant helped transfer his load to another truck and delivered it on December 8, 1982. He did report to his employer that he was hurt and he was told to see his family doctor. J. A. Keuhn, D.O., took x-rays, prescribed muscle relaxants and told claimant not to drive for two or three weeks. Claimant testified that he felt like he had a needle in his back and he had shooting pains down his legs.

Claimant testified that he returned to work in March of 1983 on a trial basis. He said that he did load and unload trucks

during this period of time when he could not find help. He stated that after his last trip, in May of 1983, he could hardly get out of the truck. He was not able to work again and Dr. Kuehn referred claimant to an orthopedic specialist, Glenn Browning, D.O., who took an EMG and myelogram and said there was damage to one or two discs. Claimant related that this doctor told him that his nerves were blocked off, put him to sleep and went in and dug them out with a needle. Claimant testified that this procedure relieved the pain. Claimant testified that manipulation also relieved his pain. Claimant testified that all of the drugs for which he is claiming payment, which totaled $253.37, were prescribed by either Dr. Kuehn or Dr. Browning for his back pain from this accident (Ex. I). This testimony was not controverted. On the contrary, defendants' counsel stated that these bills had never been presented for payment prior to the hearing. Exhibit one is an itemized list of mileage for which claimant testifed that he drove to the doctors or to go to vocational rehabilitation at the request of the insurance carrier.

Claimant testified that Dr. Browning said he could return to work on July 31, 1985 but that he could not drive a truck, lift over 30 pounds or sit for over one hour. Claimant testified that defendants did not rehire claimant or offer him a job after July 31, 1985. Claimant testified that he requested work from them within his restrictions. Claimant testified that he last saw Dr. Browning in July of 1985. He is not seeing Dr. Kuehn but is getting prescriptions from him.

Claimant began vocational rehabilitation in March of 1984 with Jewish Vocational Services in Kansas City at the request of the insurance carrier. Claimant testified that the insurance carrier agreed to pay for his mileage and motel expenses. He said that he stayed with his aunt and there was no motel bill. The insurance carrier did not pay for his mileage. Claimant added that his workers' compensation checks were interrupted occasionally and stopped all together in June of 1985. Claimant testified that he has not presented any other workers' compensation claims.

The vocational rehabilitation counselor recommended college in 1984. Claimant investigated college in 1984 and in 1985 but did not actually get started until the spring of 1986 according to his testimony. He explained the delay was due to the fact that he could not walk the steps or sit that long until he actually started. The vocational rehabilitation reports also indicate that claimant had financial problems producing the tuition of $267.00 per semester. Claimant is enrolled in a two year program of management and accounting. He stated that he is a C student and does fair. The grade reports for the fall of 1986 and the spring of 1987 show grades of B, C and D (Ex. F, p. 6). Claimant testified that he hopes to graduate in July or August

of 1988. He hopes to be employed in accounting after he graduates. He testified that after the injury and up to the time of the hearing he has worked in filling stations, at a greenhouse and on farms for his parents and his brothers. Claimant did not know and could not estimate how much he would earn after he graduates. Eventually he hoped to get into business management.

Claimant testified that with respect to his back he has good days and bad days. He cannot drive a truck because of the 30 pound weight restriction and the prohibition against sitting for more than one hour. He stated that his endurance is increasing in an eight hour day but he still gets sore, stiff and tired. Quick movements, bouncing and sitting a long time cause a sharp pain. Claimant testified that the state of Missouri has paid for part of his vocational rehabilitation because he is not able to perform his old job of truck driving due to this injury.

Claimant saw Scott Neff, D.O., in December of 1985 at the request of defendants. He said that they visited five minutes and Dr. Neff had him bend over once. He granted that Dr. Neff did order a CT scan in April of 1986 which is something that Dr. Browning had not done.

Claimant testified that in 1982, which was the last full year the he worked, he earned $20,000.00. He testified that he did not have taxable earnings in 1983, 1984 or 1985. In 1986, claimant reported earnings of $5,000.00 as a gas station attendant from August of 1986 to December 31, 1986. He stated that this also included his income for work in the greenhouse in 1986. Claimant testified that he was unemployed at the time of the hearing because the service station had closed. Claimant testified that he looked for jobs around home in Trenton, Missouri and had made one appliation at Bethany, Missouri but had not been successful in finding employment. Claimant said that he had not tried police work, because he believes it would be to strenuous for him. He said that he lives on a farm near his parents and brothers and sisters near Trenton, Missouri.

Jo Anne Trump, claimant's wife of 17 years, testified that claimant is a hard worker and a good provider. She said that her husband is limited in his ability to do physically demanding work since the injury. His movements are limited. He cannot sit a long time. He cannot ride in a car for a long time.

A review of the medical evidence shows that claimant saw Dr. Kuehn approximately eight times between December 15, 1982 and May 26, 1983. Dr. Kuehn described contusion, acute ligamentous strain and acute tenderness. He prescribed medication and performed manipulative back treatment. Dr. Kuehn referred claimant to Dr. Browning on June 20, 1983 (Ex. G, pp. 1-3).

Dr. Browning made the following note at the time of claimant's

first visit on June 20, 1983.

> Mr. Trump was seen today for evaluation of his back. He has had problems with it for a long time. He was in a truck wreck and has had further problems since then. He brings x-rays with him which reveal sacralization of L5 with large batwing deformity and fusion of the transverse process on one side causing excessive strain mechanism. He neurologically shows no deficits. He is somewhat restricted in motion. We will place him on non-steroidal anti-inflammatories and also on Williams' flexion excerises and we will be rechecking him again in 2 weeks.

(Ex. G, p. 9)

An electromyograph and nerve conduction study on October 3, 1983 by Michael L. Kucera, D.O., failed to reveal any evidence of radiculophathy, plexopathy or entrapment neuropathy (Ex. G, p. 11).

On January 4, 1984 claimant was admitted to the hospital for a myelogram. The result of the myelogram is not in evidence (Ex. G, pp. 17 & 18). On the following day, January 5, 1984, Dr. Browning administered manipulation under general anesthesia and injection of epideral morphine and steroids (Ex. G, pp. 18 & 19). It was reported that this relieved claimant's pain. When the course of conservative treatment in 1984 did not produce positive results, the manipulation under anesthesia was performed again on March 29, 1985 by Dr. Browning (Ex. G, pp. 20 & 21). Dr. Browning then prescribed a course of physical therapy in his office in April, May and June of 1985 (Ex. G, p. 16). On July 31, 1985 Dr. Browning said that claimant could return to light duty with a 35 pound weight restriction and stated that claimant had a 25 percent permanent partial impairment of his back (Ex. G, pp. 15 & 16).

Claimant's vocational rehabilitation history begins in March of 1984 with Jewish Vocational Services (JVS) in Kansas City on March 29, 1984. Claimant was wearing a lumbosacral support at that time. They noted that Dr. Browning had recommended that claimant discontinue as a tractor truck driver because of the constant jarring and bumping (Ex. F, pp. 44 & 45). Dr. Browning's return to work evaluation which he completed on June 14, 1984 was very limiting. Dr. Browning said that claimant could not work eight hours a day (Ex. F, p. 40). On June 18, 1984 JVS recommended that claimant go to collge at Trenton Junior College even though it would be a difficult adjustment for an adult and would require dedication and hard work (Ex. F, pp. 37-39). On August 18, 1984, Mike Horan, the vocational rehabilitation specialist, reported that Dr. Browning indicated that claimant

had reached maximum medical improvement and had issued certain restrictions; however, Dr. Browning did not issue an impairment rating at that time. The specialist also indicated that claimant intended to enroll in Trenton Junior College (Ex. F, pp. 34 & 35). At the time of his next report, in January of 1985, the vocational rehabilitation specialist reported that Dr. Browning said that claimant was "making progress" and "gaining strength" and that the doctor still had not issued a disability rating (Ex. F, p. 33). On March 18, 1985 claimant and the specialist together saw Dr. Browning again and requested a release to return to work. Dr. Browning refused because he wanted to repeat the epideral injection and spinal manipulation again to increase claimant's functional level and to decrease his pain. After that, Dr. Browning wanted a six weeks physical therapy program through his own office and then he would provide a disability rating and a work release (Ex. F, p. 31). The specialist reported that claimant last saw Dr. Browning on July 31, 1985. The specialist said that claimant was reluctant to look for work (Ex. F, pp. 25 & 26). Terri Schmitz, claimant's new rehabilitation specialist, wrote to Dr. Browning for a rating, a release to return to work evaluation and a return to work date. Dr. Browning replied on July 30, 1985 as follows.

> This letter is in reference to G. Joseph Trump in answer to your letter of July 2, 1985. As you remember from our phone conversation of June 26, 1985; I stated that Mr. Trump would not be able to return to his former type of employment as a truck driver, but he should be able to perform other types of jobs and duties at that time or at least would be available for further testing and could perform light duty work, should not lift over 35 lbs. on an occasional basis and only up to 35 lbs. on a repetitive basis. While I feel that he could probably work an 8 hour shift at this time, it would be required that he be allowed to walk and sit and stand intermittently during that time.
>
> I feel that he has a permanent partial disability of 25% of his back. I hope that this clarifies any problem.

(Ex. F, p. 17)

On August 28, 1985 Schmitz reported that claimant was reluctant to look for work. He preferred to go to junior college. He talked about it but never started allegedly due to a lack of funds (Ex. F, pp. 15 & 16). Schmitz filed this final report on December 2, 1985.

Final Report

Mr. Trump has not responded to letters or telephone calls from this counselor; however, his mother indicated he is not going to school, but is working around the family farm. She also reported he has occasional back pains, but these come and go and are not major problems.

* * * *

Recommendations

As Mr. Trump has been released by Dr. Browning and Mr. Trump has not responded to calls or letters from this specialist, it would appear he is not interested in further vocational exploration or assistance, therefore, JVS will be closing our file at this time.

(Ex. F, p. 12)

On January 13, 1986 the JVS program director wrote to claimant's attorney. She pointed out that they had instructed claimant how to contact Missouri vocational rehabilitation assistance and how to contact the college financial aid office for a Pell Grant. She added that claimant never did follow through on either one of these suggestions. She pointed out that JVS counselors had stressed to claimant that he should begin his education while he was still receiving workers' compensation payments but claimant did not do so. She also stated that JVS had promised to help claimant with job placement but claimant did not respond to their telephone calls (Ex. F, pp. 7-9). Claimant did finally enter college in the fall of 1986 with the aid of the Missouri division of vocational rehabilitation (Ex. F, pp. 1-5). He has completed two semesters of college, namely the fall of 1986 and the spring of 1987 (Ex. F, p. 6).

Defendants eventually had claimant examined by Scott B. Neff, D.O., on December 30, 1985. Dr. Neff was critical of the manipulations under anesthesia. He declared maximum healing should have ended one year after claimant's injury which would have been December of 1984 which was one year prior to the time of his examination in December of 1985. Dr. Neff stated claimant had a ten percent impairment of his back according to the guides published by the American Medical Association. Dr. Neff said that some persons can return to truck driving if they are able to avoid the heavy unloading. He said that claimant could return to many activities. He said claimant has stiffness and backaches. He said that claimant should avoid heavy lifting and should not shovel. Dr. Neff recommended a CAT scan and back school for claimant (Ex. E, pp. 1-3). Claimant attended back school on June 6, 1986 and again on June 13, 1986 (Ex. E, pp. 4 & 5). The CAT scan which Dr. Neff ordered showed the following:

"Findings: There is diffusely bulging disc material seen at L3-L4 and L4-L5. Mild to moderate degenerative changes are seen in the posterior facets of the lower lumbar spine. No evidence of herniated disc. Nothing for central canalicular stenosis or lateral foraminal stenosis." (Ex. E, p. 6). Claimant's wage records have been introduced into evidence for a proper computation of the rate (Ex. B). More will be presented on the rate in the next section of this decision.

Claimant made a claim for transportation expenses to see the vocational rehabilitation specialists at JVS (Ex. 1, p. 1). Claimant also presented an itemized statement of mileage expense to come to Des Moines for medical examination and evaluation at the request of defendants (Ex. 1, p. 2).

12-30-85	Dr. Neff, Des Moines, Iowa	230 mi.	$55.20
4-28-86	Iowa Lutheran Hospital, Des Moines, Iowa and Dr. Neff, Des Moines, Iowa	230 mi.	$55.20
6-13-86	Physical Therapy Consultants, Des Moines, Iowa	230 mi.	$55.20
		Total	$165.60

(Ex. I)

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 8, 1982 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to

be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

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 injury of December 8, 1982 was the cause of claimant's time off work for a period of recovery from the date of the injury, December 8, 1982 until March 2, 1983, the date that claimant returned to work (Form 2A, industrial commissoner's file; Ex. B, p. 3).

The injury was also the cause of claimant's time off work for a period of recovery from May 19, 1983, when claimant terminated his employment with employer because he was unable to work, until July 31, 1985 when Dr. Browning formally released claimant to return to work and gave claimant a permanent functional impairment rating. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981); Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124 (Iowa App. 1984).

Claimant is entitled to healing period benefits for both of these periods of time.

It is true that at one point, on August 16, 1984, Dr. Browning told the vocational rehabilitation specialist that claimant had reached maximum medical improvement and Dr. Browning imposed restrictions (Ex. F, pp. 34 & 35). However, Dr. Browning refused to give a permanent functional impairment rating at that time. Also, he continued to treat claimant and subsequently noted that claimant was "making progress" and "gaining strength" on his next report (Ex. F, p. 33). Dr. Neff's statement that claimant should have reached maximum medical improvement a year after the injury may be correct. Claimant's period of recovery

up to one and one-half years was unusually long in comparison with other back injuries of this nature. However, when the opinion is rendered three years after the injury it does not carry as much weight as a treating physician who was seeing claimant regularly in conjunction with a vocational rehabilitation specialist who was present during most of these examinations by Dr. Browning. Dr. Neff's opinion would have been more valuable if it had been rendered closer to the point in the recovery that it referred to rather than two years later. Therefore, deference is given to the treating physician, Dr. Browning, based upon the evidence presented in this case. Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (1985).

The operative phrase in industrial disablity is loss of earning capacity. Ver Steegh v. Rolscreen, IV Iowa Industrial Commissioner Report 377 (1984).

This injury was the cause of permanent disability. Dr. Browning awarded a 25 percent permanent functional impairment rating. Dr. Browning imposed restrictions of no more employment as a truck driver and a weight restriction of 35 pounds. Dr. Neff awarded a 10 percent permanent functional impairment rating. He felt that claimant should avoid heavy lifting and should not shovel.

With truck driving ruled out, claimant was forced from the method he had used most in the last 15 years to make a living. Claimant followed Dr. Browning's advice and did not drive a truck. Dr. Neff indicated that claimant might try to drive a truck because others do it. Claimant testified that he could not drive a truck because he could not stand the bouncing (Ex. E). Therefore, it is determined that claimant is foreclosed from the occupation of over-the-road truck driving which he had followed for the last 15 years and this will cause a sizable reduction in his earning capacity. Michael v. Harrison County, Thirty-fourth Bienniel Report of the Industrial Commissioner 218, 220 (Appeal Decision 1979).

Claimant was age 33 at the time of the injury and age 37 at the time of the hearing. Claimant is young enough to be retrained. The feasibility of retraining is one of the considerations involved in determining industrial disability. Conrad v. Marquette School, Inc., IV Iowa Industrial Commissioner Report 74, 78 (1984). Claimant had completed high school and one year of college prior to the injury. Claimant has gone back to college although he was very slow in getting started. He was urged to go in 1984 but didn't get started until 1986. Claimant hoped to graduate with an accounting degree in 1988. His long term goal is business management. In the employer's favor is the fact that employer offered serious vocational rehabilitation to claimant and paid claimant a reasonable amount of workers' compensation benefits for this injury. Schelle v. Hygrade

Food Products, Thirty-third Biennial Report of the Industrial Commissioner 121 (1977). Claimant was admonished by the vocational rehabilitation specialist to get his college training started while he was receiving workers' compensation payments. Claimant was actually paid workers' compensation payments for a total of 145 weeks.

Even though claimant cannot return to over-the-road truck driving he has other skills and a varied employment background. Claimant has experience with construction, sales, maintenance, police work and self-employment. His past employments provide him with a number of qualifications and work experiences. Claimant apparently knows how to farm also. At several points in the medical evidence it was indicated that claimant had worked on farms. He had strained himself lifting bales and lifting a car out of a ditch. He admitted to helping his parents and brothers and sisters farm by driving a tractor.

Dr. Browning's award of a 25 percent permanent functional impairment rating seems high when compared with other cases of this nature. Dr. Browning did not state how he arrived at this number. Dr. Neff's award of a ten percent permanent functional impairment rating appears to be more reasonable, particularly for a back injury that has not required surgery and for which no surgery is contemplated. Dr. Neff stated that he used the AMA guides. Furthermore, the sacralization that Dr. Browning initially described is normally a congenital defect. Also, Dr. Neff's CAT scan showed a considerable amount of degeneration for claimant's young age. Industrial disability can be equal to, less than or greater than functional impairment. Lawyer & Higgs, Iowa Workers' Compensation -- Law & Practice, section 13-5, page 116 and 1987 supplement page 20.

The fact that claimant earned $20,000.00 in 1982 and only $5,000.00 in 1986 is not a real standard. Claimant has not tried to work full time since the injury. Claimant was a student for one-half of the year in 1986.

Based on the foregoing discussion and all of the factors that are used to determine industrial disability, it is determined that claimant has sustained a 30 percent industrial disability to the body as a whole.

Defendants' calculation of the proper rate is not correct. It leaves off the thirteenth week prior to the injury and considered the $200.00 of vacation pay as a week of earnings whereas it is actually a payment of accumulated vacation time rather than a seperate weeks earnings. Claimant had earnings that same week of October 28, 1982 in the amount of $431.04 (Ex. B, p. 2).

Claimant's attorney correctly computed the rate in his brief

at paragraph six as follows.

> Claimant's rate of weekly compensation is $278.62. Claimant's last day of work was December 8, 1982. He received pay for that period of work on December 16, 1982, according to the payroll records (Combined Exhibit B). Claimant was paid 16¢ per mile (claimant's Petition, testimony of claimant). Consequently, the claimant is paid by his output so his earnings are properly computed in accordance with Section 85.36(6) of the 1987 Code of Iowa which provides that an employee paid on the basis of output should have his weekly earnings computed by dividing by 13 the earnings not including overtime or premium pay of said employee earned in the employ of the employer in the last completed period of 13 consecutive weeks immediately preceding the injury.

The last completed period of 13 consecutive calendar weeks preceding the injury would include the checks issued to Joe Trump on September 23, 1982, through December 16, 1982. The October 28, 1982, payment of $200.00 was vacation pay which he received for working during his scheduled vacation. Likewise, the payment of $107.18 on December 9, 1982, should be disregarded as it was reimbursement for expense receipts turned in by Joe Trump. However, the $20.00 paid on December 2, 1982, as holiday pay should be included in accordance with the Commissioner's decision in Stevens v. John Morrell Company, Vol I, No. 1 Iowa Industrial Commissioner Decision 236 (1984) which stated that holiday pay is a regular payment as opposed to an irregular bonus, overtime or premium pay. Except for the payment of $200.00, $107.18, and $20.00 previously discussed, all other payments were regular salary payments.

Referring then to Combined Exhibit B, the gross pay of the claimant for the applicable pay period would be as follows:

Week Number	Date of Paycheck	Gross Weekly Pay
Week 1	9-23-82	$ 506.78
Week 2	9-30-82	308.04
Week 3	10-7-82	489.02
Week 4	10-14-82	486.88
Week 5	10-21-82	413.90
Week 6	10-28-82	431.04
Week 7	11-4-82	339.76

Week 8	11-11-82	748.86
Week 9	11-18-82	401.66
Week 10	11-25-82	305.06
Week 11	12-2-82	415.00
Week 12	12-9-82	439.88
Week 13	12-16-82	489.14
Total Gross Weekly pay for 13 weeks immediately preceding injury on December 8, 1982		$5,775.02

$5,775.02 divided by 13 equals $444.23

The average gross weekly wage is of Joe Trump for the 13 weeks immediately prior to his injury is $444.23. The parties have stipulated in the Pretrial Report and Order that Gilbert Joe Trump is married and has five exemptions. Referring then to the Worker's Compensaton Benefit Schedule effective July 1, 1982, on page 45 referring to gross weekly wages of $444.00 for a married person with five dependents is $278.62. This amount of $278.62 is the same amount which the defendants have compensated claimant. Computation of gross weekly wage is in accordance with the applicable statutes. The rate of compensation is in accordance with the Worker's Compensation Benefits Schedule published by the Iowa Industrial Commissioner on July 1, 1982. Consequently, the proper rate of compensation for the claimant is $278.62.

(Claimant's Brief, paragraph 6)

The carrier paid claimant at the rate of $278.62 per week. Why defense counsel disputed the rate at the time of the hearing was not immediately clear.

Claimant tesified that all of the prescriptions claimed were prescribed by either Dr. Kuehn or Dr. Browning for this injury. This testimony was not disputed. Therefore, claimant has sustained the burden of proof that he is entitled to payment for these prescriptions in the amount of $253.37 (Ex. I).

Claimant is not entitled to mileage for vocational rehabilitation training. Vocational rehabilitation is not one of the authorized itemized expenses in Iowa Code section 85.27 as a medical expense; nor is it one of the items that the legislature provided for in Iowa Code section 85.70.

Claimant is entitled to the medical mileage to travel to and from Des Moines to see Dr. Neff at defendants request in the amount of $165.65.

FINDS OF FACT

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

That claimant was off work for a period of recovery due to this injury from December 8, 1982 until March 2, 1983 and again from May 19, 1983 until July 31, 1985.

That Dr. Browning stated that claimant sustained a 25 percent permanent functional impairment and Dr. Neff said that claimant sustained a ten percent permanent functional impairment.

That the proper rate of compensation is $278.62 per week.

That claimant incurred $253.37 in prescription drugs due to this injury.

That claimant incurred $165.65 in medical mileage due to this injury.

That claimant sustained an industrial disability of 30 percent of the body as a whole.

CONCLUSIONS OF LAW

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

That the injury was the cause of temporary disability during a period of recovery.

That the injury was the cause of permanent diability.

That claimant is entitled to healing period benefits from December 8, 1982 until March 2, 1983 and again from May 19, 1983 until July 31, 1985.

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 the proper rate of compensation is $278.62 per week.

That claimant is entitled to $253.37 in prescription drug expense.

That claimant is entitled to $165.65 in medical mileage expense.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to claimant healing period benefits for twelve point two eight six (12.286) weeks for the period from December 8, 1982 to March 2, 1983 and one hundred fourteen point five seven one (114.571) weeks of healing period benefits for the period from May 19, 1983 to July 31, 1985, a total of one hundred twenty-six point eight five seven (126.857) weeks of healing period benefits, at the rate of two hundred seventy-eight and 62/100 dollars ($278.62) per week in the total amount of thirty-five thousand three hundred forty-four and 90/100 dollars (35,344.90).

That defendants pay to claimant one hundred fifty (150) weeks of permanent partial disability benefits based upon an industrial disability of thrity (30) percent of the body as a whole at the rate of two hundred seventy-eight and 62/100 dollars ($278.62) per week in the total amount of forty-one thousand seven hundred ninty-three dollars (41,793.00) beginning on July 31, 1985.

That defendants are entitled to a credit for one hundred forty-five (145) weeks of workers' compensation benefits paid prior to the hearing at the rate of two hundred seventy-eight and 62/100dollars ($278.62) per week in the total amount of forty thousand three hundred ninty-nine and 90/100 dollars ($40,399.90).

That all accrued benefits are to be paid in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That defendants pay to claimant two hundred fifty-three and 37/100 dollars ($253.37) for prescription drug expense and one hundred sixty-five and 65/100 dollars ($165.65) in medical mileage.

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

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

That if claimant desires a second bifurcated hearing on the issue of Iowa Code section 86.13 penalty benefits that claimant arrange a conference call with the prehearing deputy and defendants' attorney for that purpose within ten (10) days of the signing and filing of this decision.

Signed and filed this 4th day of April, 1988.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Richard L. Ambelang
Attorney at Law
1920 Court Avenue
Chariton, Ioa 50049

Mr. Ross H. Sidney
Ms. Iris J. Post
Attorneys at Law
2222 Grand Avenue
PO Box 10434
Des Moines, Iowa 50306

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK A. VAN BLARCOM,	:	
Claimant,	:	File No. 796651
vs.	:	A R B I T R A T I O N
FDL FOODS, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Mark A. Van Blarcom against FDL Foods, Inc., his self-insured employer. The case was heard and fully submitted at Dubuque, Iowa on December 15, 1987. The record in this proceeding consists of testimony from Mark A. Van Blarcom, joint exhibits 1 and 2 and claimant's exhibit A.

ISSUES

The only issue presented by the parties for determination is the nature and extent of claimant's permanent partial disability. It was stipulated that Van Blarcom had sustained an injury in the nature of carpal tunnel syndrome which arose out of and in the course of his employment on or about May 14, 1985, that his healing period ran from June 7, 1985 to September 8, 1985 and had been fully paid and that his rate of compensation is $85.17 per week.

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.

Mark A. Van Blarcom is a 26-year-old man who has been employed by FDL Foods, Inc. since October 18, 1984. In 1985, he developed right carpal tunnel syndrome and was referred to L. C. Faber, M.D., for treatment. After attempts at conservative treatment were unsuccessful, carpal tunnel release surgery was performed on July 26, 1985 (exhibit 1, pages 1, 4 and 10). Dr. Faber released claimant to return to work on September 9, 1985 (exhibit

1, page 23).

Claimant testified that the surgery did not completely resolve his symptoms, but that, in the weeks following surgery, he noticed a decrease in numbness and a return of his grip strength. Claimant exhibited the scar on his right hand which ran into the palm of his hand and also approximately one and one-half inches from the base of the palm toward the wrist and forearm.

Claimant testified that he continues to have difficulties with his right hand and arm. He stated that numbness has returned and that now it includes all the fingers of his hand and runs up his forearm, at times even to his shoulder. Van Blarcom stated that, at times, he has jolts which feel like an electrical shock which run throughout his entire arm. He stated that they start in the elbow and move in both directions, going to the shoulder and also to his hand. He stated that jolting can be produced by fully flexing or extending his right wrist.

Claimant has bid on different positions and, at the present time, pushes carcasses in the cooler. He stated that, in view of the type of work he now performs, his symptoms are less frequent and less severe than they were at times when he performed knife work. Claimant stated that the scar does not restrict his wrist.

In response to his complaints, claimant was referred to A. Sterrett, M.D., a neurologist, who felt that claimant was suffering from recurrent right carpal tunnel syndrome. He suggested reexploration of the carpal tunnel (exhibit 1, pages 24 and 25).

On June 26, 1986, Anthony J. Piasecki, M.D., issued a report in which he indicated that claimant has had carpal tunnel syndrome of his right wrist and that he has residual findings. Using the AMA tables on impairment of function, Dr. Piasecki assigned claimant an impairment rating of 11% of his right upper extremity (claimant's exhibit A).

Claimant was also referred to William F. Blair, M.D., for an evaluation. On March 6, 1987, Dr. Blair issued a report which indicates that claimant has a persistent activity-related median neuropathy with an associated measurable decrease in sensibility in the right hand. Dr. Blair rated claimant as having a five percent permanent functional impairment of the right hand, a figure which he indicated was equivalent to a five percent impairment of the right upper extremity.

APPLICABLE LAW AND ANALYSIS

In view of the stipulation made by the parties, the extent of permanent partial disability is the only issue to be determined. Contained within that issue is whether the disability is limited

to the hand or extends into the arm. The fact that Dr. Piasecki gave his rating as an impairment of the upper extremity is not necessarily an indication that impairment exists beyond the hand. Physicians commonly rate carpal tunnel syndrome impairment alternately as either an impairment of the hand or as an impairment of the upper extremity, regardless of the actual precise location of the impairment. Additionally, when the AMA guides are used to convert impairments between the hand and the arm, the net result when awarding compensation generally varies little regardless of whether the impairment is treated as one of the hand or of the arm.

The operative report found at exhibit 1, page 10 indicates that the annular ligament was incised. The annular ligament is anatomically located distally to the distal end of the radius and ulna. It is located in an area that is considered to be part of the wrist. The wrist is considered to be part of the hand. Elam v. Midland Manufacturing, II Iowa Industrial Commissioner Report, 141 (App. Decn. 1981). None of the physicians in the case have identified anything in their reports which indicates that claimant has any physical ailment, abnormality or derangement that extends beyond the wrist and into the arm. Accordingly, claimant's disability should be evaluated as a disability of the right hand. Lauhoff Grain Company v. McIntosh, 395 N.W.2d 834 (Iowa 1986).

Dr. Blair's ratings do not appear to be inconsistent with table 9 which is found at page 10 of the second edition of the Guides to the Evaluation of Permanent Impairment. It shows a five percent impairment of the hand to be equivalent to a five percent impairment of the upper extremity. Dr. Piasecki's 11% impairment rating of the upper extremity is shown, in that same table, to be equivalent to a 12% impairment of the hand. Impairment ratings of the hand are easily converted to an equivalent impairment rating of the upper extremity and vice versa using the table in the guides. Division of Industrial Services Rule 343-2.4. Agency experience and expertise shows that an impairment rating, following carpal tunnel surgery, of five percent of the hand or less usually indicates a favorable result from surgery. Impairment ratings of 10% of the hand or greater usually indicate a surgery that was not completely successful. Claimant's appearance and demeanor was observed as he testified. His testimony concerning his complaints is accepted as being correct. The rating from Dr. Piasecki is found to be more consistent with claimant's continuing symptoms and complaints than the rating from Dr. Blair. Nevertheless, when considering all the evidence in the case, it is determined that claimant has a 10% loss of use of his right hand as a result of the carpal tunnel syndrome. This entitles him to receive 19 weeks of compensation for permanent partial disability. Payment of those 19 weeks was due commencing at the end of the healing period, in this case, on September 10, 1985. Claimant is also entitled to recover interest on the unpaid compensation at the rate of 10% per annum computed from the date each payment

came due until the date of actual payment. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

FINDINGS OF FACT

1. Mark A. Van Blarcom has a 10% loss of use of his right hand as a result of the carpal tunnel syndrome which he incurred through his employment with FDL Foods, Inc.

2. Even though claimant experiences symptoms in his arm, the physical impairment and anatomical derangement is located in his hand.

CONCLUSIONS OF LAW

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

2. Claimant's disability should be evaluated as disability to the hand under Iowa Code section 85.34(2)(l).

3. Claimant is entitled to receive 19 weeks of compensation representing a 10% loss of use of the hand.

ORDER

IT IS THEREFORE ORDERED that defendant pay claimant nineteen (19) weeks of compensation for permanent partial disability at the stipulated rate of eighty-five and 17/100 dollars ($85.17) per week payable commencing September 10, 1985.

IT IS FURTHER ORDERED that the entire amount thereof is past due and shall be paid to claimant in a lump sum together with interest at the rate of ten percent (10%) per annum computed from the date each payment came due until the date of actual payment.

IT IS FURTHER ORDERED that the costs of this action are assessed against the defendant, including the sum of ninety-nine and 50/100 dollars ($99.50) for a written report from Dr. Piasecki, pursuant to Division of Industrial Services Rule 343-4.33.

IT IS FURTHER ORDERED that defendant file a Claim Activity Report within ninety (90) days from the date of this decision.

Signed and filed this 16th day of May, 1988.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Louis P. Pfeiler
Attorney at Law
Washington Park Law Building
679 Bluff Street
Dubuque, Iowa 52001

Mr. David C. Bauer
Mr. James M. Heckmann
Attorney at Law
One CyCare Plaza, Suite 216
Dubuque, Iowa 52001

1402.40; 1803
Filed April 7, 1988
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD L. WALES,	:	
Claimant,	:	File No. 763660
VS	:	A R B I T R A T I O N
CATERPILLAR TRACTOR COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

1402.40; 1803

Claimant was paid healing period benefits and was either paid or it was agreed that he would be paid certain permanent partial disabilitiy benefits that were agreeable to both parties. The terms of the permanent partial disability agreement were not disclosed at the hearing and are not included in the industrial commissioner's file.

The agency was asked to determine the narrow issue of whether claimant was entitled to additional permanent partial disability benefits during a period of layoff when a junior employee was called back to work and claimant, who was senior, was not because the company physician had unilaterally placed certain restrictions on claimant due to his back. Claimant asserted that the restrictions of the company physician were imposed as part of the call back process and this was the reason that the junior employee was called back and claimant, who was senior, was forced into a longer period of layoff.

It was held that this factor could and should have been included in the industrial disability factors that the parties considered in reaching their agreement of permanent partial disability. One element or one factor of industrial disability cannot be determined in isolation from all of the other elements or factors of industrial disability.

The selection process used by employer in calling back to work certain employees during a period of layoff was not a proper subject of the workers' compensation law. This was an

employer-employee issue, a labor-management issue to be determined by labor law and the labor-management agreement.

No benefits allowed. Costs are assessed against claimant. Parties ordered to file a copy of their settlement agreement on the permanent partial disability.

001742

FILED

APR 7 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD L. WALES,	:	
	:	
Claimant,	:	File No. 763660
	:	
VS	:	A R B I T R A T I O N
	:	
CATERPILLAR TRACTOR COMPANY,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Richard L. Wales, claimant, against Caterpillar Tractor Company, employer and self-insured defendant, for benefits as a result of an injury that occurred on April 18, 1984. A hearing was held in Davenport, Iowa on February 18, 1988 and the case was fully submitted at the close of the hearing. The record consists of the testimony of Richard L. Wales (claimant), William Knudsen (union representative) and joint exhibits A, B, C and D. Joint exhibit A contains 13 indexed subparts. The attorney for claimant submitted a very good brief. The attorney for defendant was ordered to file a brief but failed to do so.

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 April 18, 1984 which arose out of and in the course of employment with employer.

That claimant was paid temporary disability benefits for two weeks and one day from April 18, 1984 to May 2, 1984 and that temporary disability benefits are no longer in dispute in this case at this time.

That claimant was paid a certain amount of permanent partial disability benefits for this injury and that those benefits are not in dispute in this case at this time.

That the type of permanent disability, in the event of an

award of permanent disability benefits, is industrial disability to the body as a whole.

That in the event of an award of additional permanent partial disability benefits, that the commencement date of benefits is to be June 30, 1986 and the ending date of such benefits is March 16, 1987.

That the rate of compensation, in the event of an award, is $279.06 per week.

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

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

That there are no bifurcated claims.

ISSUE

The parties submitted one issue for determination.

Whether claimant is entitled to industrial disability benefits during a period of layoff beginning June 30, 1986, when a junior employee was called back to work ahead of claimant who was senior, until March 16, 1987 when claimant was actually called back to work.

SUMMARY OF THE EVIDENCE

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

Claimant is 33 years old. He graduated from high school in 1973 and started to work for employer on August 20, 1973. Claimant has performed the duties of parts washer, power truck operator, paint laborer and tool crib attendant for employer. On April 18, 1984, claimant was injured while pulling a load as a power trucker. He suffered a sensation of pain in his back which radiated down to his feet. He was off work for two weeks and one day from April 18, 1984 to May 2, 1984.

James C. Donahue, M.D., plant physician, released claimant to return to work on May 3, 1984. Dr. Donahue imposed restrictions of no repetitive lifting, bending, pushing, pulling and no lifting over 25 pounds (Exhibit A, page 12c). Claimant worked until a general plant layoff occurred on April 1, 1985 at which time he was laid off (Ex. B).

A recall list was issued for the week of June 23, 1986.

Claimant's name did not appear on that list. An employee by the name of G. A. Twigg was recalled to work on that list effective June 30, 1986 (Ex. C, p. 2). Both claimant and Twigg have the same seniority date of August 20, 1973 (Ex. C, pp. 1 & 2). Article seven of the bagaining agreement provides as follows. "(7.2) In applying the provisions of this Local Agreement, the seniority of employees who have the same seniority date shall be determined by the indentification numbers assigned to such employees, the employee with the lowest identification number being deemed to have the greatest seniority." (Ex. D).

The identification number of Twigg is 31014 (Ex. C, p. 2). The identification number of claimant is 31005 (Ex. C, p. 1).

Claimant said that he inquired as to why Twigg was recalled and he was not and he was told that it was due to his weight restriction.

It had happened that Dr. Donahue had completed a "Disability Report" a few days before the recall on June 3, 1986 about claimant who was on layoff which appears to state "limit lifting to 45 lbs., no repetitive bending." There is an "x" in the block labeled "Personal Injury". The box marked plant injury is left blank (Ex. 12b).

Claimant testified that he did not know why Dr. Donahue checked the block personal injury on this form. Claimant further testified that he did not know why this disability report was made out by Dr. Donahue at this time. Claimant testified that he did not request it. Furthermore, claimant said he had not seen Dr. Donahue for an examination at that time. Claimant concluded that it may have been issued at employer's request in regard to the recall that occurred on June 23, 1986, when Twigg was recalled on June 30, 1986 and claimant was not even though he had a lower indentification number than Twigg.

An earlier return to work pass, after a layoff that occurred on September 22, 1983, stated that claimant could return to work on December 21, 1983 for a sit down job (Ex. 12e).

Claimant testified that he talked to Dr. Donahue and was told he could not return to work because (1) a workers' compensation case was pending and (2) because of the 45 pound weight restriction that he had issued on June 3, 1986.

Dr. Donahue wrote to claimant's counsel on February 26, 1987 that he felt that any individual having chronic back problems should be limited to 45 pounds lifting with no repetitive bending in order to return to work (Ex. A, p. 12a). On February 16, 1987 employer wrote a letter that employer adhered to the 45 pound weight restriction imposed by Dr. Donahue and felt that it was appropriate in claimant's situation (Ex. A, p. 13a).

Claimant was not recalled to work until March 16, 1987 (Ex. C). As far as claimant knows the weight restriction of 45 pounds, issued by Dr. Donahue on June 3, 1986, was still in effect on March 16, 1987 and was still in effect at the time of the hearing.

Claimant's counsel stated that claimant is not expecting to be paid workers' compensation benefits for the period of the general layoff from April 1, 1985 to June 30, 1985 when Twigg, who had less seniority than claimant, was called back to work and claimant was not. He stated that claimant does contend that claimant is entitled to workers' compensation benefits from June 30, 1986 until claimant was actually called back to work on March 16, 1987. He bases his claim on the fact that Dr. Donahue said on June 3, 1986 that claimant should limit lifting to 45 pounds and to do no repetitive lifting (Ex. 12b).

Claimant conceded that he has had back problems dating back to 1979; however, no doctor had ever imposed any lifting restrictions prior to this injury which occurred on April 18, 1984.

Defendant's counsel contended that Dr. Donahue's restrictions of June 3, 1986 were based upon claimant's documented back problems that date back to 1980 rather than the injury of April 18, 1984.

Claimant admitted that he was involved in an automobile accident where he was rear ended; however, this occurred in November of 1986 after Dr. Donahue's disability report dated June 3, 1986 and after the recall on June 30, 1986.

Claimant did acknowledge that his own personal physician stated back on May 2, 1981 that claimant was to do no lifting until his back problem was evaluated, but that this restriction was only temporary and related to a very brief period of time in the past (Ex. A, p. 4d).

William Knudsen testified that he is president and chairman of Local 215. He verified that there was an indefinite layoff of claimant on April 1, 1985. A copy of the layoff was given to the union (Ex. B). Knudsen further verified that Twigg was junior to claimant in seniority because he had a higher clock number than claimant (Exs. C & D). Knudsen testified that he did not personally know why Twigg was recalled and claimant was not. He said that in his opinion it was common knowledge that it was due to the weight restriction and it was not a case of whether Twigg had greater skill and ability. Knudsen testified that he was not knowledgeable on claimant's prior health conditions or problems.

Although there is no other evidence of it in the industrial commissioner's file or in the evidence introduced at hearing,

claimant's counsel stated that claimant and defendant had agreed that claimant was entitled to 20 percent industrial disability for this injury. Nevertheless, the period from June 30, 1986 to March 16, 1987, when Twigg was called back to work and claimant was not, was the only disputed matter in this case at the time of hearing.

A physician report from Richard L. Kreiter, M.D., stated on October 15, 1986 that CT scans, myelogram and a magnetic resonance imaging scan were all normal. He found claimant had (1) chronic low back pain and (2) depression. Dr. Kreiter stated that he suggested and claimant was agreeable to seeing a psychiatrist and working with the mental health center (Ex. A, p. 1d).

Byron W. Rovine, M.D., said that a neurological examination was normal on June 17, 1986 (Ex. A, p. 3a).

A report of F. Dale Wilson, D.O., attributes claimant's complaints to the automobile accident of November 20, 1986 (Ex. A, p. 2a).

The records of P. J. Crowley, M.D., all predate this injury and do not appear to apply to the instant issue (Ex. A, p. 4).

Darrell B. Johnson, M.D., a neurologist, saw claimant on November 5, 1984. He performed an EMG and nerve conduction tests which were completely normal. He recommended behavior modification rather than medication (Ex. A, p. 5).

John F. Collins, M.D., treated claimant for the injury of April 18, 1984. He returned claimant to work on May 3, 1984 with the recommendation that he should avoid lifting anything over 25 pounds and avoid bending, lifting, pushing, pulling and climbing (Ex. A, pp. 6 & 7).

The report of Truce T. Ordona, M.D., records a major depression episode, recurrent on September 26, 1981 (Ex. A, p. 8). The report of Ralph H. Congdon, M.D., reports mechanical low back pain in May and June of 1981 (Ex. A, p. 9).

The report of Steven C. Chang, M.D., reports depressive reaction on August 27, 1980 (Ex. A, p. 10). The report of Victor G. Strang, M.D., reports spinal subluxations in June and July of 1980 (Ex. A, p. 11).

APPLICABLE LAW AND ANALYSIS

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

Claimant has the burden of proving by a preponderance of the

evidence that he received an injury on April 18, 1984 which arose out of and in the course of employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

This employee suffered an injury on April 18, 1984. He was paid for a period of temporary disability and he was paid for a permanent partial disability. That much of this case is a normal workers' compensation claim to which the workers' compensation statute applies. In addition, claimant asks us to make a determination on the employer's right to evaluate an employee before a call back from a layoff and then call back the employees that the employer chooses to call back based on the physical condition of the employee. This is not a workers' compensation issue. This is an employer-employee issue, a labor-management issue, to be determined by labor law and the labor-management agreement. The selection process of the employer in calling back laid off employees is not a subject of the workers' compensation law.

As far as claimant's injury on April 18, 1984, claimant was paid temporary disability benefits and permanent disability benefits apparently based upon an industrial disability. The amount of industrial disability and the industrial factors were not placed into evidence at this hearing and they are not a matter of record in the industrial commissioner's file. Industrial disability includes loss of earning capacity. Loss of earning capacity would include not being called back to work after a

layoff due to restrictions for the work injury from the company doctor. Claimant's entitlement, if any, for not being recalled from the layoff for the period from June 30, 1986 to March 16, 1987 due to his work restriction should be included as a factor in the permanent partial disaibility settlement which he has apparently made with employer and for which there is no evidence in the record at this time. In conclusion, it is held that claimant is not entitled to a specific award of permanent partial disabilty as industrial disability for the period for which he was not called back to work from June 30, 1986 to March 16, 1987.

FINDINGS OF FACT

Based on the evidence presented the following findings of fact are made.

That claimant was not recalled after the layoff of April 1, 1985 on June 30, 1986 because of a 45 pound weight restriction imposed by the company doctor on June 3, 1986 according to the evidence presented at the hearing.

That claimant had apparently previously settled and worked out an agreement on both temporary and permanent disability prior to the hearing.

CONCLUSIONS OF LAW

Based upon the evidence presented and the pinciples of law previously discussed the following conclusions of law are made.

That claimant did not sustain the burden of proof by a preponderance of the evidence that he is entitled any additional industrial disability because employer did not recall him to work on June 30, 1986.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from this proceeding.

That the costs of this proceeding are to be paid by 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.

That the agreement for settlement reached by the parties should be sumbitted to the industrial commissioner for approval.

001749

Signed and filed this 7th day of April, 1988.

Walter R. McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Roger Owens
Attorney at Law
840 Fifth Ave
Des Moines, Iowa 50309-1398

Mr. Larry Shepler
Attorney at Law
600 Union Arcade Bldg
111 E. 3rd St.
Davenport, Iowa 52801-1550

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARJORIE E. WALK, Claimant, vs. LEHIGH PORTLAND CEMENT CO., Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 806963 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 Marjorie E. Walk against Lehigh Portland Cement Company, her employer, and The Travelers Insurance Company, the employer's insurance carrier. The case was heard and fully submitted at Mason City, Iowa on March 16, 1988. The record in the proceeding consists of testimony from Marjorie E. Walk and Louis B. Fasing and joint exhibits 1 and 2.

ISSUES

The only issue in this case is determination of the degree of permanent partial disability sustained by claimant. It was stipulated that claimant sustained an injury which arose out of and in the course of employment; that she has been paid all compensation due for healing period; and, that she has been paid 35 weeks of compensation for permanent partial disablity. It was further stipulated that any further compensation for permanent partial disability should be payable commencing on March 22, 1987. Claimant's rate of compensation was stipulated to be $272.83 per week.

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.

Marjorie E. Walk is a 57-year-old married lady who has been employed by Lehigh Portland Cement Company since 1976. Claimant is a high school graduate and also has work experience managing a restaurant, managing a country club, clerking in a drug store and working as a telephone operator.

Claimant has performed a number of different functions for Lehigh Portland Cement Company. All the positions within the company have required moderate to heavy physical exertion, except for the positions in the laboratory. A good portion of claimant's time has been spent as a general laborer performing whatever tasks were assigned. She has worked as a brick layer and as a brick layer's helper. She has worked as a brakeman on the plant's railroad system.

At the time of injury, claimant was assigned to work as a tower lancer. She was using a water blaster to remove deposits of built-up material from the kiln. The water blaster sprays water at high pressure into the kiln. While doing so, the blaster kicked back, injuring claimant's right shoulder.

Claimant continued to work throughout that shift and also worked the following shift, but then sought medical care.

Claimant was seen at St. Joseph Mercy Hospital by Jon R. Yankey, M.D., one of the employer's plant physicians. After a period of conservative treatment did not resolve claimant's complaints, she was referred to Darrell Fisher, M.D., an orthopedic surgeon. Dr. Fisher employed a course of physical therapy which provided some improvement of claimant's condition. In a report dated May 28, 1986, Dr. Yankey concluded that claimant still had bursitis and tendonitis. He released her to return to work effective July 1, 1986 with a restriction that she not perform any work requiring lifting more than 25 pounds or lifting higher than her shoulder. He concluded that she had a seven percent impairment of the body as a whole (exhibit 1, page 7). On February 15, 1988, Dr. Fisher confirmed his impairment rating (exhibit 1, page 13). On May 20, 1987, Dr. Fisher reaffirmed claimant's work restriction of less than 25 pounds and working below shoulder level (exhibit 1, page 14).

Claimant's initial request to return to her job was denied. The employer consulted with Dr. Yankey to confirm claimant's physical restrictions and limitations. Dr. Yankey authorized claimant to return to employment with the same restrictions as had been previously indicated by Dr. Fisher (exhibit 1, pages 9-12).

After receiving the information from Dr. Yankey, claimant was provided a position in the laboratory where she gathers

samples of materials used in the production process and performs quality control analysis of the samples. The work is within the physical restrictions imposed by the physicians and claimant has been able to perform it. The position is intermittent, however, in that claimant works only when someone else in the department is on vacation or otherwise absent. Fasing testified that, when a full-time position in the lab department comes open, claimant will be able to obtain that position. He testified that, in the meantime, she would work to cover vacations and as otherwise needed and that she would draw unemployment when work was not available. Fasing testified that, currently, work would be available for 27 weeks of the year for vacations. In the near future, the vacation entitlement of the regular lab employees would grow to 31 weeks and then to 34 weeks. In addition to the weeks that claimant works, she also receives three weeks of paid vacation each year. Fasing testified that another worker in the laboratory department is expected to retire in the near future. The retirement could be in November of 1989 if the employee retires at age 62. Fasing testified that, if claimant had not been injured, she would be able to work a full year in view of her seniority and current levels of operation in the plant.

Claimant testified that, when she draws unemployment, she is required to seek work and that she has done so. Claimant testified that her unemployment benefit is $164.00 per week. Claimant indicated that she did not desire to obtain any job other than her job with Lehigh since all she could find would be in the minimum wage pay range and it would not pay for her to take such a low paying job. Claimant testified that, when injured, her rate of pay was $10.91 per hour and that it has been frozen since then based upon the union contract.

APPLICABLE LAW AND ANALYSIS

Both witnesses who testified at the hearing are found to be fully credible. This case presents an excellent example of an injured employee who has made a very sincere attempt to overcome her disability. This case presents an excellent example of an employer who has responded very well to the needs of an injured employee. The net result is that both parties have benefited greatly by the efforts they have made. The employer's action in making work available to the claimant within the confines of its normal business operations has prevented her from being cast aside and forced to seek new employment in the competitive labor market. If such had occurred, claimant would certainly have suffered a very severe loss of earnings. Claimant earns considerably more in her present work situation than she could be expected to earn with a new employer. Claimant has been able to retain her quite favorable fringe benefit package. The employer has the services of a valued, reliable employee and has avoided what might have been a quite substantial workers' compensation liability.

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 fact that a worker is approaching normal retirement age is a factor which may be considered. Becke v. Turner-Busch, Inc., 34th Biennial Report, Iowa Industrial Commissioner, page 34 (App. Decn. 1979).

At the present time, claimant's work of 27 weeks per year and three weeks of paid vacation provide her with full-time employment at her regular rate of earnings for approximately 60% of each year. During the remaining 40% of the year, she receives unemployment compensation, an amount which is approximately 40% of what she would earn if she was working. When claimant's umemployment compensation and wages for the year are combined, the net result is that she has an income which is approximately 25% less than what she would be earning if she worked for the full year. The record shows that the number of weeks that she is assigned to work will be increasing. It is probable that one of the full-time workers will be retiring or otherwise leaving within the next two to five years. Claimant is, herself, approaching the range of what is considered to be normal retirement age. When all the material factors of industrial disability are considered, it is found and concluded that claimant has sustained a 15% loss of earning capacity as a result of the injuries she sustained on or about October 11, 1985.

FINDINGS OF FACT

1. Marjorie E. Walk and Louis Fasing are fully credible witnesses.

2. Marjorie E. Walk has a seven percent functional impairment of the body as a whole as a result of the injuries she sustained on or about October 11, 1985 and is restricted to lift no more than 25 pounds and to avoid working at levels higher than shoulder level.

3. Claimant's earnings from employment, paid vacation and unemployment compensation are approximately 75% of the amount she would earn each year if she worked the entire year.

4. The amount of time that claimant is assigned to work annually will be increasing in the future due to increasing vacation entitlements of the full-time laboratory employees.

5. Claimant will be offered a full-time position in the laboratory when the first vacancy occurs, which vacancy is anticipated to occur within the next five years.

6. Claimant has sustained a 15% loss of earning capacity as a result of the injuries to her right shoulder.

CONCLUSIONS OF LAW

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

2. Marjorie E. Walk has sustained a 15% industrial disability which entitles her to receive 75 weeks of compensation under the provisions of Iowa Code section 85.34(2)(u).

3. Defendants are entitled to credit for the 35 weeks of permanent partial disability compensation previously paid.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant forty (40) weeks of compensation for permanent partial disability at the stipulated rate of two hundred seventy-two and 83/100 dollars ($272.83) per week payable commencing March 22, 1987. The entire amount thereof is past due and shall be paid in a lump sum together with interest pursuant to section 85.30 of The Code of Iowa.

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

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 31st day of March, 1988.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert W. Pratt
Attorney at Law
1913 Ingersoll Avenue
Des Moines, Iowa 50309

Mr. Mark A. Wilson
Attorney at Law
30 Fourth Street NW
P.O. Box 1953
Mason City, Iowa 50401

1402.40, 1802, 1803, 4100
Filed February 10, 1988
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JEAN WAMSLEY, N/K/A JEAN KENNE, Claimant, vs. K-MART CORPORATION, Employer, Self-Insured, Defendant.	:	File No. 789563 A R B I T R A T I O N D E C I S I O N

1402.40, 1802, 1803, 4100

Sixty-one-year-old claimant at time of injury, age 63 at time of hearing, sought benefits in the nature of running healing period or permanent total disability as a result of a back injury which had been admitted by the employer. Claimant's credibility regarding the severity of her complaints was found to be lacking as it was not corroborated by objective evidence in the record. Claimant had not made bona fide efforts to resume employment. Awarded healing period as indicated by one of her treating physicians and 15% permanent partial disability.

FILED 901757

FEB 10 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JEAN WAMSLEY, N/K/A JEAN KENNE, Claimant, vs. K-MART CORPORATION, Employer, Self-Insured, Defendant.	:	File No. 789563 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 Jean Wamsley, now known as Jean Kenne, against K-Mart Corporation, her self-insured former employer.

The case was heard at Fort Dodge, Iowa on July 1, 1987 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from claimant, June Hageness and Donald Kenne. The record also contains claimant's exhibits 1, 2 and 3.

ISSUES

It was stipulated that claimant sustained injury which arose out of and in the course of her employment on March 8, 1985, that her rate of compensation is $124.38 per week and that she had been paid 82 weeks of compensation at the correct rate prior to hearing. The issues in the case are determination of claimant's entitlement to compensation for healing period and determination of her entitlement to compensation for permanent disability. It was stipulated that the payments of weekly compensation that have been paid were ended on October 4, 1986.

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.

Jean Wamsley, now known as Jean Kenne, is a 63-year-old lady who has married since the date of her injury. She stated that her husband is age 71 and has been retired since 1982. Claimant

has two adult children. Her daughter lives in Cumberland, Maryland and her son lives in Jacksonville, Florida.

Claimant is a 1940 high school graduate, but has no other formal education. She is not currently employed and now lives in Cumberland, Maryland. In the past, claimant has worked as a bookkeeper, a bank teller, a billing clerk, a telephone operator, a waitress, a receptionist, a cashier in a cafeteria and a retail sales clerk.

Claimant commenced employment with K-Mart Corporation in Fort Dodge, Iowa in September, 1978. She has worked in several different departments. In particular, she worked in the jewelry and camera department for three years. She worked on check-outs for two years. Claimant was assigned to the lay-away department in mid-1983 and was working in that department at the time of her injury. Claimant testified that her duties involved handling boxes or bags with the items which were being placed into or out of lay-away. She stated that her activities could include carrying the articles up steps to the storage area. She stated that some of the items she handled were heavy, such as microwave ovens. She related that, usually, there was only one person working in the department, but that she could call for assistance for any items which she was unable to handle.

Claimant testified that she had no difficulty with her back while working in the lay-away department until March 8, 1985. On cross-examination, claimant stated she could remember only one hospitalization for back problems prior to the injury now under consideration. She did not deny, however, having an acute lumbar strain in 1982 or being hospitalized for low back problems three times during the 1980 through 1982 time range.

Claimant related that, on March 8, 1985, she experienced stinging pains in the front of her legs at approximately 3:30 or 4:00 p.m., but that they went away and that she worked until 6:00 p.m. She related that March 8, 1985 was a Friday and that, after work, she did nothing strenuous. She stated that, on Saturday, she felt okay and did not do much. She stated that Sunday morning she found herself in excruciating pain on the left side of her body and was unable to get out of bed. She phoned her daughter for assistance and went to the hospital for medical care. She was given medication and sent home, but, on Monday, her condition had worsened and she was hospitalized.

Claimant testified that, during the period of approximately ten days while she was hospitalized, she received therapy, but felt no better when discharged.

Claimant testified that she was referred to John T. Bakody, M.D., a neurosurgeon. Claimant stated that, after tests had been conducted, Dr. Bakody told her that she did not have a

ruptured disc and that he would not perform surgery.

Claimant continued to treat with Dr. Bakody, but related that he was unable to find a cause for her pain and suggested that she be seen at the Mayo Clinic.

Claimant went to the Mayo Clinic on June 24, 1985 where extensive tests were performed. Claimant related that she was given steroids which provided some temporary relief and that treatment with a Hubbard tank also provided temporary relief. She stated that the exercises which were recommended caused too much pain for her to perform them.

Claimant testified that she was released and returned home where she resumed care under the direction of Roy M. Hutchinson, M.D., and that she has not been released to return to work by any of the physicians in the Midwest who have treated her.

Claimant testified that she moved out of Iowa in July, 1986, going first to Burnsville, North Carolina, and then to Maryland in 1987. She has not returned to work at any location.

Claimant testified that she received a letter from the K-Mart Corporation in October, 1986 which informed her that her employment had been terminated because she had left the state of Iowa.

Claimant testified that she desires to return to work, but does not feel she could do so and has not looked for employment. She testified that she likes to work with people and that she also needs the money. She related she had planned on working until age 70.

Claimant testified that she has limitations which make her unable to operate a vacuum cleaner. She stated that she climbs stairs one step at a time and that washing dishes drives her crazy. She stated that she is unable to sit for longer than approximately 20 minutes in a straight-back chair. She related that she spends her days reading, knitting and painting.

While in North Carolina, claimant saw E. Stanley Willett, M.D., an orthopaedic surgeon. Claimant related that Dr. Willett advised her she could work four hours per day if she was able to sit and to stand as she felt the need and that she should have a 20-pound lifting limit.

Claimant stated that, in Maryland, she was seen by W. C. Spiggle, M.D. Claimant related that Dr. Spiggle told her she had a herniated disc and should have surgery. Claimant stated that she does not want to have surgery at the current time, but that she may if her pain worsens. She felt that the pain was worse at the time of hearing than it had been in March, 1985.

June Hageness is an evaluator at Iowa Central Community College where she interviews and tests applicants for their vocational aptitudes. Hageness evaluated claimant and indicated that claimant appeared to be uncomfortable when performing a peg board test and that she also appeared to be anxious about the testing. Hageness indicated that claimant's test results showed her reading to be at the beginning of the eleventh grade level and her math to be at the end of the seventh grade level. Hageness felt that claimant's evaluation showed that claimant would have a better chance of success at jobs she could learn from on-the-job training rather than from formal education. Hageness indicated that claimant's aptitude scores were sufficiently low that they did not indicate the ability to perform some of the jobs claimant has actually held in the past. Hageness indicated that claimant's expressed interest had been in either retiring or in obtaining part-time work. Hageness did not present any wage level survey information, but indicated that some of the jobs which appeared to be suitable for claimant would pay a wage that would probably be less than what claimant had earned at K-Mart.

Donald Kenne testified that he and claimant drove to Fort Dodge from the East, a distance of approximately 800 miles, and that they made the trip in 15 hours. Donald Kenne indicated that claimant was uncomfortable from sitting for so long and that he was also uncomfortable. He indicated that claimant did some of the driving and that they stopped at rest areas during the trip.

Claimant has been thoroughly evaluated and examined by a number of physicians. Drs. Hutchinson and Spiggle have indicated that claimant has a herniated intervertebral disc (exhibit 1-1; exhibit 3). Dr. Bakody found her to have some traumatic myofascitis (exhibit 1-14). Dr. Willett felt that she had preexisting degenerative arthritis which was aggravated by her injury (exhibit 1-2). At the Mayo Clinic, it was concluded that she had bilateral chronic L5 radiculopathies, most prominent on the left, but that there was no satisfactory explanation for the pain which she described (exhibit 1-16). Dr. Hutchinson indicated that claimant had reached her maximum healing period by May 19, 1986 (exhibit 3). When Dr. Willett examined her on September 29, 1986, he felt that she had already reached maximum medical improvement (exhibit 1-2; 1-3).

Dr. Willett indicated that claimant had a five percent impairment of her back (exhibit 1-2). He suggested the following physical restrictions: No lifting of more than 20 pounds, no repetitive bending or stooping and a job that would permit claimant to change from sitting to standing positions as she felt the need (exhibit 1-2). Dr. Hutchinson felt that claimant would not be able to return to work and that her physical activities should be restricted to lifting no more than 10

pounds. He indicated that she would have difficulty if she was called upon to sit, stand or walk for prolonged periods (exhibit 3).

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 8, 1985 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Claimant complained of the onset of pain, sought immediate medical attention and has continued under medical care. Dr. Willett, in his report of December 2, 1987, indicated that claimant's condition was preexisting degenerative arthritis that had been aggravated by her injury. The medical history that claimant has consistently given indicates an onset of symptoms while lifting a microwave oven at work on Friday, March 8. None of the physicians have indicated that claimant's activities at work on March 8, 1985 were not a cause of her low back problems. It is therefore found and concluded that the injury claimant sustained on March 8, 1985 was a proximate cause of the disability which she has experienced arising from the condition of her low back. It is also found that claimant had preexisting spurs and degenerative disc disease in her spine, but diagnostic tests and recent studies have failed to demonstrate significant abnormalities in claimant's low back area (exhibit 1-2; 1-8; 1-9; 1-11; 1-16; 1-32; 1-33; and, 1-37). Only Dr. Spiggle found any abnormality (exhibit 1-1). Claimant had a history of prior back problems. It nevertheless appears that the injury of March 8, 1985 was of sufficient severity to cause claimant to seek medical treatment and that she has some residual limitations as a result of that injury.

Claimant is entitled to recover compensation for healing period under the provisions of section 85.34(1). The healing period ended at the time she attained maximum medical improvement. Dr. Hutchinson made such a determination on May 19, 1986 as shown in exhibit 3 and his assessment is accepted as correct. Claimant's healing period therefore commences on Sunday, March 10, 1985, the first day where she experienced any disability, and it ends on May 19, 1986, a period of 62 2/7 weeks.

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

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963).

Claimant's degree of permanent disability should be compensated under the provisions of section 85.34(2)(u). Compensation benefits are geared to weekly wage loss. It is not inconsistent to generally state that workers, even if not disabled, typically, though not exclusively, retire at some point between the ages of 60 and 75. The fact that a worker is in or approaching typical retirement age may be considered as one of the factors in determining industrial disability. Brecke v. Turner-Busch, Inc., 34th Biennial Report 34 (App. Decn. 1979).

In this case, claimant was gainfully employed at K-Mart and had been employed for several years. Subsequent to the injury, she married. She now lives in Cumberland, Maryland. Her daughter has likewise moved to Cumberland, Maryland since claimant's injury. Claimant appears to be living what could be characterized as a typical life for a retired person. Her husband is also retired. When claimant spoke with June Hageness regarding reentering the job market, her expressed interests were part-time work or retirement. Her physical restrictions as indicated by Drs. Hutchinson and Willett are substantial. It appears, however, that those restrictions were imposed more as a result of claimant's description of her problems to the physicians than as a result of any definable physical abnormalities that the doctors were able to identify. Claimant's appearance and demeanor were observed as she testified. Claimant's complaints

regarding the severity of her pain and discomfort are not corroborated by objective medical evidence. Her ability to drive from Maryland to the state of Iowa in 15 hours, without stopping overnight, is not corroborative with her complaints. When all the material factors of industrial disability are considered, it is determined that claimant sustained a 15% permanent partial disability as a result of the injury she sustained on March 8, 1985.

Claimant urged that she is permanently and totally disabled under the odd-lot doctrine as defined by the Iowa Supreme Court in the case Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). She has not, however, made a showing that she has made bona fide efforts to return to gainful employment and has, therefore, failed to make a prima facie showing of permanent total disability under the odd-lot doctrine. Emshoff v. Petroleum Transportation Services, (App. Decn. March 31, 1987). Claimant has no physical abnormalities that have been identified by the medical practitioners, as contrasted from her complaints, which make a prima facie case for total disability.

FINDINGS OF FACT

1. Claimant injured her back on March 8, 1985 while performing lifting in the lay-away department of the K-Mart store at Fort Dodge, Iowa.

2. Following the injury, claimant was medically incapable of performing work in employment substantially similar to that she performed at the time of injury from March 10, 1985 until May 19, 1986 when she reached the point that it was medically indicated that further significant improvement from the injury was not anticipated.

3. Claimant is 63 years of age, married and has no dependents.

4. Claimant's injury was an aggravation of preexisting degenerative arthritis in her spine.

5. Claimant is able to function at least as well as indicated by Drs. Hutchinson and Willett.

6. Claimant lives a relatively normal life for a retired person.

7. The credibility of claimant's testimony regarding her plans of continued employment and also regarding the severity of her physical complaints is not well corroborated and is not accepted as being an accurate indicator of her abilities and limitations.

8. Claimant has experienced a 15% loss of earning capacity

as a result of the injuries she sustained on March 8, 1985.

9. Claimant has not made bona fide efforts to return to gainful employment.

CONCLUSIONS OF LAW

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

2. Claimant is entitled to receive 62 2/7 weeks of compensation for healing period and 75 weeks of compensation for permanent partial disability.

ORDER

IT IS THEREFORE ORDERED that defendant pay claimant sixty-two and two-sevenths (62 2/7) weeks of compensation for healing period at the stipulated rate of one hundred twenty-four and 38/100 dollars ($124.38) per week commencing March 10, 1985.

IT IS FURTHER ORDERED that defendant pay claimant seventy-five (75) weeks of compensation for permanent partial disability at the stipulated rate of one hundred twenty-four and 38/100 dollars ($124.38) per week commencing May 20, 1986.

IT IS FURTHER ORDERED that defendant receive credit for the eighty-two (82) weeks of compensation paid prior to hearing and also for any weekly compensation paid subsequent to the date of hearing. All past due amounts remaining unpaid after allowance of the credits as provided herein shall be paid in a lump sum together with interest computed from the date each payment came due pursuant to section 85.30.

IT IS FURTHER ORDERED that the costs of this action are assessed against the employer pursuant to Division of Industrial Services Rule 343-4.33 in the amount of one hundred forty-one and 67/100 dollars ($141.67).

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 10th day of February, 1988.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Monty L. Fisher
Attorney at Law
Suite 200, Snell Building
P.O. Box 1560
Fort Dodge, Iowa 50501

Mr. Joel T. S. Greer
Attorney at Law
112 West Church Street
P.O. Box 496
Marshalltown, Iowa 50158

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEN WATSON, Claimant,	:	
vs.	:	File No. 726062
GETTY OIL COMPANY, Employer,	:	A R B I T R A T I O N
	:	D E C I S I O N
and	:	
TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Ken Watson against Getty Oil Company, his former employer, and the Travelers Insurance Company, its insurance carrier.

The case was heard and fully submitted on October 5, 1987 at Des Moines, Iowa. The record in this proceeding consists of testimony from Ken Watson, joint medical exhibits 1 through 11, joint non-medical exhibits 1 through 7 and defendants' exhibit 8, which consists of claimant's deposition taken December 15, 1986.

ISSUES

Claimant seeks further benefits based upon an injury he sustained on February 10, 1983. It was stipulated that claimant's entitlement to compensation for temporary total disability or healing period is 19 3/7 weeks running from February 11, 1983 to March 27, 1983 and again from June 20, 1983 to September 18, 1983 and that it has been fully paid at the stipulated rate of compensation which is $317.18 per week. The issues to be determined are determination of claimant's entitlement, if any, to compensation for permanent partial disability and section 85.27 benefits. The commencement date for any permanent partial disability compensation was identified as an issue. The employer asserts that there is no causal connection between the injury and the alleged disability.

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.

Ken Watson testified that he is a 46-year-old high school graduate. He stated that, since high school, he has been employed primarily as a truck driver. He was employed by Getty Oil Company, and its predecessor company, since 1970. Claimant's employment with Getty terminated concurrent with a purchase of the company by Texaco. Claimant was offered severance pay in excess of $30,000 which he chose to accept in lieu of working for lower wages and fewer benefits under Texaco.

Watson testified that he has generally enjoyed good health throughout his lifetime. He related that, in 1981, he injured his lower back while changing hoses on a tanker. He stated that he was paid workers' compensation and was treated by Marshall Flapan, M.D. Medical exhibit 1 shows that claimant was hospitalized at that time for a lumbosacral strain. In the course of treatment, claimant complained of headaches and neck discomfort. X-rays revealed a compression fracture of his sixth cervical vertebra. The final progress note dealing with that incident is dated January 6, 1982. It indicates that Watson was coming along well, that he was not having any pain or discomfort and that he had a full range of motion of his cervical spine without any neurological deficit. The note indicates that no permanent impairment had been sustained as a result of that injury.

Claimant testified that, on February 10, 1983, he slipped and fell when opening a large gate at the employer's Vandalia Road terminal near Des Moines, Iowa. In his deposition, exhibit 8, at page 19, claimant indicated that, when he fell, he fell forward and hung onto the gate, apparently with his hands. He also indicated "...my feet went out from under me behind me." Claimant indicated that it hurt immediately. Medical exhibit 2 shows that claimant was seen by John T. Bakody, M.D., on February 17, 1983 at the Mercy Hospital Emergency Room. Claimant voiced complaints of neck discomfort with aching into his shoulders and arms, headaches and numbness of his hands. Claimant was off work from the date of the injury until March 27, 1983. He then returned to work until June 20, 1983. Watson was again seen by Dr. Bakody at Mercy Hospital on June 21, 1983 with complaints similar to those he had made previously. Claimant was hospitalized for a myelogram and CT scan which showed findings consistent with a pinched nerve in the neck from a disc at the C6-7 and C5-6 levels. Claimant was treated conservatively with physical

therapy and medications (medical exhibit 2, page 6). A progress note from Dr. Bakody dated September 13, 1983 indicates that claimant should try working on September 19, 1983 (medical exhibit 2, page 8). Claimant stated that he returned to work with Getty and worked until 1985 when he suffered another injury.

Claimant testified that, in 1985, he pulled his back muscles again in an incident that occurred in Kansas City, Missouri while changing hoses on a tanker. Claimant stated that he was treated by Richard L. Owens, M.D., and James R. Rochelle, M.D., in Kansas City, but that none of the treatment was for his neck. Claimant testified that he did not know if he told either of those physicians that he had injured his neck in 1983. Medical exhibit 6 shows that claimant had an accident on February 8, 1985 when he slipped on ice while delivering gas. The condition was initially diagnosed as a lumbar strain, but a later assessment indicated that claimant had probable degenerative disc disease. A work hardening program was recommended, but claimant stated that he never participated in it. A report from Dr. Rochelle dated May 15, 1985 indicates that claimant's complaints had changed little recently and that the pain remained in the lumbosacral region with no significant radiation into the buttocks or thighs. Dr. Rochelle indicated that the purpose of the work hardening program was to evaluate claimant's endurance and to attempt to condition him to the point that he would be able to find another job in a laboring capacity.

Exhibit 7 is a report from Dr. Owens in which he concludes that claimant had suffered a subacute ligamentous and muscular strain of the lumbar area and that claimant also had a history of a preexisting injury to the neck area as a result of an injury in 1983 for which claimant had residual symptoms. Dr. Owens assigned a five percent permanent partial disability rating of the whole body as a result of the injury of February 8, 1985. He addressed claimant's neck condition only as a matter of history.

Claimant testified that he was thoroughly examined by James W. Hall, M.D., for both the 1983 and 1985 injuries. The report sent to James R. Brown, which is dated May 5, 1986 and appears in medical exhibit 10 starting at page 40, indicates that, in the 1985 accident, claimant had sustained a chronic lumbosacral strain with no evidence of neurological involvement. He rated claimant as having a permanent partial disability of seven and one-half percent of the body as a whole due to that incident. The second report from Dr. Hall, also dated May 5, 1986, commences at page 42 of medical exhibit 10. Dr. Hall did not have the benefit of any of the prior diagnostic radiographic studies, but did take x-rays of claimant's neck which showed mild spurring of the C6 vertebra. Dr. Hall made his diagnosis of a damaged disc of the cervical spine only from the history that claimant provided. Dr. Hall assigned a 20% permanent partial disability

rating of the body as a whole based upon the written report from Dr. Bakody which is dated March 4, 1986 and the history that was provided by the claimant.

On April 4, 1986, in response to an inquiry made by the insurance carrier, Dr. Bakody stated that claimant had a 20% permanent partial disability of the body as a whole (medical exhibit 9).

Claimant was also evaluated by Thomas A. Carlstrom, M.D. Dr. Carlstrom did review the radiographic studies which had been made commencing in 1981 and running through 1983. Dr. Carlstrom felt that the studies did not support the diagnosis of a compression fracture of the cervical spine. He stated that, in his opinion, the claimant had a myofascial neck syndrome which probably began in February of 1983. He rated claimant as having a 1-2 percent permanent partial impairment under the AMA guidelines (medical exhibit 11).

Medical exhibit 3, at page 13, contains the report of a myelogram which was performed on June 22, 1983. It reports large spurs at the C6-7 level. On the same page, regular x-rays of the cervical spine again showed hypertrophic spurring at C6-7 and C5-6. A CT scan of the cervical spine, the report of which is found at medical exhibit 3, page 14, indicates that there were spondylotic changes, particularly at the C-5,6 and C-6,7 and a possible disc protrusion at C-7,T-1.

Claimant testified that, following the period of treatment and recuperation in 1983, he returned to his same job as a transport driver for Getty Oil Company. He stated that, due to his problems, he was often assigned to haul propane, which he considered to be lighter work than delivering gasoline. Claimant testified that he took severance pay, rather than continuing employment with Texaco, for a number of reasons, some economic and some due to his desire to seek lighter work.

After claimant left Getty Oil Company, he attended real estate school and became licensed. He sold real estate for approximately ten months during which time he earned approximately $5,000.

Claimant has returned to truck driving and is currently employed as a temporary, full-time driver for Farmland Industries where his take-home pay is approximately $350 per week. Claimant indicated that his gross earnings have run as high as $450 per week. Claimant had worked for Farmland in the spring of 1986, but then obtained another truck driving job with Fleming-Babcock, Inc. where his gross earnings were approximately $340 per week. Claimant testified that he hopes his employment with Farmland will continue and develop into a full-time, year-round job. Claimant stated that he now earns $10,000 to $14,000 per year

less than what he had most recently earned while working for Getty Oil Company.

Claimant testified that his neck problems have continued since 1983 and that he continues to experience headaches and numbness in his arms and hands on a daily basis. He stated that his low back does not cause him much difficulty at the present time.

Claimant testified that he commenced treatment with the Makings Chiropractic Center in Liberty, Missouri upon the recommendation of Carol Meier, D.C., the chiropractor who had treated him in Des Moines, Iowa. Claimant stated that the insurance carrier and employer had paid Dr. Meier, but that he had not submitted any of the bills from Dr. Makings to them for payment. Claimant testified that he continues to see Dr. Makings approximately once per month.

APPLICABLE LAW AND ANALYSIS

The first issue to be addressed is determination of the extent of permanent partial disability, if any, that was proximately caused by the injury that claimant sustained on February 10, 1983. For a cause to be proximate, it must be a substantial factor in bringing about the result, but it need not be the only cause. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

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

The spurring which has been identified in claimant's cervical spine is evidence of a degenerative process. Since it was identified shortly after the 1983 injury, it probably had preexisted that injury for a considerable amount of time. Such conditions, by their very nature, are prone to exacerbations from physical activity or strains which normally resolve over a period of a few weeks. According to claimant's testimony, as corroborated by the physicians, the neck complaints from the 1983 injury did not completely resolve. The impairment ratings are quite divergent, ranging from 20% by Dr. Bakody to 2% by Dr. Carlstrom. They do agree, however, that there is some degree of permanent impairment that resulted from the 1983 injury.

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).

Industrial disability, 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 a loss of wages in any specific occupation. Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa App. 1977) 100 A.L.R.3d 143. Post-injury earnings create an inference of earning capacity commensurate with them, but they are not synonymous with earning capacity and may be rebutted by evidence which shows them to be an unreliable basis for estimating earning capacity. 2 Larson Workmen's Compensation Law, sections 57.21 and 57.31; Michael v. Harrison County, 34th Biennial Report, 218 (1979).

The impairment ratings are greatly divergent. None of the physicians have provided any physical restrictions or activity limitations for claimant to follow. Following the injury, claimant returned to the same job with Getty without any loss of earnings. That status existed until the 1985 injury and the termination of Getty Oil Company employment. Claimant has now returned to the occupation of truck driving, the same general occupation in which he engaged at the time of injury. He earns less now than he did prior to the injury, but the same result would likely have occurred regardless of whether or not he was injured. The change in the Getty Oil Company employment status was not related to claimant's injury or disability. It is determined that the mere fact the employment with Getty Oil Company ended is the primary cause in the reduction of income which claimant has experienced. In view of the activities in which claimant has actually engaged since 1983, the impairment rating imposed by Dr. Carlstrom is determined to be more accurate than the quite substantial rating assigned by Dr. Bakody. Claimant is, nevertheless, more symptomatic than he was previously.

Activities such as lifting that are commonly involved in the process of loading and unloading trucks, a requirement of many truck driving jobs, are troublesome for him. When all the material factors of industrial disability are considered, it is determined that claimant has a five percent permanent partial disability as a result of the injuries he sustained on February 10, 1983.

According to Iowa Code section 85.34(2), compensation for permanent partial disability comes due at the end of the healing period. Code section 85.30 provides interest on compensation that is not paid when it comes due. A literal construction of those statutes was adopted by the Iowa Supreme Court in the case Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Interest is simply an adjustment which recognizes the investment value of money. It is not a penalty that is assessed for wrongdoing. There may be some unique circumstances in which an exception to that general rule may be implied. It would not be unreasonable if, where the existence of permanent partial disability was not discoverable through the exercise of reasonable diligence, commencement of payment and interest on unpaid amounts could be delayed. The minimum showing necessary, however, to establish reasonable diligence would require that the treating physicians have been asked whether or not any permanency had resulted. In the absence of such an inquiry, it is impossible to conclude that reasonable diligence had been exercised as would justify a delay in the commencement of compensation. The permanent partial disability compensation awarded in this case therefore becomes payable commencing on March 28, 1983. It is interrupted by the subsequent healing period running from June 20, 1983 through September 18, 1983 and then resumes on September 19, 1983. Defendants are therefore responsible for payment of interest at the rate of ten percent per annum computed on each payment from the date it came due until the date it is actually paid.

Section 85.27 of The Code gives the employer the right to choose the medical care which an employee is receiving. Claimant had been treating with Dr. Meier, with the employer's knowledge and consent, and the employer paid for Dr. Meier's expenses. The employer and its insurance carrier were not given notice of the transfer of care to Dr. Makings. It is clear from the itemized statement found at medical exhibit 5 that Dr. Makings provided an ongoing course of treatment to claimant. By claimant's testimony, it continues to the present time. The records show gaps in treatment of as much as six months. It is determined that the treatments from Dr. Makings were not substantially related to the February 10, 1983 injury. They appear more likely to be a result of treatment for the recurrent exacerbations which commonly occur with individuals who have a degenerative condition. According to the evidence in this record, it appears that the exacerbations which occurred through July 13, 1985 were

related to claimant's employment with the Getty Oil Company. Subsequent care and treatment does not appear related to that employment. The employer's liability under section 85.27 is therefore $331.00. From the evidence in the case, it appears that the treatments were reasonable treatments for claimant's condition. Since the employer had not directed claimant to obtain his care from any specific source and since the referral was made from Dr. Meier to Dr. Makings, the defense of lack of authorization does not absolve defendants from liability. Limoges v. Meier Auto Salvage, I Iowa Industrial Commissioner Report, 207 (1981).

FINDINGS OF FACT

1. Ken Watson injured his neck on February 10, 1983 while opening a gate in the course of his employment at the employer's place of business.

2. The injury was a myofascial neck strain which has become chronic.

3. The injury produced a two percent permanent partial impairment of the body as a whole.

4. Following recuperation, Watson returned to the same employment he held at the time of injury and performed it for approximately one and one-half years until he was temporarily disabled by a subsequent injury and then voluntarily terminated his employment with this employer.

5. The termination of claimant's employment occurred primarily due to a change in ownership of the company. Watson chose to take a severance payment in lieu of remaining employed at reduced earnings. Claimant's physical ailments were a minor factor in his decision to terminate the employment.

6. Watson has now returned to truck driving at a level of earnings which is considerably less than what he earned with Getty Oil Company. Watson would have experienced a decrease in his actual earnings in any event, regardless of whether or not he voluntarily terminated his employment with the employer.

7. Waton is of at least average intelligence, emotionally stable and motivated to be gainfully employed.

8. Watson experiences discomfort in his neck and has headaches. The discomfort is aggravated by lifting and other physical exertion.

9. Claimant has a five percent loss of earning capacity as a result of the injury of February 10, 1983.

10. Watson receives some relief through chiropractic treatments.

11. The chiropractic treatments claimant received running through July 13, 1985 were treatments for the injury which is the subject of this claim and aggravations thereof which occurred in the employment of Getty Oil Company. The subsequent treatments were related primarily to aggravations which occurred after claimant left employment with Getty Oil Company.

CONCLUSIONS OF LAW

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

2. The injury claimant sustained to his neck on February 10, 1983 arose out of and in the course of his employment with Getty Oil Company.

3. Ken Watson has a five percent permanent partial disability under the provisions of Iowa Code section 85.34(2)(u) which entitles him to receive 25 weeks of compensation for permanent partial disability.

4. Payment of compensation for permanent partial disability is due commencing at the end of the healing period where there is no showing that the fact of permanent disability could not have been determined through the exercise of reasonable diligence at the end of the healing period. The burden of proving that permanent disability was not discoverable through the exercise of reasonable diligence rests upon defendants, who are the proponents of such theory.

5. The expenses Watson incurred with Makings Chiropractic Center up to and through July 13, 1985 were proximately caused by the February 10, 1983 injury and aggravations thereof which occurred in the course of his employment with Getty Oil Company. Defendants are responsible for payment of those expenses in the amount of $331.00 under Iowa Code section 85.27. Defendants are not responsible for treatment received subsequent to July 13, 1985.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant twenty-five (25) weeks of compensation for permanent partial disability at the stipulated rate of three hundred seventeen and 18/100 dollars ($317.18) per week payable commencing March 28, 1983 with an interruption running from June 20, 1983 to September 18, 1983 when claimant was in a healing period status. The permanent partial disability compensation then is resumed commencing September 19, 1983.

IT IS FURTHER ORDERED that the entire amount of compensation for permanent partial disability is past due and owing and shall be paid to claimant in a lump sum together with interest at the rate of ten percent (10%) per annum from the date each payment came due until the date of its actual payment pursuant to Iowa Code section 85.30.

IT IS FURTHER ORDERED that defendants pay claimant three hundred thirty-one and 00/100 dollars ($331.00) representing expenses incurred with Makings Chiropractic Center under the provisions of Iowa Code section 85.27.

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 11th day of April, 1988.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Toby Swanson
Attorney at Law
1922 Ingersoll Avenue
Suite B-1
Des Moines, Iowa 50309

Mr. Terry L. Monson
Attorney at Law
100 Court Avenue
Suite 600
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUSSELL F. WEYANT, Claimant, vs. JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY, Employer, Self-Insured, Defendant.	:	File No. 801718 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendant appeals from an aribtration decision awarding permanent partial disability benefits based upon an occupational hearing loss.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 14. Both parties filed briefs on appeal.

ISSUES

Defendant states the following issues on appeal:

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 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.

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 is 62 years old and was employed by defendant from January 27, 1959 until retirement on September 1, 1983. Over the course of his employment with defendant, claimant has been exposed to noise levels as high as 91 decibels and has held more than forty positions at defendant's plant. Since 1970 claimant has been exposed to noise levels as high as 89 decibels and as low as 73 decibels. Claimant's last position was tool crib attendant. Claimant held this position from November 15, 1982 to August 30, 1983.

Claimant had several audiograms while employed by defendant. The results of those audiograms are summarized as follows:

Date	Percent hearing loss: Total, Binaural
09/23/71	39.7 %
04/23/74	32.2 %
12/06/79	34.38%
03/05/81	25.3 %
09/08/82	23.8 %
09/15/82	20.0 %
09/28/82	21.9 %
06/10/85	31.6 % after retirement

(Exhibits 4, 5, 6, 7, 8, 9, 12, 13)

Exhibit 1 is a record of physical examination taken at the time defendant first hired claimant. Exhibit 1 reveals no evidence that claimant suffered any hearing problems at that time.

Mervin McClenahan, M.D., testified that he is employed by defendant and that he was involved with the hearing testing of claimant. Dr. McClenahan revealed that he is not an otolaryngologist and that he referred claimant to James Spoden, M.D., and James White, M.D., otolarynologists. Dr. McClenahan opined that noise levels less than 90 decibels can cause hearing loss. (Tr., p. 23) Dr. McClenahan also opined that claimant's hearing loss was most likely noise induced. (Tr., p. 49)

Dr. Spoden examined claimant on September 28, 1982, and he opines in his examination report that claimant has "sensorineural deafness most likely noise induced of moderate severity." See joint exhibit 12, page 1. Dr. Spoden recommends in his report that claimant use a hearing aid and wear hearing protection. See joint exhibit 12, page 1.

Dr. White examined claimant on June 10, 1985, and he opines

in his examination report that: "The hearing test shows a mild progressional loss since 1982. He has considerable history of noise exposure. Would feel his hearing loss is related to noise induced difficulty. The recm was for a HAE." (Jt. Ex. 13)

Claimant testified that before he went to work for defendant he was a farmer. Claimant opined that as a farmer he was exposed to noise while operating tractors, but that noise from operating tractors on the farm was different from the noise at defendant's plant because on the farm he operated the tractors out doors.

Robert Havertape, safety director at defendant's plant, testified that joint exhibit 14 was prepared under his direction and supervision. Patricia Gage, industrial hygienist at defendant's plant, testified concerning the methods and instruments used to obtain the noise level measurements set out in joint exhibit 14.

APPLICABLE LAW

Iowa Code section 85B.8 states:

> 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:

> 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 (1983), if a worker who has been exposed to permanent sensorineural hearing loss is transferred from the area of exposure to a nonexposure 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 20, 1987.

ANALYSIS

Defendant contends that claimant experienced a transfer from excessive noise level employment when he was moved from the inspector job (89 dBA) to the tool crib job (73 dBA) on November 14, 1982 and, therefore, claimant's hearing loss claim is barred.

However, the record reveals that claimant was subject to reassignment to varying levels of noise exposure. He experienced those transfers numerous times throughout his employment with defendant. Claimant's move from the inspector position to the tool crib attendant position was not a transfer within the meaning of section 85B.8. Rather, such action was merely a reassignment within the same work force and subject to change.

The remaining issue for consideration is the extent of claimant's hearing loss. The deputy based this determination on the audiogram taken on September 28, 1982. No audiograms taken prior to the date of injury, retirement in this case, can be

considered. Only the lowest threshold audiogram taken subsequent to the filing of notice of occupational hearing loss claim can be used to determine the extent of claimant's hearing loss. See Iowa Code section 85B.9; Dale Furry v. John Deere Dubuque Works of Deere and Company, Appeal Decision, November 12, 1986.

The audiogram taken on June 10, 1985 is the only audiogram which was taken after the filing of the notice of an occupational hearing loss claim. The June 1985 audiogram reveals that claimant suffers a 31.6 percent total binaural hearing loss. Therefore, claimant is entitled to 55.3 weeks of benefits for occupational hearing loss.

FINDINGS OF FACT

1. Claimant has been employed by the John Deere Dubuque Works of Deere and Company for over 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 retired on September 1, 1983.

5. Claimant has a noise induced hearing loss.

6. The duration and intensity of claimant's work noise exposure resulted in prolonged exposure to excessive noise levels.

7. Claimant's binaural sensorinaural hearing loss as reflected on his audiogram was 31.6 percent June 10, 1985.

CONCLUSIONS OF LAW

Claimant has established that he sustained an occupational hearing loss arising out of and in the course of his employment with defendant on September 1, 1983.

Claimant has established an occupational hearing loss in the amount of 31.6 percent for which he is entitled to 55.3 weeks of occupational hearing loss benefits.

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

ORDER

THEREFORE, it is ordered:

That defendant pay claimant fifty-five point three (55.3) weeks of occupational hearing loss benefits at the rate of two hundred eighty-three and 76/100 dollars ($283.76) per week.

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

That defendant pay costs of this proceeding including the cost of the transcript on appeal pursuant to Division of Industrial Services Rule 343-4.33.

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

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

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. David A. Lemanski
Mr. Michael J. Coyle
Attorneys at Law
200 Security Building
Dubuque, Iowa 52001

Mr. Leo A. McCarthy
Attorney at Law
222 Fischer Building
P.O. Box 239
Dubuque, Iowa 52004-0239

001782

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED

MAR 17 1988

IOWA INDUSTRIAL COMMISSIONER

EDITH C. WHEELER, Claimant, VS. SELDIN PROPERTIES d/b/a HERITAGE INN, Employer, and AETNA LIFE AND CASUALTY CO., Insurance Carrier, Defendants.	File No. 802285 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 Edith C. Wheeler, claimant, against Seldin Properties, d/b/a Heritage Inn, employer, and Aetna Life and Casualty Company, insurance carrier, for benefits as a result of an alleged injury that occurred on July 28, 1985. A hearing was held on July 15, 1987 at Council Bluffs, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Edith C. Wheeler (claimant), Nellie Harms (head housekeeper), Ann Miller (assistant head housekeeper), Phyllis Rajcevich (employer's manager) and exhibits one through 26.

RULINGS ON EXHIBITS

Initially, exhibits one through 25 were proposed as joint exhibits. Claimant objected to joint exhibit 22, a medical report of Richard D. Smith, M.D., because he had not deposed the witness. This objection was overruled and exhibit 22 was admitted into evidence.

The original exhibit list was initially prepared by claimant and marked as claimant's exhibit list. At the hearing, defendants' counsel agreed that it could be called a joint exhibit list with the understanding that a joint exhibit list was to avoid duplication of exhibits to which neither party had any objection. Later, defendants' counsel learned that the exhibit list and the exhibits contained a personal home calendar prepared by claimant (Exhibit 25). Defendants' counsel objected to exhibit 25 for the reason that he had never seen it before July 14, 1987, the

day before the hearing. Defendants' counsel added that claimant had not served the calendar or the exhibit list within 15 days prior to the hearing as required by paragraph six of the hearing assignment order which provides as follows.

> Witness and Exhibit Lists. A list of all witnesses to be called at the hearing and a list of all proposed exhibits to be offered into the evidence at the hearing along with copies of all written exhibits not previously served shall be served upon opposing parties no later than fifteen (15) days prior to the date of hearing. Only those witnesses listed will be permitted to testify at the hearing unless their testimony is clearly rebuttal or sur-rebuttal. Medical records, practitioners reports and all other written evidence shall not be admitted as exhibits at the hearing unless they have been served upon an opposing party as ordered herein.

Defendants' counsel introduced into evidence the envelope and exhibit list used by claimant's attorney to transmit the exhibit list (Ex. 26). The certificate of service on the exhibit list was dated July 7, 1987. The envelope was postmarked July 7, 1987. Furthermore, the envelope was marked return to sender. Claimant's counsel admitted that he had sent it to the wrong address and that it was returned to him. Defendants' counsel then stated that he had never seen the exhibit list or exhibit 25 until July 14, 1987, the day before the hearing. He added that he never knew of the existance of exhibit 25 and had never seen it until July 14, 1987. Defendants' counsel then did not sign the joint exhibit list. Defendants' objection to exhibit 25 was sustained. Exhibit 25 was not admitted into evidence and was not considered in the decision of this case. It will remain a part of the record as an offer of proof.

STIPULATIONS

The parties stipulated to the following matters.

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

That the type of 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 to be January 12, 1987.

That the rate of compensation, in the event of an award of

weekly benefits, is $68.78 per week.

That the fees charged for medical services or supplies rendered are fair and reasonable.

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

That the medical expenses were caused by the condition upon which claimant is now basing her claim.

That defendants seek no credit under Iowa Code section 85.38(2) for the previous payment of benefits under an employee non-occupational group plan.

That defendants are entitled to a credit for benefits paid to claimant prior to hearing for 30.86 weeks of compensation at the rate of $68.78 per week.

That in the event of an award claimant is entitled to costs as shown by claimant's affidavit of taxable costs attached to the prehearing report in the total amount of $450.86.

ISSUES

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

Whether claimant sustained an injury on July 28, 1985 which arose out of and in the course of employment with employer.

Whether the alleged injury was the cause of temporary disability during a period of recovery.

Whether the alleged injury was the cause of permanent disability.

Whether claimant is entitled to temporary disability benefits during a period of recovery, and if so, to what extent.

Whether claimant is entitled to permanent disability benefits and if so, to what extent.

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

SUMMARY OF THE EVIDENCE

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

The first report of injury was prepared on August 23, 1985

by Phyllis A. Rajcevich. She also testified that this was the same day that claimant reported the injury to her. The first report states, and Rajcevich testified, that claimant did not know what date the injury occurred, but believed that it occurred in July of 1985 as noted on the first report of injury.

A petition was filed on February 27, 1986, alleging that the injury occurred on June 29, 1985. A hearing was scheduled for October 9, 1986. Claimant moved to dismiss her claim without prejudice on the grounds that her recollection of the date of the occurence of the injury differed from the injury date alleged on the petition. This motion was granted and the claim was dismissed without prejudice. A new petition was filed on October 15, 1986 alleging that the injury occurred on July 14, 1985.

Then, on Feburary 5, 1987 claimant moved to amend the second petition to change the injury date from July 14, 1985 to July 28, 1985.

Claimant testified that she is 55 years old. She has a ninth grade education with no additional education or training. She is married and her husband has received social security since 1981.

Claimant testified that she had a cervical fusion using a bone from her hip about 11 or 12 years ago in the mid 1970's. She said this was a work related injury, however, she did not file a workers' compensation claim for it. Claimant denied that she had any lumbar problems prior to this alleged injury. She did admit that her hip often aches from where the bone was removed for her cervical fusion.

Past employments include motel maid and dairy-ice cream store clerk and manager. Claimant started to work for employer on May 30, 1985, Memorial Day, as a housekeeper cleaning rooms. She obtained this job through her neighbor, Nellie Harms, who also works for this employer. Claimant testified that she was looking for part-time work. She only wanted weekend work, but agreed to work four days a week --- Wednesday, Thursday, Saturday and Sunday --- at the minimum wage to supplement her husband's social security income.

Sometimes, disgruntled tenants leave a motel room in disarray. Such rooms are described as "trashed" or "messed" or "tossed". Claimant recalls a trashed room in June of 1985, but the one involved in her injury was in July of 1985. The tenants in room number 209, on the night of July 27, 1985, left the room trashed. There was hairspray on the mirror and spilled liquids. The mattress was turned over and the linens were underneath it. Claimant testified that she got the linens out and looked for help to turn the mattress over. She did not find any help in

the hallway and tried to do it herself. She had been able to do it in the past on other occasions. While endeavoring to turn the mattress over she felt a hit in her low back. She went down on her knees in pain for several minutes. She thought she strained her back. She had never had back problems before. She did not know what it was for sure. She pulled herself up, went into the bathroom, sat on the stool and washed her face.

At lunch time, in the linen room, claimant told a group of employees, including her supervisor, Ann Miller, that she hurt her back on a mattress in a trashed room. Claimant contended that Miller asked her why she didn't go and get help. Claimant added that she mentioned this incident two or three times in conversation at that time.

Claimant said she had pain in her back and right leg down to her toes but continued to work. In August she told one of her supervisors that she had to take some time off due to the pain in her back. She told Rajcevich the same thing and Rajcevich told her to go to the doctor.

Claimant went to see her personal physician, James L. Whalen, M.D. He told her not to work until she got better. Claimant then called Rajcevich and told her she wanted to file a workers' compensation claim but she did not recall what day it happened. Rajcevich told her that they would look at a calendar and try to figure it out. When claimant came to the motel office to make the report, Racjevich told her that if there were no witnesses, she would not get any money from the insurance company.

Nellie Harms testified that she is the head housekeeper. She has worked at this location for nine years. She has been a neighbor of claimant for 17 years. At the time of the injury, Harms was the laundress. She said that she helped claimant get this job. They had been good friends at home and at work, but this case and Harms testimony at this hearing has affected their friendship. Harms testified that claimant had complained of a backache for a long time prior to July and August of 1985. Harms added that claimant never reported to her that claimant had injured her back until a long time after August of 1985. Harms admitted that all of the housekeepers complain about backaches because they do a lot of bending and stooping. Claimant denied that she told Harms that she had a backache, but admitted that she did complain about her hip.

Ann Miller, a 21 year employee of employer, testified that she is assistant head housekeeper. Injuries are reported to her and she reports them to the manager. Claimant, like all of the housekeepers, complained about her back. Claimant never reported a back injury to her at break time or at any other time that she can recall. Miller believes that if claimant had told her that she injured her back that she would remember it. Miller did not

know if claimant had been trained in how to report an injury or accident.

Phyllis Rajcevich, a 20 year employee of employer, testified that she had been manager for three years. Claimant started to work again for this employer on May 30, 1985. She had worked there earlier but quit on August 18, 1980. Claimant first reported the injury to her on August 23, 1985. Claimant had not reported it to her prior to that time. Claimant did not know the date of the injury, but did state that it was in July sometime. Claimant described an incident in a room that was torn up with a mattress off the bed. When this happens, the housekeeper is supposed to tell the head housekeeper. The last time there is a recorded incident of a trashed room, it occurred on June 15, 1985. Claimant had cleaned that room. The witness stated that she strongly believes that if claimant had reported the injury to Miller, then Miller would have reported it to her. Rajcevich said she did not know if claimant was trained in how to report an accident or injury. They did not have a handbook or written instructions at that time.

Claimant testified her current situation is that she has a burning and a crawling sensation in her right leg. She stated that she cannot lift anything. She said that she is limited as to how long she can sit. She cannot bend or stoop. She cannot do her old housekeeping job. She has no current income. She has not tried to find work. She does do some housework at home. She knows of nothing other than this injury that could have caused her back problems.

Dr. Whalen, summarized claimant's early condition for the insurance carrier in these words on September 16, 1985.

> This patient came to see me on August 22, 1985 with a back pain which she said occurred as a result of a work related injury on the job several weeks before that time. She does a lot of heavy lifting at work and developed the pain while she was working. She continued to try and work with this for several weeks prior to coming to see me; however, it got to the point where she had to come in because of the persistent nature of the pain. The pain was going down to the right leg to some extent. She was unable to work the week of my initial examination. Physical findings revealed paravertebral muscle spasm, decreased range of motion but no neurological deficits. She was treated conservàtively with anti-inflammatories, muscle relaxants and physical therapy. X-ray of the lumbar spine did not reveal any abnormalities. The patient was treated conservatively and was followed on a weekly basis. She continued to do

> poorly and as a result she was finally referred to Dr. B. Rassekh for his evaluation from a neurosurgical point of view. Dr. Rassek [sic] saw her in consultation after she was admitted to the hospital because of severe and acute exacerbation of the pain and she was admitted to Jenny [sic] Edmundson Hospital. During her stay in the hospital a myelogram was carried out which did not conclude any significant herniated disc enough to warrant surgical procedure. As a result, Dr. Rassekh recommended that she continue to be treated conservatively with rest, ROM excerises and anti-inflammatories and a TNS unit as an outpatient. She continues with the conservative treatment at this time, I am not certain at this point whether she will have any permanent disability from the injury; however, she is not able to go back to her previous employment and I am not certain about how soon she will be able to do this. We will keep you posted on her progress. I will follow her along with Dr. B. Rassekh.
>
> (Ex. 1)

Dr. Whalen reported later that Dr. Rassekh did make some objective findings but that there was no nerve root impingement at that time. Dr. Whalen said:

> The patient was initially sent to Dr. B. Rassekh, who felt that the patient had a possibility of a herniated lumbar disc and admitted the patient to Jenny [sic] Edmundson Hospital and performed a lumbar myelogram. She had bulging of the L-4 lumbar disc with a transitional S1 segment but at the time there was not felt to be any nerve root impingement and as a result, the patient was dismissed from the hospital with a diagnosis of likely musculoskeletal vasuloskeletal lumbar sprain to continue with conservative treatment. Dr. Rassekh at this point referred the patient back to my office again.
>
> (Ex. 9)

Dr. Whalen said that when claimant failed to make any progress and was not able to work he then referred her to Patrick Bowman, M.D., an orthopedic surgeon. Dr. Bowman reported on November 20, 1985 that claimant's workup and physical exam did not show any sign of active disc disease, however, she did complain of right leg pain. He felt the workers' compensation claim was an influence on her condition and recommended that she settle it. Dr. Bowman concluded as follows on November 20, 1985.

"I think she has enough objective findings on physical exam as well as radiographic changes to justify back pain, although quite candidly, her level of impairment seems a bit out of proportion to what these would suggest. I hope we can do Edie some good." (Ex. 3).

Claimant was next examined by Richard D. Smith, M.D., at the request of defendants on December 6, 1985. Claimant said that she saw Dr. Smith for five minutes. It took three minutes to tell him why she was there and two minutes to be examined by him. Dr. Smith said that claimant told him that she could not bend, sit or stand. She hurt like the devil and was all around miserable. Dr. Smith stated that he felt that claimant's responses to his examination were voluntarily altered. Dr. Smith concluded as follows in his letter to the insurance carrier. "I really do not feel that Mrs. Wheeler has significant pathology. I think she should receive no further treatment, and if at all possible she should be returned to work so that she might be rehabilitated. I do not feel that Mrs. Wheeler has any permanent disability." (Ex. 22).

Claimant had been receiving workers' compensation benefits. She testified that after she saw Dr. Smith her workers' compensation benefits were terminated.

Dr. Bowman reported again on April 2, 1986 that he continued to treat claimant and administered three caudal blocks which seemed to help temporarily but not permanently. He said he could not establish a pinched nerve, but he did feel that she had legitimate back disease. He stated that her complaints were out of porportion to what he could find medically. Dr. Bowman thought she could be gainfully employed if she did not lift more than 15 pounds and avoided excessive bending, lifting or stooping. He also suggested that she wear an abdominal binder (Ex. 4).

Claimant testified that she was unable to get out of bed on June 22, 1986. She was taken to the emergency room at Jennie Edmundson Hospital and seen by D. P. Moffett, M.D. He concluded his history and physical with the following words.

ASSESSMENT: Chronic low back pain with negatve [sic] extensive evaluation in the past, unable to cope with it at home. Status post cervical fusions times two in the past; status post appendectomy and vaginal hysterectomy with repair of rectocele and cystocele.

Patient has had extensive evaluation in the past including CT scan of the back, EMGs with nerve conduction studies, myelography, numerous radiographic plain films, physical therapy, caudal blocks, TNS,

> and now admitted to the hopsital for control of her pain.
>
> At this time, I would recommend MRI and if negative could treat with TNS, moist heat, further physical therapy, and possibly pain schooling.

(Ex. 5)

Claimant was hospitalized on June 22, 1986 and at that time was examined by R. Schuyler Gooding, M.D., a neurosurgeon. A magnetic resonance imaging (MRI) was subsequently performed on June 24, 1986 (Ex. 20). After his examination on June 25, 1986 he gave the history that claimant was injured while putting a mattress back on the bed at the motel. He said that she had a tendency to stand bending forward and appeared to be in marked distress. Dr. Gooding summarized the history of her radiologic examinations as follows.

> X-ray of the lumbar spine reveal partial lumbarization of S1. A lumbar myelogram revealed a mild L4-L5 bulging disk which tended to bulge more as the patient was raised to an erect posture. A CT scan of the lumbar spine was suggestvie of a mild L4-L5 disk protrusion. A more recent MRI also confirms the presence of an L4-L5 disk protrusion.

(Ex. 6)

The MRI demonstrated some herniation of the L-4, L-5 disk space with some nerve root impingement (Ex. 8). Dr. Gooding ended his examination on June 25, 1986 as follows.

> When I initially evaluated her in February of 1986, I was not impressed that she had a surgical condition, even though she did have an obvious protruding disk at the L4-L5 level.
>
> She describes herself as not having been able to return to work since the original injury and that her pain is increasingly localizing to the right hip, where as previously it was primarily in her lower back.
>
> In view of the overall progressive picture, I would suggest that we surgically remove the offending disk at the L4-L5 level from a right-sided approach.

(Ex. 6)

On June 27, 1986 Dr. Gooding performed an interlaminal excision of herniated L-4-5, right posterolateral approach with

removal of a small free fragment in the right L-5 root foramina (Ex. 7).

Dr. Gooding stated on February 20, 1987 that claimant is impaired and that the impairment is a product of the injury to her lower back and subsequent surgery. His final evaluation is as follows.

> I have released her to progressively return to all activities without restrictions, but I did caution her about using good judgement with regards to bending, lifting, carrying and prolonged sitting.
>
> I would place her permanent partial disability with regards to the whole person as the product of the injury to her lower back and the subsequent surgery, at 15%. This is because the lower back has not been returned to a normal anatomical condition by virtue of this surgery, even though she has clinically been significantly helped by this surgery. The permanent alteration of her lower back, does place her at a slightly greater risk with regards to another injury in the future, were she never have had the injury and subsequent surgery in the first place.

(Ex. 10)

Dr. Whalen in his final report of September 22, 1986 related the entire history from the beginning until after her surgery and he stated that she did sustain a job injury and that she has been totally disabled since the original injury. His exact words are as follows.

> From my previous experience from dealing with Mrs. Wheeler as well as following the progress of this particular injury through the last year, I have no doubts that she, indeed, suffered a significant injury to her lumbar spine on the job in 1985. It was our feeling all along tht [sic] this patient indeed has a significant component of lumbar disc injury compounded by musculoskeletal ligament sprain and muscle sprain; however, it was only after studying the patient with nuclear magnetic resonance imaging that we were able to prove our diagnosis. this [sic] patient has been totally disabled since this original injury and I feel quite confident that the patient has no significant component of malingering.

(Ex. 9)

Claimant presented the following medical expenses for payment.

Midlands Family Medicine (Dr. Whalen)	$ 950.00
Abby Medical (TENS Unit)	80.00
Medical Anesthesia Associates	400.00
American Ambulance Service	195.00
Dr. Gooding	2,655.00
The Pharmacy	11.99
The Pharmacy	16.99
Johnson Pharmacy & Home Health Care	402.28
Jennie Edmundson Memorial Hospital	1,703.10
Jennie Edmundson Memorial Hospital	398.55
Jennie Edmunsdon Memorial Hospital	5,416.80
	$12,229.71

The parties stipulated that the fees charged for medical services and supplies are fair and reasonable; that the expenses were incurred for reasonable and necessary medical treatment and that the expenses were caused by the condition upon which claimant is basing her claim.

The office notes of Dr. Whalen, who began seeing claimant in 1980 as her personal physician, do not show a history of any treatment for her back prior to this injury on July 28, 1985. On August 17, 1984 Dr. Whalen did record that the patient complains of some low backaches and leg aches as one of many things he discussed on that date. Her main complaints and treatment on that date was actually for sweats, depression, and female problems. He administered no treatment for her back but simply mentioned her back and legs in passing.

The next time he saw claimant was on August 22, 1985 for this injury. At that time, this is what he recorded.

> Patient has an on the job injury to her lumbar spine approximately 3 or 4 weeks ago. She has been trying to work with this and work it out since it occurred. She is now having pain going down to the right leg. She is having constant discomfort and has been unable to work this week.
> P/E Limping gait, paravertebral muscle spasm of the lumbar spine with decreased flexion an extension of the lumbar spine. Rotation and lateral flexion and extension is normal.
> RX Physical therapy, x-rays lumbar spine, Motrin 400 4 x a day and Robaxin 500 4 x a day, reck 1 week.
>
> IMPRESSION: Lumbar sprain possibly herniated

lumbar disc.

(Ex. 23)

Even though Dr. Smith said that claimant could return to work after he examined her on December 6, 1985, Dr. Whalen said on January 21, 1986 that he would continue with her disability. Dr. Whalen said again on June 23, 1986 that she was unable to work (Ex. 23). Dr. Gooding performed surgery on June 27, 1986 and released claimant to return to all activities without restrictions on January 12, 1987 (Ex. 10).

APPLICABLE LAW AND ANALYSIS

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

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on July 28, 1985 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 28, 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).

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 did satisfy the burden of proof by a preponderance of the evidence that she sustained an injury on July 28, 1985, or sometime close to that date, which arose out of and in the course of her employment with the employer. Defendants argue that claimant is a poor historian. This is an understatement, but it is no basis for denying an otherwise compensable claim. Claimant caused many problems for herself, her attorney, defendants' attorney and this agency because she could not determine the exact date of her injury. This may well have defeated her case except for the fact that her personal physician, Dr. Whalen, and her surgeon, Dr. Gooding, gave a clear and unequivocal opinion that her work injury caused her back condition and subsequent surgery.

Dr. Whalen traced the entire history of claimant's symptoms and treatment from the date she first saw him on August 22, 1985 until the surgery on June 27, 1986 and even beyond. His last office note is dated February 24, 1987. Dr. Whalen is convinced that claimant injured her back at work as she described and that it caused the eventual surgery. He makes out a case that cannot be ignored and is extremely difficult to discount or refute (Ex. 9). Furthermore, Dr. Gooding said the surgery was the product of the injury (Ex. 10). No other physician disputed or challenged the opinions of Dr. Whalen and Dr. Gooding. No physician disputed that claimant had a work injury --- Dr. Rassekh, Dr. Bowman, Dr. Smith, or Dr. Moffett. Dr. Bowman and Dr. Smith thought that claimant's complaints exceeded their objective medical findings. Dr. Smith could not find much if anything wrong with claimant and told her to go back to work. Dr. Whalen said that he felt all along that claimant's complaints were justified and he implied that medical science simply had not determined the

medical cause of her complaints until the MRI on June 24, 1986 which described the bulging annulus with what appeared to be a disc protrusion or herniation at L-4, L-5 (Ex. 20). In this case, the written opinions of the treating physician, Dr. Whalen, and the surgeon, Dr. Gooding, are clear, unequivocal and convincing. Also, these two physicians were responsible for the success or failure of claimant's care and their opinions were not disputed by any other physician. Rockwell Graphics Systems, Inc. v. Prince, 366 N.W.2d 189, 192 (Iowa 1985).

Claimant was not a persuasive witness on her own behalf. Nevertheless, it is understandable that if she did in fact strain her back, and expected it to go away, which is a frequent and common human experience, then she probably did not make a record of the exact date of the injury.

The fact that the defendants have a record of only one tossed room in 1985, on June 15, 1985, is not necessarily absolute proof that there were not other tossed rooms on other dates. Claimant's testimony indicated that she had a tossed room in June of 1985. She also testified that there were two tossed room two days in a row at the time of her injury in July 1985. It is doubtful if June 15, 1985 was the only date that the motel had a tossed room in 1985 or that the motel record is perfectly accurate or infallible on this point.

Miller and Harms testified that claimant did complain of her back prior to the injury date in 1985. Claimant denied it and said she complained about her hip. Dr. Whalen recorded backaches and leg aches on August 17, 1984. It is entirely possible that a 54 year old motel maid/housekeeper might have back complaints. There was no evidence however, that claimant had ever injured her back or had sought treatment for a back injury prior to this incident.

Defendants assert that the length of time between June 15, 1985 or July 28, 1985 and when claimant first sought treatment on August 22, 1985, demonstrates that claimant did not in fact sustain a back injury as she alleges because of the time interval between the alleged injury date and the date that she sought treatment. This is definitely an element to consider in this case. Claimant testified however, that she had increasing back problems from the date of the injury until the time she went to see Dr. Whalen. Dr. Whalen corroborated this testimony by his office notes, his medical report and his deposition. Dr. Whalen stated that claimant reported that she sustained the injury three or four weeks ago and had been trying to work with it since it occurred but she then had pain going down her right leg. He felt that she was unable to work. The interval between any of the injury dates which have been suggested (June 15, 1985; June 29, 1985; July 14, 1985; and July 28, 1985) is not in itself sufficient to warrant a decision in favor of defendants

in the face of the testimony of Dr. Whalen and Dr. Gooding that the injury and resulting surgery were caused by work and their testimony is not contradicted, rebutted or refuted by any other medical practitioner. Therefore, it is determined that claimant did sustain the burden of proof by a preponderance of the evidence that she sustained an injury on or about July 28, 1985 which arose out of and in the course of her employment which was the cause of both temporary and permanent disability.

Dr. Whalen took claimant off work on June 26, 1985. Dr. Gooding did not return claimant to work until January 12, 1987. Even though Dr. Smith thought claimant could work on December 6, 1985, Dr. Whalen said on January 21, 1986 and June 23, 1986 that claimant should remain off work. After the surgery on June 27, 1986 Dr. Gooding did not release claimant to return to work until January 12, 1987. Therefore, it is determined that claimant is entitled to healing period benefits from June 23, 1985 to January 12, 1987.

Claimant is 55 years old and has a 9th grade education. Her past employments are store clerk and motel housekeeper. Claimant testified at the hearing that she is still unable to work. Dr. Whalen did not think that she was able to perform gainful employment on Feburary 24, 1987 (Ex. 23). Nevertheless, Dr. Gooding, the surgeon, did release claimant to return to all activities without restrictions with only the admonition that she be careful because she is more predisposed to a greater risk of injury than if she had not had the surgery. Claimant conceded that she had not tried to work since the injury. When claimant took this job for employer she only wanted part-time work on the weekends only. Claimant's husband is retired. Claimant's work pattern appears as though she might also be partially retired. Age and proximity to retirement affect a claimant's entitlement to industrial disability. Beck v. Turner-Busch, Inc., Thirty-fourth Biennial Report of the Industrial Commissioner 34, 36 (1979); Walton v. B & H Tank Corp., II Iowa Industrial Commissioner Reports 426 (1981).

The operative phrase in industrial disability is loss of earning capacity. VerSteegh v. Rolscreen Company, IV Iowa Industrial Commissioner Reports 377 (1984). Since Dr. Gooding placed no formal restrictions or limitations on claimant's activities but returned her to all activities, claimant's industrial disability would not be great. She was working for the minimum wage prior to the injury. If she finds additional employment at the minimum wage it would not constitute a loss of income. Industrial disability need not exceed functional impairment. Birmingham V. Firestone Tire and Rubber Co., II Iowa Industrial Commissioner Report 39 (1981). Industrial disability can be equal to, less than or greater than functional impairment. Lawyer & Higgs, Iowa Workers' Compensation -- Law & Practice, section 13-5, page 116 and 1987 supplement page

20.

It would appear that claimant could return to work as a motel housekeeper if she does not attempt to lift mattresses. The evidence was that she was not supposed to lifting the mattress by herself in the first place when this injury occurred according to her own testimony.

Based upon the foregoing evidence and discussion and all of the factors that go into a determination of industrial disability, it is determined that claimant has sustained a 15 percent industrial disability to the body as a whole.

Claimant is entitled to recover $12,229.71 in medical expense as stipulated to by the parties.

In addition the parties stipulated that in the event of an award claimant was entitled to costs in the amount of $450.86 as shown in the affidavit of taxable costs presented by claimant's attorney.

FINDINGS OF FACT

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

That claimant sustained an injury to her back on or about July 28, 1985 while lifting a mattress while at work for employer as a housekeeper.

That the injury caused claimant to be off work from August 23, 1985 to January 12, 1987.

That claimant suffered a 15 percent impairment to the body as a whole.

That claimant sustained a 15 percent industrial disability to the body as a whole.

That claimant incurred $12,229.71 in medical costs.

CONCLUSIONS OF LAW

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

That claimant sustained an injury on or about July 28, 1985 which arose out of and in the course of her employment with employer.

That the injury was the cause of both temporary and permanent disability.

That claimant is entitled to 72.429 weeks of healing period benefits from August 23, 1985 to January 12, 1987.

That claimant is entitled to 75 weeks of permanent partial disability benefits as industrial disability.

That claimant is entitled to medical expenses in the amount of $12,229.71.

That claimant is entitled to costs in the amount of $450.86 as stipulated.

That defendants are entitled to a credit of 30.86 weeks of workers' compensation benefits paid prior to hearing.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to claimant seventy-two point four two nine (72.429) weeks of healing period benefits for the period from August 23, 1985 to January 12, 1987 at the rate of sixty-eight and 78/100 dollars ($68.78) per week in the total amount of four thousand nine hundred eighty-one and 67/100 dollars ($4,981.67).

That defendants pay to claimant seventy-five (75) weeks of permanent partial disability benefits as industrial disability at the rate of sixty-eight and 78/100 dollars ($68.78) per week in the total amount of five thousand one hundred fifty-eight and 50/100 dollars ($5,158.50) commencing on January 12, 1987.

That defendants are entitled to a credit of thirty point eighty-six (30.86) weeks of workers' compensation benefits at the rate of sixty-eight and 78/100 dollars ($68.78) per week paid to claimant prior to hearing in the total amount of two thousand one hundred twenty-two 55/100 dollars ($2,122.55).

That all accured benefits are to paid in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That defendants pay to claimant or the provider of services twelve thousand two hundred twenty-nine and 71/100 dollars ($12,229.71) in medical expenses introduced at the hearing.

That defendants pay to claimant four hundred fifty and 86/100 ($450.86) in costs as stipulated to at the time of the hearing and that claimant is entitled to costs 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 17th day of March, 1988.

Walter R McManus

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Jacob John Peters
Attorney at Law
PO Box 1078
Council Bluffs, Iowa 51502

Mr. Theodore Stouffer
Mr. David Blagg
Attorneys at Law
8805 Indian Hills Dr.
STE 300
Omaha, Nebraska 68114

1100 - 1108.50 - 2206
1802 - 1803.1
Filed February 29, 1988
DAVID E. LINQUIST

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VIVIAN LORRAINE WILLIAMS,	:	
	:	
Claimant,	:	File No. 771072
	:	
vs.	:	
	:	A P P E A L
JOHN DEERE COMPONENT WORKS,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

1100 - 1108.50 - 2206

Claimant was found to have suffered a six percent permanent partial impairment to the right hand arising out of and in the course of janitorial duties that required her to pinch heavy clamps together. Claimant's work was found to have aggravated a preexisting arthritic condition.

1802

Claimant's healing period ended when significant medical improvement was no longer anticipated and was not extended by surgery designed not to improve functions but only to relieve pain.

1803.1

Claimant's arthritis was aggravated by her work. Since the surgery involved the trapezium as well as the thumb, she was found to have suffered an impairment of the hand.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

001801

VIVIAN LORRAINE WILLIAMS,	:	File No. 771072
Claimant,	:	
vs.	:	O R D E R
JOHN DEERE COMPONENT WORKS,	:	N U N C
Employer,	:	P R O
Self-Insured,	:	T U N C
Defendant.	:	

FILED

MAR 2 1988

IOWA INDUSTRIAL COMMISSIONER

It was brought to the attention of the undersigned that there was an error in the order portion of the Appeal Decision filed February 29, 1988. The order should read as follows:

THEREFORE, it is ordered:

That John Deere Shall pay to claimant healing period benefits from November 5, 1983 through October 31, 1984 and temporary total disability benefits from January 14, 1985 through July 14, 1985 at the rate of two hundred fifty-seven and 50/100 dollars ($257.52) per week.

That John Deere shall pay to claimant eleven point four (11.4) weeks of permanent partial disability benefits at the rate of two hundred fifty-seven and 52/100 dollars ($257.52) per week from July 15, 1985.

That John Deere shall pay accrued weekly benefits in a lump sum.

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

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

That John Deere 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 2nd day of March, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert D. Fulton
Attorney at Law
P.O. Box 2634
616 Lafayette Street
Waterloo, Iowa 50704-2634

Mr. John W. Rathert
Attorney at Law
P.O. Box 178
620 Lafayette Street
Waterloo, Iowa 50704

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VIVIAN LORRAINE WILLIAMS,	:	
	:	
Claimant,	:	File No. 771072
	:	
vs.	:	
	:	A P P E A L
JOHN DEERE COMPONENT WORKS,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision filed May 31, 1985 and a decision on the extent of permanent partial disability filed October 16, 1986 that awarded healing period benefits and permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits A, 1A, 2A, 3A, 4A, 5A, B, C, and D; and commissioner's exhibit 1. Both parties filed briefs on appeal.

ISSUES

Defendant states the following issues on appeal:

1. Whether claimant received an injury arising 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 healing period benefits.

Defendant also filed an appeal of the decision dated October 15, 1986 which awarded permanent partial disability benefits.

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 work for defendant in November 1972 in a clerical position. In August 1982, a layoff resulted in claimant being assigned to a janitorial position for one to two months. Claimant obtained a restriction on lifting weights over 15-20 pounds as a result of a prior back condition. Claimant was reassigned janitorial duties again from August 30, 1983 until September 23, 1983. Her work as a janitor in 1983 required her to pinch together six to eight clamps that held plastic garbage bags under a container, with this procedure being repeated anywhere from eight to fourteen times per evening shift. Claimant was also required to operate a floor buffer, which required her to guide the device with her thumbs, and to use and squeeze a mop. Claimant's janitorial work in 1982 did not involve these activities. Claimant began to experience pain and swelling in her hands and thumbs, with more pain in the right thumb than the left. Claimant also stated that in approximately 1978 or 1979, she injured her right thumb at work with a door. Claimant did not report the injury as she felt it was not significant. Claimant stated she felt pain from that injury for only a few days after and did not experience any pain in her thumb until she was reassigned to the janitorial work.

Claimant's foreman, Stephen Moriarty, testified that claimant was unhappy about her reassignment and her inability to obtain daytime work. Claimant reported the pain in her hands to him. Moriarty testified that in his opinion claimant's work did aggravate her hand condition. He also advised claimant that if she received a medical restriction on her hands, he would have no work for her and claimant would be laid off. Claimant also discussed her hand and thumb problems with the plant safety manager and a union steward, both of whom also advised her that medical restrictions on her hands would result in a layoff. Claimant could not be reassigned to her clerical position due to a lack of seniority.

On September 21, 1983, claimant experienced painful paralysis in her right hand. Claimant reported her hand problems to C. R. Buck, M.D., defendant's staff doctor. Dr. Buck's examination revealed crepitation and some tenderness of the metacarpophalangeal joint and in the carpometacarpal joint on the right thumb. However, Dr. Buck felt these symptoms were not of recent origin. Dr. Buck opined that claimant would have had symptoms in her thumb prior to her janitorial work since her thumb condition was arthritic. Dr. Buck imposed a temporary restriction of claimant's use of her right thumb.

Claimant's private physician, Dr. Tarr, also observed swelling and tenderness of the carpometacarpal joint of the right hand, and advised claimant not to use her thumb at work. Dr. Tarr referred claimant to Arnold E. Delbridge, M.D., a hand and orthopedic specialist, in October 1983. Dr. Delbridge found claimant to have limited motion and a positive grinding test in

the right thumb, with pain in the carpal metacarpal joint. An x-ray revealed degenerative arthritis of the carpal metacarpal joint of the right thumb and around the right trapezium bone. He described the trapezium bone in his deposition as part of the wrist.

Because she could no longer perform the janitorial duties with her restrictions on the use of her thumb, claimant was transferred to an assembly line job in October 1983. This job required claimant to use a hand operated polisher, which again resulted in swelling of claimant's right hand. Claimant was then transferred to a job requiring her to lift heavy tractor screens. When she continued to experience pain in her hands, she again consulted Dr. Buck, and was laid off in November 1983 due to a lack of work within her restrictions. On January 4, 1984, Dr. Buck amended her medical records to add a permanent restriction of no repetitive gripping or pinching of her right thumb.

On February 10, 1984, Dr. Delbridge noted that "her main problem...is degenerative changes in her first metacarpal carpal joint of the right thumb."

On October 31, 1984, Dr. Delbridge stated:

Very likely what precipitated her problems with her thumb was changing from a job that did not require great stress on her carpal metacarpal joints to jobs that did require considerable stress. She very likely had some problem with her carpal metacarpal joints prior to her changing jobs and the job change caused her additional problems.

....

...After examining her right thumb, considering her loss of motion and the fact that she has some degenerative changes in her thumb, part of which are very likely due to her aggravation, I would suggest that she has 15% impairment of her thumb. A 15% impairment of her thumb is a 6% hand impairment.

....

...It is my feeling that there may have been some problems with her thumb which she was unaware of prior to the placement of considerable stress on her thumb when she changed jobs.

It is likely that she will not get better. It is virtually certain that this is a permanent

> condition and will very likely be gradually progressive as she is getting more and more collapse of her thumb because of the loss of motion of her carpal metacarpal joint.

Dr. Delbridge performed trapezium carpal metacarpal joint replacement surgery on January 14, 1985. This surgery was designed to relieve pain only, and was not expected to increase functional use.

Dr. Buck opined:

> I don't think there was any significant injury to her back as a result of those [janitorial] activities. She had longstanding back symptoms that could be triggered by any strenuous activity, even mildly strenuous activity."

(Transcript, page 127)

> I don't feel her activities in ordinary janitorial work, which she was doing, would have caused a significant injury to her thumb. I think that her problem primarily pre-existed that assignment. I don't doubt that she was having some pain associated with the use of her hands and that her hands were bothering her. I don't doubt that at all. But I don't think that there was a significant additive or additional injury to her thumb.

(Tr., pages 123-124)

Dr. Delbridge testified it was his opinion that claimant's present impairment was a result of her janitorial work, and cited the absence of any pain or impairment of function prior to commencing her janitorial work. In his deposition, he stated:

> Lorraine had some arthritis in her thumb prior to ever taking that mopping job, but that aggravated her arthritic situation to the point where it put her thumb into sort of a tailspin, which made it move downhill more rapidly.

(Delbridge Deposition, page 18)

> I did feel that most of her motion loss was relatively recent, and I felt that way because right under my very eyes over a period of time she started developing hyperextension of her metacarpal phalangeal joint, and she hadn't had that before and she didn't have it when I first saw her, so I felt that her thumb motion was getting worse. And so I really feel

> that most of that impairment based on the loss of motion is relatively recent.

(Delbridge Dep., pp. 26-27)

Because claimant had recently undergone trapezium carpal metacarpal joint replacement surgery at the time of the original arbitration hearing, the record was held open to receive further evidence in the form of a letter from Dr. Delbridge dated January 8, 1986, which stated in part:

> On exam she has pinch of eight pounds on the right, ten pounds on the left and she has a grip at the first notch on the grip meter of fifteen pounds on the right and fifteen pounds on the left and at the second notch, twenty pounds on the right and twenty pounds on the left. At the third no [sic] notch of the grip meter she has grip of twenty-five pounds on the right and thirty pounds on the left.
>
> At this time I do not anticipate her improving significantly in the future. Originally I judged her impairment to be 15% of her thumb or 6% of her hand.
>
> Basically this has not changed.

(Comm. Ex. 1)

Claimant's last day of work was November 4, 1983. Her stipulated rate of compensation is $257.52.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received injuries in August and September 1983 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

The words "in the course of" refer to the time and place and

circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe, 246 Iowa 402, 68 N.W.2d 63.

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

A determination that an injury "arises out of" the employment contemplates a causal connection between the conditions under which the work was performed and the resulting injury; i.e., the injury followed as a natural incident of the work. Musselman, 261 Iowa 352, 154 N.W.2d 128); Reddick v. Grand Union Tea Co., 230 Iowa 108; 296 N.W. 800 (1941).

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.

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).

When the result of an injury is a 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 v. Nevada Poultry Company, 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. Company, 194 Iowa 819, 184 N.W.2d 746 (1922).

Iowa Code section 85.34(1) provides:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code section 85.34(2) provides:

> For all cases of permanent partial disability compensation shall be paid as follows:
>
> ....
>
> 1. For the loss of a hand, weekly compensation during one hundred ninety weeks.

ANALYSIS

The record shows that claimant's assignment to janitorial duties in August 1983 required her to engage in movements and

motions that involved pinching and gripping with her thumb. Her previous thumb injury, which occurred years earlier, was considered by her to be insignificant. She testified that the earlier injury did not cause her any impairment prior to her job reassignment in August 1983. There is no evidence in the record to the contrary. Claimant sought medical assistance for her condition even though she was repeatedly told it might result in the loss of her job. She appeared to be well motivated to work throughout the record, but was thwarted by a system of seniorty and her medical restrictions. Her description of the work duties and the pain and swelling caused by those duties was credible. It is therefore concluded that her complaints of pain and swelling were genuine and not the result of dissatisfaction with the work assignment.

Both Dr. Buck and Dr. Delbridge concluded that the previous thumb injury may have caused claimant's arthritis. Dr. Delbridge, Dr. Buck and claimant's foreman all agreed that claimant's janitorial work aggravated that condition. Claimant has met her burden in proving she had an aggravation of a preexisting condition which arose out of and in the course of her employment as a janitor for defendant.

Claimant is entitled to compensation only if her present impairment is causally connected to the injury. Dr. Buck stated that claimant's present condition was caused by her prior injury. Dr. Buck also opined that although her work did aggravate her preexisting arthritis, it was not a significant aggravation.

Dr. Delbridge was of the opinion that claimant's condition is permanent, and was the result of her janitorial work. He bases his conclusion on the absence of prior pain, impairment or symptoms before claimant began her janitorial duties.

Dr. Delbridge is a hand specialist and orthopedic surgeon. He has performed surgery on claimant's hand and treated her extensively, including examination of x-rays of her hand. Dr. Buck's opinion is based on more limited contact with claimant. In addition, Dr. Delbridge observed ongoing deterioration of claimant's hand condition during the course of treatment, corroborating his conclusion that the aggravation of her condition was both ongoing and significant. The opinion of Dr. Delbridge will therefore be given the greater weight.

Claimant is entitled to healing period benefits pursuant to Iowa Code section 85.34(1). Claimant was laid off work on November 4, 1983. Although defendant argues that claimant was laid off due to a bad local economy and her lack of seniority, the record clearly shows that claimant was laid off because defendant had no work for her in keeping with her medical restriction of the use of her right thumb. But for that restriction, claimant could have kept working for defendant in her

janitorial job. Therefore, the healing period began on claimant's last day of work on November 4, 1983.

Dr. Delbridge gave a rating of permanent impairment for claimant's right thumb on October 31, 1984. Claimant's condition did not significantly change after that. Subsequent to the surgery, Dr. Delbridge reiterated the same rating of impairment to the thumb and hand. Claimant did not ever return to work. It was never medically determined that she was capable of returning to the same or substantially similar employment. Thus, the healing period would end under section 85.34(1) of the Code when significant improvement from the injury is not anticipated. The surgery performed in January of 1985 was not expected to improve the function of the hand or thumb, but was designed to relieve pain. It appears that at the time the rating of impairment was given on October 31, 1984, no significant improvement was anticipated and the healing period ended on that date.

Claimant is also entitled to temporary total disability from January 14, 1985, the date of her surgery, until recovery from the surgery. Dr. Delbridge estimated that recovery would take six months. Claimant is therefore entitled to temporary total disability from January 14, 1985 until July 14, 1985.

As to the extent of claimant's permanent partial disability, Dr. Delbridge originally opined that claimant had a 15 percent impairment of the thumb, or 6 percent of the hand. After the trapezium implant surgery, he reiterated that opinion. As the trapezium is part of the hand, the pathology of claimant's injury extends beyond the thumb to the hand. Dr. Delbridge's rating of impairment is uncontroverted in the record. Claimant is determined to have a 6 percent permanent partial impairment of the right hand.

The record also contains references to an impairment of claimant's left thumb and hand. However, there is little medical evidence pertaining to the left thumb and hand in the record, and Dr. Delbridge indicated that impairment to the left hand is not significant and therefore no award is made for the left hand or thumb. Claimant also failed to prove any impairment or disability to her neck, back or leg.

FINDINGS OF FACT

1. Claimant was in the employ of defendant from August through October 1983.

2. Claimant's job from August through October 1983 consisted of janitorial duties and tasks in the parts reclamation department requiring extensive use of her hands and thumbs.

3. From August through October 1983, claimant's work aggravated a preexisting arthritic condition in her right thumb and hand.

4. Prior to August 1983, claimant had no loss of function of her right thumb or right hand.

5. As a result of her right thumb and right hand work injury in 1983, claimant has been permanently restricted from repeated gripping and pinching with her right thumb.

6. Claimant was terminated from the employ of defendant on November 4, 1983 for the reason that no work was available within claimant's medical restrictions.

7. As a result of her work injury of August through October 1983, claimant has a six percent permanent partial impairment of the right hand.

8. Claimant's rate of compensation is $257.52 per week.

9. Claimant reached maximum healing on October 31, 1984.

10. Claimant's last day of work was November 4, 1983.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence entitlement to healing period benefits from November 5, 1983 through October 31, 1984, and temporary total disability benefits from January 14, 1985 through July 14, 1985.

Claimant received an injury arising out of and in the course of her employment with defendant in August through October 1983.

As a result of her injury in August through October 1983, claimant has a permanent partial impairment of six percent of her right hand.

WHEREFORE, the decision of the deputy is modified.

ORDER

THEREFORE, it is ordered:

That John Deere shall pay to claimant eleven point four (11.4) weeks of permanent partial disability benefits at the rate of two hundred fifty-seven and 52/100 dollars ($257.52) per week from July 15, 1985.

That John Deere shall pay accrued weekly benefits in a lump sum.

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

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

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

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert D. Fulton
Attorney at Law
P.O. Box 2634
616 Lafayette Street
Waterloo, Iowa 50704-2634

Mr. John W. Rathert
Attorney at Law
P.O. Box 178
620 Lafayette Street
Waterloo, Iowa 50704

001814

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEITH D. WORRELL, Claimant, vs. GRIFFIN WHEEL CO., Employer, Self-Insured, Defendant.	:	File No. 702268 A P P E A L D E C I S I O N

FILED

FEB 26 1988

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals from a review-reopening decision awarding 12½ percent permanent partial disability of the body as a whole and nursing services expenses.

The record on appeal consists of the transcript of the review-reopening hearing; claimant's exhibits 1 through 18; and defendant's exhibits 1 through 4. Defendant filed a brief on appeal.

ISSUES

The issues on appeal are whether there is a causal connection between claimant's disability and his May 7, 1982 injury and whether claimant is entitled to nursing services expenses for care provided by his spouse.

REVIEW OF THE EVIDENCE

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

On May 7, 1982, while claimant was working, a one-half ton railroad wheel fell from behind him and struck him in the legs below the knees and knocked him to the floor. As a result of this incident he received broken bones in both legs and kneecaps. He was hospitalized for about two weeks and returned home where he was bedridden for about six and a half months. His wife, who is certified as a nurse's aide in the state of Missouri and had been working part-time at a nursing home for $3.75 per hour, cared for claimant while he was bedridden.

Claimant testified that while he was in the hospital, he

complained of back pain to Bruce L. Sprague, M.D., and that two or three weeks after his return home from the hospital he asked his local doctor, John Beckert, D.O., for pain medication for his back. Claimant also testified that the pain grew worse after his return to work.

Dr. Sprague was claimant's treating physician for his leg injuries. The doctor advised that claimant did not complain to him of back pain until October 1983, shortly after claimant returned to work. Dr. Sprague said there was no indication of trauma to claimant's back in May 1982 and he could not therefore see any causal relationship between the May 1982 injury and October 1983 back complaints. However, it was Dr. Sprague's opinion that claimant's back condition could have been indirectly related due to muscle weakness as a result of being off work for fifteen months. Dr. Sprague found a 20 percent permanent partial impairment to the lower left extremity and no permanent impairment to the lower right extremity. A March 27, 1984 letter from Dr. Sprague indicates that he could not say whether claimant's back problem was "directly" related to his work injury but opined that the back problem could be secondary to the incident of injury and weak muscles due to one year of rehabilitation.

Dr. Beckert testified in his deposition that he had treated claimant on several occasions, both before and after his work accident. The doctor said that he had treated claimant previously for back pain in the cervical and dorsal areas but not for lumbar pain until after the leg injuries. He opined that claimant's back complaints were causally related to the work injury primarily based upon the fact that claimant had no complaints prior to that injury. The doctor described the condition as permanent but did not express an opinion on the degree of disability.

Jerry L. Jochims, M.D., stated that he examined claimant on August 14, 1984. At that time he obtained a history from claimant and reviewed evaluation reports from other doctors who had examined claimant. Based upon that examination, Dr. Jochims opined that claimant had probably not reached his full tolerance for physical activity at the time of the August 1984 examination. He said, however, that this would not affect his impairment rating of claimant's back condition which he described as minimal. He assessed a total impairment to claimant of 17 percent of the body as a whole. This was composed of a five percent rating to the dorsal spine for an old compression fracture; five percent to the lumbar spine for instability; and, the remainder being related to the lower extremities. Dr. Jochims related all of these problems to claimant's work injury but said the compression fracture could have other causes if claimant's history included such things as auto accidents. The doctor further opined that claimant had a five percent impairment to

the right lower extremity as a result of a fractured patella and a 12 percent impairment of the left extremity for a fractured patella and crushing injury.

Webster B. Gelman, M.D., examined claimant relative to low back complaints in March 1984. After examining claimant and certain of his medical records, the doctor said he found nothing suggestive of injury to claimant's low back. He stated, however, that he believed claimant to be honest about his back pain and believed that the pain was by implication related to the May 1982 injury.

D. Mackenzie, M.D., examined claimant and in a letter dated February 19, 1986 stated that the thoracic and lumbar spines were entirely normal. The doctor stated that there was no evidence that any of claimant's back problems were neurological or post-traumatic in nature.

Claimant's wife testified that when claimant was released from the hospital following his injury he was totally incapacitated and confined to a hospital bed. She stated that she washed his hair in bed and changed the bed with him in it. She helped him get in and out of the wheelchair from the bed. After a therapist had shown claimant's wife how to do therapy, she did therapy with him.

APPLICABLE LAW

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

ANALYSIS

Defendant attempted to introduce evidence which consisted of certain medical reports after the review-reopening hearing. The defendant admits in its application that it had received them and that it was erroneously assumed that claimant would introduce the exhibits at the time of the hearing. Defendant's application to introduce is herein denied and the medical records are not part of the evidence in this matter. See Division of Industrial Services Rule 343-4.31.

Defendant argues on appeal that the deputy erred in finding a causal connection between claimant's work injury and a permanent partial disability of the body as a whole of 12½ percent. Defendant's argument is not persuasive. Claimant clearly suffered a severe injury which required many months of convalescence including being bedridden for six and a half months. It is reasonable to believe that not all of claimant's injuries were immediately known to him or his physicians. It is also reasonable to believe that his lower back condition did not manifest itself until after the injury or until after his extensive bedridden

period. The examining physicians generally found that claimant suffered a back strain as a result of his injury. While Dr. Sprague, one of the treating physicians, is reluctant to state that the back injury was directly related to the work injury, he nonetheless indicates that the back injury is secondary to the incident of the work injury.

Doctors Beckert and Gelman found, by implication, that claimant had a sprain resulting from the work injury. Dr. Jochims thought claimant's back problem was causally connected to his work injury but Dr. Mackenzie found no evidence that his back problem was neurological or post-traumatic in nature. Dr. Jochims was the only doctor that gave an impairment rating for the lower right extremity, the back or the body as a whole. Dr. Sprague was the primary treating physician and his testimony should be given the most weight. The deputy correctly concluded that claimant's thoracic compression fracture was not the result of the work injury. Claimant has proved by the great weight of evidence that the lumbar sprain was causally connected to his work injury.

There is no dispute that claimant has suffered permanent impairment to his left leg. Dr. Sprague's opinion is relied upon and it is concluded that claimant has no impairment to the right leg. Claimant does have an impairment of five percent to his lumbar spine. Considering all the factors, the deputy was correct in determining that claimant has proved by the greater weight of evidence that claimant suffered a 12½ percent industrial disability of the body as a whole.

Defendant next argues that the deputy erred in awarding payment to claimant's wife for services for 21 hours per week for 26 weeks at $3.50 per hour. Defendant's main argument is that claimant wishes to be paid after the services were performed and as a result, defendant did not have an opportunity to approve the services beforehand. Claimant was bedridden for approximately six and one-half months after his injury and the amount awarded by the deputy for the services of claimant's wife constitute only three hours per day at nearly minimum wage. Iowa Code section 85.27 provides that an employer has an obligation to furnish reasonable services and supplies to treat an injured employee and has the right to choose the care. The services of claimant's wife the deputy ordered are certainly reasonable in both amount and cost. Defendant should have known that claimant was going to require extended care, especially in light of the fact he was in the hospital for two weeks after surgery with two broken legs. Defendant, by not objecting to claimant's wife's services and by not offering alternative services, in effect, waived its right to choose the services. Defendant will not now be allowed to object to the services which are definitely reasonable.

FINDINGS OF FACT

1. On May 7, 1982 claimant suffered an injury arising out of and in the course of his employment.

2. As a result of his injury, claimant broke both legs and suffered a back strain.

3. Claimant has a 20 percent permanent impairment to his left extremity; five percent impairment to his lumbar spine; and no impairment to his lower right extremity.

4. Claimant has returned to work.

5. Claimant is young, intelligent, and well motivated.

6. Claimant's rate of compensation is $243.74.

7. Claimant has been previously paid 44 weeks of permanent disability representing 20 percent disability to the lower left extremity.

8. Teresa Worrell provided nursing services to claimant equal in value to $1,911.

9. Dr. Jochims' bill for an independent medical examination is fair and reasonable.

10. Claimant's industrial disability as a result of his injuries is 12½ percent.

CONCLUSIONS OF LAW

Claimant has proven by a preponderance of the evidence that there is a causal connection between his injury of May 7, 1982 and industrial disability of 12½ percent.

Claimant has proven by a preponderance of the evidence that nursing services from his wife were authorized and the reasonable value thereof is $1,911.

Claimant has proven by a preponderance of the evidence that the charges for Dr. Jochims' examination are fair and reasonable.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant an additional eighteen and one-half (18½) weeks of compensation at the rate of two hundred

forty-three and 74/100 dollars ($243.74) commencing April 6, 1984. All accrued payments to be made in a lump sum together with statutory interest.

That defendant pay unto Teresa Worrell one thousand nine hundred eleven dollars ($1,911) for nursing services rendered to claimant.

That defendant reimburse claimant for four hundred two dollars ($402) expended for the examination by Dr. Jochims.

That the costs of this action including costs of the appeal and the transcription of the hearing proceeding are taxed to defendant.

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

Signed and filed this 26th day of February, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. James P. Hoffman
Attorney at Law
Middle Road
Keokuk, Iowa 52632-1066

Mr. John E. Kultala
Attorney at Law
511 Blondeau Street
Keokuk, Iowa 52632

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

:URT ZANDERS, Claimant, vs. CITY OF MALVERN, Employer, and EMPLOYERS MUTUAL COMPANIES, Insurance Carrier, Defendants.	FILED MAY 26 1988 IOWA INDUSTRIAL COMMISSIONER	File No. 772273 D E C I S I O N O N 85.27 B E N E F I T S

STATEMENT OF THE CASE

This is a proceeding brought by Kurt Zanders, claimant, against City of Malvern, employer, and Employers Mutual Companies, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act, specifically under Iowa Code section 85.27 as a result of an injury sustained on August 10, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner April 18, 1988 and was considered fully submitted at the close of the hearing. The record in this case consists of the closed testimony of claimant and Danny Zanders, his father; claimant's exhibits 1 through 5, inclusive, and defendants' exhibits A through J, inclusive.

ISSUES

The sole issue in this matter is claimant's entitlement to benerits unaer Iowa Code section 85.27.

FACTS PRESENTED

Claimant, age 24, a C-5 quadriplegic, was injured August 10, 1984 in a swimming pool accident arising out of and in the course of his employment as a lifeguard for defendant employer. Claimant explained he has use of his body down to his shoulders and a "shoulder shrug is about the lowest" with use of his head and neck. Claimant does not have any use of his limbs and utilizes an electric wheelchair which he controls using his mouth or chin. .Claimant lives in Omaha, Nebraska with his parents who attend to the majority of his needs in a home

001821

odified for accessibility. Defendants have provided for the osts of home modification. Claimant estimated his motorized heelchair, with him in it, weighs approximately 500 pounds. laimant testified that there is no other way to transport his otorized wheelchair other than an especially equipped van ithout contracting with someone else to "take it somewhere" and hat he cannot move around in a normal car or station wagon ithout a number of people to lift him and the chair in and out. laimant explained that since his loss of independence the otorized wheelchair "has been a life saver" and that the obility provided by the chair and the van give him back "a ittle bit of his previous life."

Claimant explained that while he does not and cannot operate he van itself, he uses it and has used it for shopping trips, o go to family functions, antique shows, house hunting with his arents, and fossil shows among other things. Claimant testified he van will be used for transportation to and from school when e resumes his study of geology at the University of Nebraska at maha. Claimant also uses the van to attend medical appoint- ents including two trips to the Craig Hospital in Englewood, olorado, and one trip to his family doctor in Omaha for general heckup.

Claimant testified he has not ridden in any vehicle other han the van since his discharge from Craig Hospital. He xplained he is not able to get into and out of the van without ssistance as he needs someone to open the door, let the motorized ift down, hoist the lift back up, buckle down the wheelchair, lose the van doors and drive.

Danny Zanders testified the van (pictured in claimant's xhibit 5) was ordered in December 1984 and delivered in February 985 shortly after claimant was discharged from Craig Hospital. . Zanders opined claimant cannot be transported without using he van and that a regular automobile would be unsuitable since would not allow claimant to do "weight shifts" since claimant annot stay in the wheelchair while a normal vehicle is moving. explained claimant cannot be restrained by use of a regular eat belt in a regular car and that it is necessary to have the apability to put claimant in a prone position should something ppen with regard to his catheter or bowel functions. Mr. Zanders so testified to the convenience of the van which, because an ndividual can move around in it, negates the necessity to make dditional stops to "drain bags."

Byron B. Oberst, M.D., who practices in the medical specialties pediatrics, adolescence, and college medicine, explained he rst saw claimant shortly after his swimming pool accident and s involved with claimant's care and treatment up through the me claimant went to Craig Hospital.

Asked what an electric wheelchair does for a quadriplegic to elp with such potential problems as depression, discouragement, oss of body image and loss of lifestyle, Dr. Oberst stated:

Q. Now, what does an electric wheelchair do for such a person to help with the problems that you've just described?

A. Well, much. Gives him independence in the first place so he can go from Point A to Point B without having anybody pushing him there. One of the things that we know in today's world in working in the computer world is that we're trying to develop methodologies and approaches to help those folks have a much better quality of life and be much more independent and to be tied to a wheelchair, tied to a bed, for anything that you need to do is -- excuse me -- a hell of a way to have to live no matter how you look at it.

Q. All right. And is this the mobility part of the treatment and rehabilitation in a patient such as this whatever --

A. It isn't treatment but it's rehabilitation. There's a difference between two -- the two.

Q. All right.

A. Treatment he no longer can have if you want to look at treatment as far as the medication or surgical procedure or something else to restore him to as near normal a life as you possibly can.

Rehabilitation and the ability to be able to address -- as we do in any therapeutic program -- is to have the patient be able to be as capable of being able to handle their own you might say living skills, if you will, as well as their mental attitudes as possible.

Q. Now, if one were to say that the psychological problems -- the depression problems, the personal self-worth things that you mentioned could be assisted by the doctor, could that not be described as part of the medical treatment for that patient?

....

....THE WITNESS: No. That would be I would consider part of the rehabilitation program. If you look at therapy as the total global type of

thing, yes. If you're talking about it as a specific modality to change something in his physical makeup, no.

(Cl. Ex. 1, pp. 9-10)

On the issue of the van, Dr. Oberst responded:

Q. Practically speaking is there any way to transport that electric chair except by an equipped van?

A. I don't know how you could because you can't pick them up and carry them. They're too cumbersome.

Q. In that sense then do you have an opinion as to whether or not the van to transport that chair would also be medically necessary in Kurt Zanders' therapy and rehabilitation?

....

THE WITNESS: Very much so. Plus the fact that in today's therapeutic world the way vans can be equipped for the handicapped individual give him a much better way to handle his quality of life and his ability to become independent and self-sufficient.

(Cl. Ex. 1, p. 11)

Roger Leuck, M.D., who specializes in the treatment of spinal cord injuries, testified he was claimant's attending physician during claimant's hospitalization at Craig Hospital from September 13, 1984 through February 8, 1985. Dr. Leuck opined that a van equipped with wheelchair accessories would be necessary to provide claimant mobility with his wheelchair and explained the importance of mobility in the treatment and rehabilitation of a quadriplegic by stating:

A. Well, mobility serves many purposes. I think from just a health standpoint alone, people that do not get up and around or tend to stay in bed have and accumulate more medical problems. So I think it's important that they get mobilized or get out of bed as much as possible. That prevents further medical potential problems such as skin sores. At the same time, it keeps people from becoming weaker or deconditioned so that they cannot tolerate the upright conditions. so I think it's very important from a mobility standpoint, one, that they get out of bed, are able to get out of bed.

> And secondly, they have to be able to get out of their environment to seek health care at times and otherwise to get about their business of going out and living.

(Cl. Ex. 2, p. 6)

Dr. Leuck issued a patient equipment prescription for "van mods for 1985 Ford E150 Club Wagon" which provided for a fully automatic lift, lowered floor, smooth floor, manual wheelchair lock-down, safety belt system, insulation package, air conditioning, auxillary heating and air conditioning, and fire extinguisher. Defendants have paid approximately $5,000 for modifications to the van to accommodate claimant's wheelchair. What remains in dispute is the actual purchase price of the van.

APPLICABLE LAW AND ANALYSIS

The crux of the issue presented for resolution is, simply put, whether defendants are liable for the purchase of the van used to transport claimant in his motorized wheelchair. Defendants have paid for modifications to the van. Claimant asserts that the purchase price of the van itself is a medical expenses under Iowa Code section 85.27. Claimant's only avenue for recovery is to establish the van is an expense under section 85.27. Iowa Code section 85.27 provides:

> 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.

This section of the law has been interpreted by the industrial commissioner as requiring the employer to furnish those things which are reasonably necessary to treat the injured employee's work-related injury. Therefore, the issue is again reduced to a determination of whether or not the van is reasonably necessary to treat claimant's work-related injury. With all deference to the claimant, his condition, and the special needs which a quadriplegic may require, it cannot be concluded that the van is a medical expense necessary to treat the injury.

Initially, it is noted that while there is a physician's prescription for modification, there is no medical prescription for the van itself. However, the mere existence of a prescription

does not necessitate a conclusion that that which is prescribed is a medical expense. Doctors Oberst and Leuck testified as to the need for the mobility of the electric wheelchair and claimant has been provided with the same. They both opined the van is the most practical way of transporting claimant in that chair. However, it is clearly not the only mode of transportation available. Claimant has shown that other modes of transportation may be inconvenient but not that they are not available.

Doctors Oberst and Leuck refer to potential problems with depression, discouragement, anxiety, and loss of body image. No evidence is contained in the record to show claimant is currently suffering from depression or anxiety. To order defendants to pay for a van based on claimant's potential for developing such problems would be to require the undersigned to base a decision on mere speculation which is clearly contrary to precedent. The recent case of Umphress v. Armstrong Rubber Co., Appeal Decision filed August 27, 1987, holds that it is not proper to base a decision on mere speculation as to what may occur to claimant in the future and it is the condition of the claimant as established at the time of hearing that must be considered. Claimant argues that purpose of the van in the quadriplegic case is to allow for the use of the electric wheelchair which gives claimant some mobility, some link to normal life, some sense of normalcy and therefore promotes both his mental and physical well-being by avoiding depression, anxiety, and by reducing the unavoidable loss of self-esteem associated with the loss of his normal life. As indicated above, the van or lack thereof, does not prohibit claimant from the use of his electric wheelchair. Further, many other things come to mind which may help claimant avoid depression, anxiety and loss of self-esteen which would not be a medical expense under Iowa Code section 85.27. It is for these reasons that the undersigned is not convinced by claimant's reliance on Fisher v. First Assembly of God Church, Decision on 85.27 Benefits, file number 447773. Fisher is particular to the facts of the case and cannot be extended to the facts of this case.

Section 85.27 also speaks of "physical rehabilitation" expenses. As the van cannot be considered a medical expense because it does not treat claimant's injuries, it likewise does not physically rehabilitate claimant from the effects of his injuries. Claimant may use the van for the purposes of continuing his education and thus for the purpose of vocational rehabilitation but the defendants' liability is limited for vocational rehabilitation under Iowa Code section 85.70. Dr. Oberst agrees the van is not a part of claimant's medical treatment and Dr. Leuck speaks in terms of avoiding potential problems.

Iowa Code section 85.27 requires defendants to furnish all reasonable services necessary to treat a work-related injury. Nowhere within in the law is it mandated that employers return

claimant to the lifestyle led before the injury. Testimony establishes claimant's use of the van is principally for personal, albeit legitimate, reasons. Only twice has the claimant returned for medical checkups and once has he returned to his family doctor. All remaining trips taken were for claimant's personal interest and satisfaction. (Defendants' responsibility for transportation expenses is not under consideration here.)

One of the purposes of the Workers' Compensation Act is to ensure a determined liability for employer and although the statute is to be construed liberally, care must be taken not to legislate under the guise of a liberal statutory construction. If an expenditure is undertaken in the name of Iowa Code section 85.27 which is not for the treatment of the compensable injury, it cannot under Iowa law be reimbursed. Claimant has not established that the van is reasonable and necessary to relieve him of the effects of his injury and therefore that the actual van is necessary to treat his work-related injury.

FINDINGS OF FACT

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

1. Claimant sustained an injury which arose out of and in the course of his employment as a lifeguard with defendant employer on August 10, 1984.

2. Claimant is a C-5 paraplegic who has no use of his body below his shoulders.

3. Claimant uses a motorized wheelchair which he operates by use of a mouth/chin control.

4. Claimant's wheelchair, with him in it,weighs approximately 500 pounds.

5. The most convenient way to transport claimant in his wheelchair is by use of the van but it is not the only mode of transportation available.

6. Although the use of the van provides convenience, the van in and of itself is not medically necessary to treat claimant's injuries.

CONCLUSION OF LAW

Wherefore, based on the principles of law previously stated, the following conclusion of law is made.

Claimant has failed to establish the purchase of a van is a medical expense under Iowa Code section 85.27 or is reasonably

necessary to treat a work-related injury.

ORDER

THERFORE, IT IS ORDERED:

That claimant take nothing further from these proceedings.

That the costs of this proceeding are assessed against defendants pursuant to Division of Industrial Services Rule 343-4.33 in the following amounts:

Dr. Byron B. Oberst - expert fee	$150.00
Dr. Roger Leuck - expert fee (pursuant to Iowa Codes section 622.72)	150.00
Blair and Associates - court reporters	79.00
Twin City Reporter	43.91

Signed and filed this 26th day of May, 1988.

Deborah A. Dubik

DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. Scott H. Peters
Attorney at Law
233 Pearl Street
P.O. Box 1078
Council Bluffs, Iowa 51502

Mr. Philip J. Willson
Attorney at Law
370 Midlands Mall
P.O. Box 249
Council Bluffs, Iowa 51502