TRENDS IN THE INSURANCE INDUSTRY

TRENDS IN INDUSTRIAL DISABILITY IN IOWA

I. INTRODUCTION

A. *Approach*

This is a comparative study of the various factors which are considered in determining industrial disability in workers' compensation cases in Iowa. A survey was conducted of all hearing level[1] cases before the Iowa Industrial Commissioner for the years 1967, 1968, 1977 and 1978, involving industrial disability.[2] The results of the survey are grouped into two time periods: 1967-1968 and 1977-1978.[3] The survey results from these two time periods will be compared to discover any general trends which might have developed in the eleven year period. The conclusions drawn from this survey are general in nature and might not be accurate when applied to a particular case or factual situation.

B. *Definitions*

The concept of industrial disability is not specifically mentioned or defined by the Iowa workers' compensation statutes, but rather is a common law interpretation of various sections of the statutes. A general discussion of the concept is a necessary prerequisite to an understanding of the results of the survey and the conclusions reached.

Industrial disability is the measure of the loss of earning capacity[4] a

1. Hearing level cases before the Iowa Industrial Commissioner are those which are conducted by the deputy industrial commissioners. In a contested case, a hearing may be held before the deputy in which testimonial and documentary evidence may be presented. A contested case may also be submitted on the basis of a stipulated record. After consideration of all evidence presented in the record, the deputy renders a proposed decision in which he makes all necessary findings of fact and conclusions of law. *See* IOWA CODE §§ 17A.11, 12 (1979). Any party may appeal the proposed decision to the industrial commissioner. *See* IOWA CODE § 86.24 (1979); Iowa Ad. Code §§ 500-4.27, 4.28 (86, 17A). After reviewing the record, the industrial commissioner renders an appeal decision, which is the final decision of the agency. This decision may be appealed to the district court and eventually to the Iowa Supreme Court. *See* IOWA CODE §§ 17A.19, 86.26, 86.29, 86.32 (1979).

2. Two-hundred thirty decisions from the files of the Iowa Industrial Commissioner's Office were surveyed for the four year period.

3. A comparison of these two time periods was chosen because there has been a complete change of personnel both at the hearing level and at the appeal level within the Iowa Industrial Commissioner's Office. The two year groups in each period were chosen to give a sufficient sampling of cases so that the results might be more reliable.

4. Loss of earning capacity is the reduced ability to earn wages in the future because of the physical or mental limitations placed on the worker due to an employment-related injury. In determining loss of earning capacity the deputy must consider a set of factors which have been

worker[5] incurs due to a permanent[6] non-scheduled injury.[7] There are several requirements which must be satisfied before a worker's injury may be rated industrially.[8] Initially, the injury must arise out of and in the course of the worker's employment.[9] Further, the injury must be to the body as a whole[10]

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established by the Iowa Supreme Court and are discussed in the text. *See* Deaver v. Armstrong Rubber Co., 170 N.W.2d 255 (Iowa 1969); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961); Martin v. Skelly Oil, 252 Iowa 128, 106 N.W.2d 95 (1960); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959); Oldham v. Scofield & Welch, 222 Iowa 764, 266 N.W. 480, *modified on different grounds*, 269 N.W. 925 (1936) (per curiam); Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W. 899 (1935); Moses v. National Union Coal Mining Co., 194 Iowa 819, 184 N.W. 746 (1922). *See also* Dahl, *Disability Compensation Under the Workmen's Compensation Law*, 16 DRAKE L. REV. 59, 61-63 (1967).

5. The IOWA CODE defines a "worker" as:

> [A] person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer, every executive officer elected or appointed and empowered under and in accordance with the charter and bylaws of a corporation, including a person holding an official position, or standing in a representative capacity of the employer, and including officials elected or appointed by the state, counties, school districts, area education agencies, municipal corporations, or cities under any form of government, and including members of the Iowa highway safety patrol and conservation officers, except as hereinafter specified.
>
> "Workman" or "employee" shall include an inmate as defined in section 85.59.

IOWA CODE § 85.61(2) (1979).

IOWA CODE § 85.61(3) (1979) provides for the following exclusions from the definition of "worker" or "employee":

> (3)(a). A person whose employment is purely casual and not for the purpose of the employer's trade or business except as otherwise provided in section 85.1.
>
> (b) An independent contractor.
>
> (c) Partners; directors of any corporation who are not at the same time employees of such corporation; or directors, trustees, officers or other managing officials of any nonprofit corporation or association who are not at the same time full time employees of such nonprofit corporation or association.

6. Permanency is normally established by medical evidence which indicates that the worker will probably never fully recover from the work-related injury. If the injury is permanent then IOWA CODE § 85.34 is applied.

7. A permanent non-scheduled injury is one that is not covered by § 85.34(2)(a)-(t), but is covered by § 85.34(2)(u), (3) of the IOWA CODE. If the industrial disability rating is less than 100% then IOWA CODE § 85.34(2)(u) is applied and is known as permanent partial disability. If the industrial disability rating is 100% then IOWA CODE § 85.34(3) applies and is known as permanent total disability. Section 85.34(2)(s) is an exception to the scheduled injury rules in some instances. *See* note 11 *infra*. Also, occupational diseases, as defined in IOWA CODE § 85A.8, are rated industrially, if not limited to a scheduled member. *See* Dahl, *The Iowa Workmen's Compensation Law and Federal Recommendations*, 24 DRAKE L. REV. 336, 342 (1975).

8. "Rated industrially" means that, in determining a disability rating, a deputy must consider loss of earning capacity. *See* note 4 *supra*.

9. IOWA CODE § 85.3(1), 85.61(6)(1979).

10. "Body as a whole" includes the trunk of the body along with the head. In other words, the meaning of the phrase encompasses all portions of the body except those specifically mentioned in IOWA CODE § 85.34(2)(a)-(t). IOWA CODE § 85.34(2)(u) (1979). *See* note 11 *infra*.

and not to a scheduled member.[11] Finally, the disability resulting from the injury must be permanent.[12]

Once the worker is entitled to have his injury rated industrially, certain factors are considered in determining the worker's loss of earning capacity.[13] This figure represents the reduced ability of the worker to earn wages in the future. The first and most important of these factors is "functional disability,"[14] the total percentage of physical or mental disability the worker incurs. This factor is strictly related to the physical or mental impairment the worker has incurred from his employment-related injury. Although functional disability is an important element in determining industrial disability, it is not the only criterion.[15] Other factors which may be considered in determining industrial disability are the worker's age, education, qualifications, experience and inability to engage in employment for which he is fitted.[16] Additionally, a worker's actual wage reduction, motivation and credibility have

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11. "Scheduled members" of the body include the fingers, the hands, the arms, the toes, the feet, the eyes and the ears. IOWA CODE § 85.34(2)(a)-(r) (1979). "[P]ermanent 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. . ." is also a scheduled injury. IOWA CODE § 85.34(2)(t) (1979). The period of compensation for an injury to a scheduled member is determined by multiplying the number of maximum weeks of compensation allowed for the particular injury by the percentage of functional disability, which is the actual percentage of physical or mental impairment incurred as a result of the work-related injury.

If two scheduled members are permanently and partially disabled in a single accident, compensation is based on the percentage of functional disability under a 500 week schedule. Prussia v. Armstrong Rubber Co., Appeal Decision (September 4, 1979) (Landess, Iowa Indus. Comm'r), *appeal docketed,* No. 11-6417 (Polk Cty., Iowa Oct. 3, 1979). If there is a loss of two scheduled members in a single accident, the injured worker is entitled to 500 weeks of compensation. If the worker is permanently and totally disabled, he may be entitled to benefits under IOWA CODE § 85.34(3). IOWA CODE § 85.34(2)(s) (1979). If a worker is entitled to benefits under IOWA CODE § 85.34(3), then his disability is rated industrially. Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959); Daily v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W. 899 (1935). *See* Dahl, *The Iowa Workmen's Compensation Law and Federal Recommendations,* 24 DRAKE L. REV. 336, 350 (1975).

12. IOWA CODE § 85.34(2)(u), (3) (1979); *see* note 7 *supra.*

13. The worker has the burden of proving loss of earning capacity by a preponderance of the evidence. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (Iowa 1969); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Martin v. Skelly Oil, 252 Iowa 128, 106 N.W.2d 95 (1960).

14. Functional disability is often expressed in the form of a mathematical percentage as presented in the medical evidence. However, an exact mathematical percentage is not required for a determination of functional disability. Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

15. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (Iowa 1969); Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961); Martin v. Skelly Oil, 250 Iowa 128, 106 N.W.2d 95 (1960); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959).

16. Olson v. Goodyear Serv. Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

been considered in some cases.[17]

Once the worker sustains his burden of proof[18] with respect to the question of loss of earning capacity, a deputy industrial commissioner (hereinafter, deputy) weighs the various factors mentioned to arrive at an industrial disability rating. This rating is expressed in terms of a numerical percentage.[19] This percentage is multiplied by the maximum number of weeks of workers' compensation allowed under the applicable statute,[20] with the product representing the number of weeks for which a worker is entitled to compensation. The weighing of the various factors which are used in determining industrial disability represents a subjective fact-finding determination by a deputy.

II. The Factors

A. *Functional Disability*

As stated previously, functional disability is the percentage of disability the worker suffers from a medical or psychiatric standpoint. Normally, a physician will give a functional disability rating[21] based on objective testing and subjective observation. If conflicting ratings are given by the various physicians, the deputy will weigh the evidence to arrive at a specific functional rating. In some instances, the deputy will report the various functional ratings given by the physicians without indicating what specific percentage of functional disability he has found.[22]

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17. Brand v. Franklin Mfg. Co., Review-Reopening Decision (November 15, 1978)(Hanssen, Iowa Dep. Indus. Comm'r)(actual wage reduction); Eittreim v. Farmers Coop. Elevator Co., Review-Reopening Decision (January 20, 1978)(Gardner, Iowa Dep. Indus. Comm'r), *modified on different grounds,* Appeal Decision (March 21, 1978)(Landess, Iowa Indus. Comm'r), *modified on different grounds,* No. 9-4739 (Polk Cty., Iowa May 30, 1979), *appeal docketed,* (Iowa Supreme Court June 29, 1979)(motivation); Leffler v. Wilson & Co., Review-Reopening Decision (August 16, 1978), *appeal docketed,* (Landess, Iowa Indus. Comm'r August 30, 1978)(credibility).

18. *See* note 13 *supra.*

19. For example, the worker injures his back at work which necessitates surgery and removal of some disc material. The physician performing the surgery reports that the worker has a 5% permanent functional impairment. The worker is 45 years old, has an eighth grade education and an employment history of hard physical labor. Because of his limited work history and the nature of his injury, the deputy officer might determine that the worker has suffered a ten percent loss in earning capacity. The worker then has a 10% industrial disability rating.

20. The maximum number of weeks for a permanent partial disability is 500. For example, if a worker had a disability rating of 80%, he would be entitled to 400 weeks of compensation. Iowa Code § 85.34(2)(u) (1979). This was the maximum number of weeks allowed for both periods surveyed. However, there was an additional restriction in the 1966 statute. Compensation could not exceed $23,750. The 1966 statute had the same week and dollar restrictions for permanent total disability. Iowa Code § 85.34(3) (1966). These restrictions were deleted from the statutory scheme in 1975. Permanent total disability under section 85.34(3) of the Code is now paid for the duration of the worker's life.

21. A functional disability rating is the percentage of functional disability.

22. This does not mean that functional disability is ignored, it merely means that the deputy did not report his specific finding in the decision. *See* Richardson v. Richardson's Warehouse, Review-Reopening Decision (Jan. 20, 1978)(Gardner, Dep. Indus. Comm'r).

Functional disability is merely a factor in determining industrial disability. It represents the measure of physical or mental impairment while industrial disability is the measure of loss of earning capacity. An industrial disability rating may be more than, equal to or less than the total functional disability rating. For example, a worker could suffer an injury causing considerable physical impairment, but at the same time, it might have little effect on his earning capacity. The earning capacity of a worker who is highly educated and has a sedentary desk job would be less affected by a physical injury than would a worker who has little education and an employment history of heavy labor. It is possible that the worker with the sedentary job could have an industrial disability lower than his functional disability because there has been little impact on his earning capacity due to physical injury.

The central focus of the survey of industrial disability decisions was on the role functional disabilty has played and is playing in the determination of the amount of industrial disability awarded. The survey reveals that while the average total functional disability rating has been reduced from 20.59% in 1967-1968 to 17.32% in 1977-1978,[23] the average industrial disability rating has risen from 20.16% in 1967-1968 to 27.03% in 1977-1978.[24] These percen-

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23. The percentages in the text were found by averaging the functional disability ratings reported in decisions for those time periods. If, in a particular decision, several different functional ratings were listed with no specific finding reported by the deputy, then an average for the listed ratings was used. For example, if a particular decision listed functional ratings from various physicians as five percent, ten percent and twenty percent, then the average, 11.6%, was used from that particular decision.

The following table indicates the number of cases examined in each period and the percentages by years for average functional disability ratings.

	1967	1968	1967-1968	1977	1978	1977-1978
Under 30	1.05	—*	1.05	1.75	2.23	1.95
30-39	.89	.85	.87	1.78	1.59	1.66
40-49	.77	1	.9	1.63	2.09	1.83
50-59	.79	1.78	1.12	2.04	2.15	2.08
Over 59	2.19	1.75	2.02	1.35	1.74	1.52

*There were no decisions in this category during the year 1968.

24. The table below indicates the number of decisions examined in each period and the percentages by years for average industrial disability ratings. Only those decisions which designated a functional disability rating were considered for this table. This was done so that a comparison could be made between functional and industrial disability ratings.

Percentage of Decisions Where:	1967	1968	1967-1968	1977	1978	1977-1978
Industrial Disability *Less* Than Functional Disability	40	34.8	38	16	7.3	12.1
Industrial Disability *Equaled* Functional Disability	34.3	34.8	34.5	3	7.3	4.8
Industrial Disability *Greater Than* Functional Disability	25.7	30.4	27.6	81.2	85.5	83.1

tages show that in the 1967-1968 period the average industrial disability rating was slightly lower than the average total functional disability rating. However, in 1977-1978 the average industrial disability rating was almost ten percentage points higher than the average total functional disability rating. Since there has been no substantial change in the applicable statutes or in the common law, it is submitted that there has been a change in interpretation of industrial disability within the office of the Iowa Industrial Commissioner. This conclusion is corroborated by the fact that there was a complete change in deputy personnel between the 1967-1968 and 1977-1978 period.

This change in interpretation of industrial disability is highlighted by the percentages presented in the table below. The table indicates the percentage of times industrial disability was less than, equal to and greater than the functional disability rating.

	1967	1968	1967-1968	1977	1978	1977-1978
Number of Decisions Surveyed	35	23	58	69	55	124
Average Industrial Disability Rating	17.5%	24.1%	20.2%	27.6%	26.3%	27%

Source: Files from the Iowa Industrial Commissioner's Office.

In 1967-1968 the greatest percentage of cases were in the "less than" category while in 1977-1978 the greatest percentage were in the "greater than" category. Also, there was a significant decrease in the percentages in the "equaled" category between 1967-1968 and 1977-1978. A comparison of all the percentages indicates that there is a definite trend in granting an industrial disability rating which is greater than the total functional disability rating. Since most claimants who are entitled to industrial disability compensation have jobs which require physical labor,[25] and a permanent physical injury can be devastating to their earning capacity, this trend indicates that deputies are now considering industrial disability more in terms of loss of earning capacity rather than just physical impairment.

Also, in 1967-1968, total functional disability appears to be the maximum disability rating given in a large number of decisions, while in 1977-1978 the reverse is true, and functional disability now appears to be a minimum basis for determining industrial disability. A probable explanation for this reversal is that the other factors of industrial disability are now used more often to increase the award, while in 1967-1968 they were used to decrease the award when compared to functional disability. In both time periods functional disability was used as a starting point, but different interpretations of the other factors[26] have brought about a larger average award of industrial disability in relation to functional disability.

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25. *See* text accompanying note 30 *infra*.

26. These other factors are considered together to determine the cumulative effect they have on earning capacity.

B. *Age*

Age is often an important factor in determining industrial disability. A relatively young worker is more likely to be a successful candidate in rehabilitation or retraining. Often a young worker has not established a long work history and is probably more flexible in ability to change occupations. However, a young worker has many years of work ahead and a serious injury early in the employment career can have a devastating impact on future wage earning. Thus, depending on the circumstances of a particular case, youth may have varying impact on earning capacity.

A middle-aged worker is less likely to be a successful candidate for rehabilitation or retraining because his work habits are well-entrenched and difficult to change. If a worker is fifty years old, he will normally have fifteen years of work remaining before retirement. Thus, a serious injury could have an important impact on the wage-earning capacity of the middle-aged worker.

The worker in his sixties or seventies would be the least likely candidate for rehabilitation. His working career is near its end and a major change in jobs is unlikely. This situation can be interpreted in two different ways: (1) because of old age, the worker is less likely to secure different employment and thus, there will be a serious impact on his wage-earning capacity or (2) since the worker is near the age of retirement there will be little impact on wage-earning capacity. Thus, an injury may have great or little impact on earning capacity on a worker in the twilight of his career.

To determine what impact age has had on industrial disability ratings, a comparison was made between functional and industrial ratings and age. Functional disability ratings were used to provide a basis for comparison. The following table is divided into five general age categories and the numbers appearing in the table were arrived at by dividing industrial disability by functional disability then taking the average for each year.[27]

	1967	1968	1967-1968	1977	1978	1977-1978
Number of Decisions Surveyed	35	23	58	69	55	124
Average Functional Disability Rating	18.5%	23.8%	20.6%	19%	15.2%	17.3%

Source: Files from the Iowa Industrial Commissioner's Office.

The figures indicate the number of times an industrial disability rating was increased over a total functional disability rating. For example, in the first age category in 1967-1968, the average industrial disability rating was 1.05 times greater than the functional disability rating and in 1977-1978 the aver-

27. For example, the industrial disability rating is 50%, while the functional rating is 25%. The industrial rating, 50%, is divided by the functional rating, 25%, yielding the product two. This indicates the industrial rating is twice the functional rating. This procedure is used so that a whole number, representing a comparison between functional and indstrial disability, can be compared with age.

age industrial rating was 1.95 times greater than the average functional rating. This type of comparison can give some indication as to how age affects the industrial disability rating.

In the 1967-1968 period the industrial disability ratings, except in the "Under 30" category, increased as the age of the worker increased. In 1977-1978 the same thing occurred except for the "Under 30" category and the "Over 59" category. The "Under 30" category had a greater increase in industrial disability over functional disability than did the "30-39" and "40-49" categories in both the 1967-1968 and 1977-1978 periods. This indicates the long careers which face the young worker are given greater weight than their ability to change their careers.

The only unusual change between 1967-1968 and 1977-1978 is found in the "Over 59" category. In 1967-1968 the average increase of industrial disability over functional disability was 2.02 times, while in 1977-1978 the average increase was 1.52 times. These figures are in contravention to the general trend of increasing industrial disability ratings in relation to total functional disability ratings. It is submitted that these differences can be explained by considering the two interpretations mentioned above. In 1967-1968, the deputies may have looked at the various factual settings presented with a view to the worker's advanced age and could have concluded that the injury had a serious effect on earning capacity given the slim chance the worker could obtain other employment. In 1977-1978, the deputies could have concluded that the injury had little impact on earning capacity since the worker was near the age of retirement.

C. *Education*

The less education a worker has, the fewer the job opportunities that will be available to him. Amount of education also affects the worker's earning capacity. The average level of education of the worker in the years surveyed never exceeded the eleventh grade.[28] Although the average level of education of the worker has increased slightly in recent times, it still remains relatively low.

The percentage of cases in which the level of education of the worker was cited as a factor in determining an overall disability rating has more than doubled. For the years 1967-1968 only 22.5% of all decisions cited education; for 1977-1978, the figure was 57.2%. Based on these figures, it may be assumed that education as a factor in determining industrial disability has gained greater importance in recent years. Perhaps now there is a greater awareness among the deputies as to the impact education can have on earning capacity, especially when the level of education is low.[29]

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28. The average grade level of worker education in 1967-1968 was 9.81. For 1977-1978, the figure was 10.85.

29. Worker education was not considered in enough cases in the 1967-1968 period to draw a comparison between educational level and industrial disability rating.

D. *Work Experience*

A worker's previous types of employment can be an important indicator of what he might be able to do in the future, particularly in those cases where his level of education is limited. In over eighty percent of the decisions surveyed, the claimants had work histories of physical labor or semi-skilled jobs requiring physical work.[30] For a person who has an entire work history of physical labor, any permanent injury could have a severe impact on his wage earning capacity.

There is a definite trend toward increased consideration of work history as a factor in arriving at an overall disability rating. The survey showed that for the years 1967-1968, 29.4% of all decisions cited work history as a factor; for the years 1977-1978, the figure more than doubled, reaching 71.7%. Like education, there may be an increased awareness among the deputies that past work experience can have an impact on earning capacity, especially when the work history reflects a primary concentration in manual labor.

E. *Return to Fitted Employment*

If a worker is able to or has already returned to the same or similar job as before the injury, there is a strong indication that his wage earning capacity has only been slightly affected. However, if a worker cannot return to the employment for which he is trained and educated, there may be a substantial impact on his wage earning capacity.

Return to fitted employment was taken into account in a majority of the cases surveyed. For cases in the years 1967-1968, 55.9% of all decisions used return as a factor. Nearly 80%, 79.9% of all cases for the years 1977-1978 used it. Consideration of this factor has increased almost 30% from 1967-1968 to 1977-1978, which indicates that this factor is gaining even greater importance in determining overall disability.

F. *Motivation and Credibility*

Although they have not been delineated as factors by the Iowa Supreme Court, the motivation and credibility of the claimant can have some impact on the determination of industrial disability. The deputy, in his role as fact-finder, can consider these items in making his determinations.[31] Motivation and credibility were considered in a few decisions surveyed. Sometimes a claimant's desire to return or not to return to work will be considered. Also, other physical problems such as obesity, smoking, alcoholism and the claimant's demeanor at the hearing[32] have been cited.

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30. Semi-skilled jobs requiring physical work include truck driving, carpentry and farmwork. "Semi-skilled" refers to jobs that require training to do essentially physical work.

31. *See* IOWA CODE §§ 17A.14, 15 (1979).

32. Based on observations at the hearing, the deputy may note in his decision various relevant actions and characteristics of the claimant. For example, these observations might

There has been a moderate increase in the percentage of cases in which the claimant's motivation and credibility were considered. Significantly, one-third of all decisions for the years 1977-1978 took these factors into account. In comparison, only 20.6% of all decisions for 1967-1968 cited to a claimant's motivation or credibility. This increase over the eleven year period suggests that these evidentiary considerations have an impact on industrial disability determinations which cannot be ignored by attorneys or claimants.

G. *Wages*

Actual loss or increase of wages after the work related injury may give some indication as to the impact the injury has had on the worker's earning capacity. If a worker returns to a job where his wages are reduced because of physical limitations due to an injury, this might constitute evidence of loss of earning capacity. This factor was considered in only a few of the cases surveyed. There has been a slight decrease in the percentage of cases in which loss or increase of wages was considered. Only 13.8% of all cases for the years 1977-1978 used change in wages as a factor, compared with 16.2% for the years 1967-1968. The low percentage of cases in which this factor is mentioned does not indicate that loss or increase of wages is not important. Rather, the finding may be attributed to the fact that in the majority of the decisions surveyed the claimant had not returned to work. Therefore, no figures would be available for a determination of actual wage loss or increase.

III. Conclusion

Although the Iowa statutes covering industrial disability have not substantially changed during the survey period, and the Iowa Supreme Court's interpretations of industrial disbility have not changed at all, the average industrial disability rating has increased as compared with average total functional disability. Consideration of such factors as education and work experience by the deputies has increased dramatically over the time period studied. Interpretation of the role of age in determining industrial disability has undergone some change, especially in the "Over 59" category. Motivation and credibility of the claimant have become important considerations which cannot be ignored.

In summary, a functional disability rating is no longer the overwhelming factor it was in 1967-1968 in determining industrial disability. Rather, functional disability has become a minimum basis to which other factors are added to arrive at an industrial disability rating. Thus, the emphasis in making an industrial disability rating has switched from physical impairment to loss of earning capacity. The Iowa Supreme Court has long held that the test for industrial disability is loss of earning capacity.[33] Therefore, the

include such things as claimant's ability to sit for several hours during the hearing even though he supposedly has a serious back injury.

33. *See* note 4 *supra*.

decisions surveyed in the 1977-1978 period are more in line with the Iowa Supreme Court's interpretation of industrial disability.

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Just before publication, the Iowa Supreme Court rendered decisions in *Blacksmith v. All-American, Inc.*, No. 63557 (filed Mar. 19, 1980) and *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). These decisions appear to open a new area for industrial disability in Iowa and a careful examination of these decisions is recommended. —*Ed.*

POTENTIAL FEDERAL INTERVENTION IN THE INSURANCE INDUSTRY: THE PENDING UNITED STATES SENATE SUBCOMMITTEE DRAFT TO AMEND THE McCARRAN-FERGUSON ACT

I. INTRODUCTION

Since the enactment of the McCarran-Ferguson Act[1] (hereinafter McCarran Act) in 1945, the business of insurance has nearly exclusively been subject to the laws of the several states.[2] The McCarran Act also renders the Sherman,[3] Clayton,[4] and Federal Trade Commission Acts[5] applicable to the business of insurance only to the extent that such business is not regulated by state law.[6] However, the Sherman Act[7] remains applicable to the business of insurance with respect to agreements to boycott, coerce or intimidate and

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1. 15 U.S.C. §§ 1011-15 (1976).

2. *See* Section 2(a) of the McCarran Act (15 U.S.C. § 1012(a)(1976)) which provides: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." *See also* Group Life & Health Ins. Co. v. Royal Drug Co., 99 S. Ct. 1067, 1076 n.18 (1979)(there is no question that the primary purpose of the McCarran Act was to preserve state regulation of the activities of insurance companies); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 539 (1978)(obviously the congressional purpose in enacting the McCarran Act was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance)(citing Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429 (1946)).

3. Sherman Antitrust Act, 26 Stat. 269 (1890), *as amended by* 15 U.S.C. § 1 (1976).

4. Clayton Act, 38 Stat. 730 (1914), *as amended by* 15 U.S.C. § 12 (1976).

5. Federal Trade Commission Act, 38 Stat. 717 (1914), *as amended by* 15 U.S.C. § 41 (1976).

For two decisions which consider the business of insurance and the applicability of the Federal Trade Commission Act, *see* FTC v. Travelers Health Ass'n, 362 U.S. 293 (1960) and FTC v. National Cas. Co., 357 U.S. 560 (1958).

6. Section 2(b) of the McCarran Act (15 U.S.C. § 1012(b) (1976)) states:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

See also Group Life & Health Ins. Co. v. Royal Drug Co., 99 S. Ct. 1067, 1077 (1977)(in section 2(b) of the McCarran Act (15 U.S.C. § 1012(b)) Congress provided that the federal antitrust laws shall be applicable unless the activities of the insurance companies are the business of insurance and regulated by state law); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 539 (1978)(section 2(b) limits the general applicability of the federal antitrust laws "to the business of insurance to the extent that such business is not regulated by State Law")(citing S.E.C. v. National Sec. Inc., 393 U.S. 453, 460 (1969) and F.T.C. v. National Cas. Co., 357 U.S. 560 (1958)).

7. 15 U.S.C. § 1 (1976).