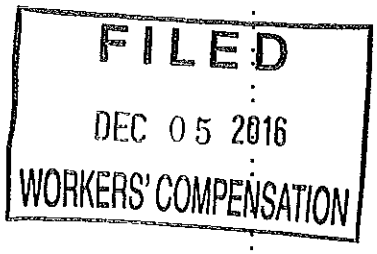
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

BRYAN FIX, Claimant, vs. POLK COUNTY, IOWA, Employer, Self-Insured, Defendant.		File No. 5051755 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Bryan Fix, claimant, filed a petition in arbitration seeking workers' compensation benefits from Polk County, Iowa, self-insured employer, as a result of an injury he sustained on March 4, 2014 that arose out of and in the course of his employment. This case was heard in Des Moines, Iowa and fully submitted on April 18, 2016. The evidence in this case consists of the testimony of claimant, Lela Mullen, Frank Cataldo Jr., Richard Leopold, Michael Jackson, M.D., joint exhibits A – P, claimant's exhibits 1 – 2 and defendant's exhibits AA – KK. Both parties submitted briefs.

The parties completed a hearing report, which contains numerous stipulations. The parties' stipulations are accepted by the undersigned without additional factual findings or conclusions of law concerning the same.

ISSUES

1. Whether claimant provided timely notice to the defendant about his injury.
2. Whether the alleged injury arose out of and in the course of his employment.
3. Whether the alleged injury is a cause of permanent disability and, if so;
4. The extent of claimant's disability.
5. The commencement date for any permanency benefits.

FINDINGS OF FACT

The deputy workers' compensation commissioner having heard the testimony and considered the evidence in the record finds that:

Bryan Fix, claimant, was 35 years old at the time of the arbitration hearing. His past work history is detailed in a vocational report. (Exhibit J, pages 109, 110) He has worked in restaurants in many capacities. He was an assistant manager at a Hy-Vee immediately before his employment with Polk County. At the time of the hearing, claimant operated a horse boarding operation. He started this business in 2004.

Claimant began his work for Polk County on July 13, 2013. He worked at the Jester Park Equestrian Center as the horse barn supervisor. His work included supervising staff and performing labor. (Transcript pp. 16, 17, 30, 31) He could supervise up to eight people. (Tr. p. 40)

Claimant testified that prior to his work for Polk County he did not have leg pain nor numbness or shooting pain. (Tr. p. 18) Claimant said that in the fall of 2013 he started to have problems with his back that were different than back problems he experienced before his work for Polk County. He went for some chiropractic treatments and in December he went to a walk-in clinic to get medication. (Tr. p. 19) He also was concerned that he could have a disc problem and wanted to get an MRI as the medication was not helping. (Tr. p. 19) The MRI was December 9, 2013 and claimant learned shortly thereafter he had a problem with a disc in his back. (Tr. p. 21) Claimant continued to work in December 2013 and January 2014 without restriction or missing time due to his back symptoms. (Tr. p. 21) Claimant contends he informed his supervisor, Lela Mullen, that he was having back problems at work. He denied telling her that he hurt his back at home. (Tr. p. 22)

On March 7, 2014, claimant filed a report of injury stating he injured his back on March 4, 2014 moving horse stalls. (Ex. DD, p. 4) Claimant did not report any specific work injury before this report. (Tr. p. 72) Claimant said that his employer referred him for medical treatment. Claimant was placed on restrictions at that time. He was referred to Michael Jackson, M.D. (Tr. p. 25) At the time Dr. Jackson released him from care, claimant was on a 30-pound lifting restriction.

Claimant was terminated on April 30, 2014. Polk County determined that he did not successfully make it through his probationary period. (Ex. BB, p. 2) Claimant also reported another injury on April 30, 2014. (Ex. CC, p. 3; Ex. EE, p. 5) Claimant testified that he was required to do a lot of heavy lifting of hay and feed sacks while working for Polk County. And the repeated heavy work caused his back problems. (Tr. pp. 30, 31)

Claimant was operating his horse boarding business at the time of the hearing. He said he had increased the number of horses and was custom farming some of his work out now because he could not perform all of the lifting. (Tr. p. 33)

Claimant complained of low back pain in July 2002. (Ex. A, p. 2) There does not appear to be any other medical treatment for this incident. Claimant saw Rodney Bjerke, D.C., in March 2005 for upper and lower back complaints. Dr. Bjerke's impression was, "Lumbar facet syndrome, Low back pain. Cervicalgia. Thoracic spinal pain." (Ex. E, p. 72) He saw Dr. Bjerke from March 2005 through December 2013.

According to the independent medical examination (IME) of John Kuhnlein, D.O., claimant's chiropractic treatment was:

> There were several incidents of back pain being mentioned in the currently available record. For example, on September 19, 2005, he saw Dr. Rodney Bjerke, a local chiropractor, for left-sided low back pain after he was thrown off of an untrained horse. He saw Dr. Bjerke again a few months later after being kicked by a colt in the back. Dr. Bjerke saw Mr. Fix on or about July 21, 2006, with complaints of low back, midback and neck complaints after throwing three tons of manure. The records suggest that he saw Dr. Bjerke for nine visits in 2007, 11 visits in 2008, with decreasing numbers of visits from 2009-2011. He saw Dr. Bjerke three times in 2009, twice in 2010, and once in 2011. He saw Dr. Bjerke six times for chiropractic care in 2012.

(Ex. P, 158)

The evidence shows Dr. Bjerke saw claimant one time in 2013 before he started his work for Polk County. (Ex. E, p. 80) On September 30, 2013, claimant complained of gradual onset of right-sided lower back and left upper neck pain. (Ex. E, p. 81) On December 9, 2013, claimant complained to Dr. Bjerke of right-sided glute pain. The report states, "Onset was unknown, but may be related to cleaning stalls at work recently." (Ex. E, p. 82) Claimant returned to Dr. Bjerke the next day after increased back symptoms when he was on his feet. (Ex. E, p. 83) An MRI was obtained and on December 11, 2013 Dr. Bjerke noted, "Objective: The physical exam is updated as follows, Lumbar spine shows paraspinal musculature hypermyotonicity. MRI: Large right central disc extrusion with posterior displacement of the right SI nerve root and with impression on the right side of the thecal sac. There is disc desiccation and decreased disc height." (Ex. E, p. 84)

In June 2007, claimant started to receive treatment from Family Chiropractic. Claimant rated his lower left back as his biggest concern. (Ex. K, p. 114) On October 13, 2013, claimant was treated for right sciatica. (Ex. K, pp. 115, 116)

On November 13, 2013, claimant went to an urgent care clinic, Doctors Now, for weakness in the right lower extremity. (Ex. F, p. 86) He was diagnosed with thoracic lumbar neuritis. (Ex. F, p. 87) He returned to the clinic on December 4, 2013. At that time, the clinic recommended an MRI if his symptoms persisted. (Ex. F, p. 89) On December 9, 2013, claimant had an MRI. The MRI revealed:

> IMPRESSION:
>
> At L5-S1, there is a large right central disc extrusion with posterior displacement of the right S1 nerve root and with impression on the right side of the thecal sac.

At L4-L5, there is a small central disc protrusion with mild impression on the thecal sac.

(Ex. G, p. 91)

Claimant was seen by Robert Hirschl, M.D., on December 19, 2013. Dr. Hirschl's assessment was a herniated disc. He agreed with claimant to continue conservative treatment and referred claimant to Metro Anesthesia. (Ex. H, p. 101)

Claimant was seen by Timothy Walsh, M.D., on January 3, 2014 at Metro Anesthesia and received an epidural steroid injection on that date. (Ex. I, p. 105) On February 28, 2014, claimant had a third injection and Dr. Walsh was considering a referral back to Dr. Hirschl. (Ex. I, p. 106d)

On March 28, 2014, claimant reported to Dr. Walsh that he re-aggravated his back and lower extremity lifting at work. Claimant received another epidural injection on that day. The note of that visit stated that claimant was working with "Worker's [sic] Comp." and was going to see a physician in three days. (Ex. I, p. 108)

Claimant denied that he ever told his supervisor that he had a non-work related back injury while working on his farm. He said the statements contained in Exhibit AA were not correct concerning having an injury at his farm. (Tr. p. 81) He did agree with a portion of the statement that he was having monthly injections. (Tr. p. 83)

Lela Mullen, facility manager at the Jester Park Equestrian Center testified. She was claimant's supervisor. (Tr. p. 90) Ms. Mullen testified that claimant's job duties were to supervise staff and that claimant would not carry 50-pound bags of grain all day. She said that he could occasionally carry such bags. (Tr. p. 92) Ms. Mullen said that she placed a memo in claimant's file in February 2014 (Exhibit AA) because claimant told her he was having issues with his back, not-related to work, and she had concerns that he could be taking pain medication and operate heavy equipment. Also, she was concerned he might have to take time off work. (Tr. p. 94) Ms. Mullen said that claimant did not know when he may have been injured and he may have done on his farm in the fall of 2013. (Tr. p. 95) Ms. Mullen testified that on a couple of occasions around September 2013 she saw claimant limping at work. She and claimant talked about him limping and claimant only mentioned that the cause was from working on his farm with horses. (Tr. p. 96) Ms. Mullen testified the stall partitions that claimant was working with when he complained he re-aggravated his back on March 4, 2014 weighted 160-pounds, however claimant would not have been moving them himself. (Tr. p. 109)

Frank Cataldo, Jr., the risk manager for Polk County testified that employees are to report injuries to their supervisors. (Tr. p. 110) Mr. Cataldo received a report of injury from claimant, Exhibit DD, and referred claimant to Duane Wilkins, M.D. Mr. Cataldo later referred claimant to Michael Jackson, M.D.

Richard Leopold was the assistant director of Polk County Conservation when claimant was employed. He met with and terminated claimant on April 30, 2014. After the termination he received an email from claimant, Exhibit CC, p. 3. Mr. Leopold said that he told claimant to contact risk management about his medical concerns. (Tr. p. 120)

Dr. Jackson was called by the defendant. He is board certified in physical medicine and rehabilitation and sports medicine. (Tr. p. 123) He provided treatment to the claimant for his low back pain. He first saw him on March 31, 2014. (Tr. p.124) Dr. Jackson agreed that he opined that claimant had two incidents at work that aggravated a pre-existing condition. (Tr. pp. 124, 125)

Dr. Jackson took great umbrage at the IME that Dr. Kuhnlein prepared in this case. He submitted a six page response to the report, Exhibit C, pages 24 through 29, and testified that he believed that Dr. Kuhnlein's report was inaccurate. (Tr. pp. 125 – 129, 134, 135) Dr. Jackson stated that as to the work incidents of March 4 and April 30, 2014 Dr. Kuhnlein agreed with him that these were temporary exacerbations. (Tr. p. 127) Dr. Jackson disagreed with Dr. Kuhnlein's conclusion that claimant's work caused or worsened his L4-L5 and L5 – S1 radiculopathy. (Tr. p. 128) Dr. Jackson testified that he recommended claimant obtain a functional capacity examination (FCE) and return to his primary care physician for ongoing treatment for his back. (Tr. p. 130) The letter of August 8, 2014 stated, "No functional capacity examination evaluation is warranted due to the fact that his ongoing symptoms are related to the chronic pre-existing lumbar condition." (Ex. C, p. 23) Dr. Jackson testified that an FCE would be in the claimant's best interest due to his chronic lumbar condition. (Tr. p. 130) He did not believe it was Polk County's responsibility. (Tr. p. 140)

Dr. Jackson stated that the 30-pound lifting restriction he recommended did not mean that the restriction was only related to a work-related injury. (Tr. p. 132)

Claimant testified that he wrote, in Exhibit B page 3 for his examination by Dr. Wilkins that he did exercise, cardio and weights. However, he also testified that he considered his work, lifting and walking to be cardio and weights exercise. He had no gym membership. (Tr. p. 69; Ex. HH, p. 43) Claimant told Dr. Kuhnlein that his cardio and weight exercise was his work that he was performing. (Ex. P, p. 161)

When deposed in November 2015 claimant testified that the last treatment for his back was with Dr. Jackson in August 2014. (Ex. HH, p. 38) He applied for some driving jobs because he has a CDL but did not obtain any work. He felt his 30-pound weight restriction would prevent him from being hired as a school bus driver. (Ex. HH, p. 38)

On March 13, 2014, Dr. Wilkins examined the claimant. Claimant's intake sheet that he filled out states he exercised "Cardio & Weights" 5 days a week. (Ex. B, p. 4) Dr. Wilkins' diagnosis was:

DIAGNOSIS:

1. Large herniated disk at L5-S1 on the right as described on the MRI.

2. L4-5 protruding disk with some embarrassment [sic: displacement] as described on the MRI.

3. Right lower extremity radiculitis manifested mostly by paresthesias and secondary most likely to diagnosis number 1.

4. Type 2 insulin dependent diabetes mellitus.

(Ex. B, p. 8) He recommended physical therapy and noted that he should continue to see Dr. Walsh. (Ex. B, p. 8)

Claimant was seen by Dr. Jackson on March 31, 2014. Dr. Jackson's impression was:

IMPRESSION:

1. Lumbosacral strain/sprain secondary to work related incident on 03/04/2014.

2. Preexisting lumbar degenerative disc disease with radiculopathy.

(Ex. C, p. 11)

Claimant returned to Dr. Jackson on May 5, 2014 and reported increasing pain on his last day of work. On June 23, 2014, Dr. Jackson wrote to Mr. Cataldo concerning claimant's condition. Dr. Jackson opined the injury of March 3, [sic] 2014 did not worsen claimant's pre-existing low back strain/pain. That claimant was, as of October 2013, already in treatment for an exacerbation of a pre-existing low back condition. Dr. Jackson stated that the March 3, 2014 work injury did not significantly aggravate or accelerate claimant's pre-existing low back condition. (Ex, C, p. 17)

On July 9, 2014, Dr. Jackson provided a lifting restriction for work of 30-pounds. (Ex. C, p. 19) On July 23, 2014, Dr. Jackson found claimant at maximum medical improvement (MMI) and discontinued physical therapy. He noted claimant would need long term medication use due to claimant's chronic degenerative back condition. He continued his restrictions and recommended FCE. (Ex. C, p. 20)

On August 8, 2014, Dr. Jackson responded to questions from Polk County. He noted claimant was receiving treatment on December 9, 2013 and had received regular chiropractic adjustment before the March 2014 work incident. It was Dr. Jackson's opinion that the December 2013 and March 2014 incidents were temporary exacerbations of a pre-existing lumbar condition. (Ex. C, p. 23)

On January 12, 2015, Dr. Kuhnlein issued his IME report. (Ex. P, 157) Dr. Kuhnlein reported that claimant reported he was not having constant back pain prior to working for Polk County. And that claimant reported that he had sudden onset of pain in the posterior and lateral right thigh that did not go below his knee while doing his morning chores at work. (Ex. P, p. 159) Dr. Kuhnlein described claimant's chiropractic care in the years before 2013 as intermittent or rare. (Ex. P, p. 163) Dr. Kuhnlein's diagnose was, "Right L5-S1 disc herniation with right S1 radiculopathy, now chronic." (Ex. P, p.167) Dr. Kuhnlein noted that the chiropractic history before his work for Polk County did not diagnose radiculopathy. (Ex. P. p. 167) He stated that claimant had a temporary aggravation of his previous S1 radiculopathy in March and April 2014. (Ex. P, pp. 167, 168) In reaching his conclusion concerning causation Dr. Kuhnlein stated,

> Therefore, in summary, the work for Jester Park was a substantial, more than minor, factor in the development of his right S1 radiculopathy. The Jester Park work was in the heavy physical demand level. His own self-employment activities were not, and would not have been a substantial factor in the development of his right S1 radiculopathy. There are no other known factors at this time that would explain the onset of the right S1 radiculopathy.
>
> . . . .
>
> There are significant changes that support this position. There is no diagnostic evidence of a pre-existing radiculopathy by Dr. Bjerke in his pre-Jester Park employment records. These records suggest only intermittent back pain, not a chronic radiculopathy. He has objective findings for right S1 radiculopathy today, that were not noted in the medical records before his Jester Park employment. He has physical limitations that were assigned by Dr. Jackson at his last visit that were specifically related to the work injury (see Dr. Jackson's Release Form from July 23, 2014 – this specifically states that the restrictions were related to the work-related injury). These restrictions were never rescinded by Dr. Jackson, even in his August 8, 2014, correspondence to the employer when he reversed his stance regarding the functional capacity evaluation. The restrictions he assigned on July 23, 2014, were never rescinded, and they were specifically for the work-related injury. Therefore, Mr. Fix has not returned to his pre-work injury status, which was working without restriction. This would also apply to the right S1 radiculopathy that did not predate his Jester Park employment. He was working without restriction before that developed.

(Ex. P. pp. 168, 169) He found claimant at maximum medical improvement on July 23, 2014. And assigned a 10 percent whole person impairment rating. He recommended lifting restrictions of 30- pounds floor to waist and 20-pounds occasionally above the shoulder and bend at the waist occasionally. (Ex. P, pp.169, 170) I find these restrictions to be claimant's restrictions. Dr. Kuhnlein noted that claimant informed him

his condition was improving, which he found added to claimant's veracity as to his medical condition,

On January 26, 2015, Dr. Jackson wrote a response to Dr. Kuhnlein's IME report. Dr. Jackson covered much of this in his testimony at the hearing. He disagrees with the history provided by claimant to Dr. Kuhnlein and some of the conclusions Dr. Kuhnlein reached about the claimant and Dr. Jackson's report.

Both Dr. Jackson and Dr. Kuhnlein found claimant reached maximum medical improvement (MMI) on July 23, 2014. (Ex. C, p. 20: Ex. P, p. 169) I find claimant was at MMI as of July 23, 2014.

On February 13, 2015, Carma Mitchell, M.S., issued a vocational report. (Ex. J, pp.109 – 112) She noted that claimant had about 20 credit hours of college credit but decided to leave college. Claimant's work history shows he worked in his parent's restaurant for many years performing many tasks. From 2005 through 2009 he was the front end manager of the restaurant. Claimant began his horse boarding business in 2004. In 2009 claimant became an assistant manager in a Hy-Vee store. He left that job to work in the equestrian center for Polk County. (Ex. J, p. 110) Based upon the restriction provided by Dr. Kuhnlein she found claimant could not do the full range of medium work and had a 29 percent loss of access to the labor market. (Ex. J, p. 112)

In October 2015 claimant had a severe injury to his right leg/ankle. He had a compound fracture that needed to be surgical repaired. This injury occurred when claimant was riding a horse and was not work related. (Ex. N, p. 127)

On December 15, 2015, Joshua Kimelman, D.O., performed an IME. (Ex. M, pp. 123 – 125) Dr. Kimelman opined that claimant has a large L5- S1 disk herniation and rejected the theory that was a cumulative injury that caused his injury. (Ex. M, p. 124) He stated that since claimant has recovered to his pre March 4, 2014 level he has no job-related permanency. (Ex. M, p. 125)

Dr. Kuhnlein reviewed Dr. Kimelman's report and did not change any of his conclusions in his IME report. (Ex. P, p. 173)

I find that at the time of injury claimant was married and entitled to four exemptions and his weekly compensation rate is $564.74. The parties stipulated the commencement date of any permanent benefits is September 18, 2014. (Tr. p. 7) The parties agreed that claimant was paid temporary total/healing period benefits. (Tr. pp. 114, 115)

I find the claimant to be credible based upon his demeanor, body language and way he answered question on direct and cross examination at the hearing.

Claimant has a number of years of experience in management at a restaurant. He was an assistant manager in a Hy-Vee. He is currently operating his horse boarding business. He has applied for some truck driving jobs but has not been hired. He

cannot perform heavy work and some medium work. He told Dr. Kuhnlein he was improving. Claimant has a 20 percent loss of earning capacity.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" referred to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Electric v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes

of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

When the injury develops gradually over time, the cumulative injury rule applies. The date of injury for cumulative injury purposes is the date on which the disability manifests. Manifestation is best characterized as that date on which both the fact of injury and the causal relationship of the injury to the claimant's employment would be plainly apparent to a reasonable person. The date of manifestation inherently is a fact based determination. The fact-finder is entitled to substantial latitude in making this determination and may consider a variety of factors, none of which is necessarily dispositive in establishing a manifestation date. Among others, the factors may include missing work when the condition prevents performing the job, or receiving significant medical care for the condition. For time limitation purposes, the discovery rule then becomes pertinent so the statute of limitations does not begin to run until the employee, as a reasonable person, knows or should know, that the cumulative injury condition is serious enough to have a permanent, adverse impact on his or her employment. Herrera v. IBP, Inc., 633 N.W.2d 284 (Iowa 2001); Oscar Mayer Foods Corp. v. Tasler, 483 N.W.2d 824 (Iowa 1992); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

I find that claimant has proven by a preponderance of the evidence that he suffered an injury that arose out of and in the course of his employment at Polk County. The injury was a result of the physical aspects of his job at Polk County. I find that the November 13, 2013 (Doctors Now visit) was the date that his cumulative trauma injury manifest itself and the December 9, 2013 (MRI date) as the date that claimant knew or should have known the seriousness of his injury.

Contrary to Dr. Jackson's opinion, the record does not show regular chiropractic treatment. While the are some, in 2013 he only one in 2013 before claimant started to work for Polk County. Claimant had one appointment with Randy Dierenfield, D.C., in 2012 and several after he started working for Polk County in 2013. (Ex. K, p. 116)

I considered the testimony of Ms. Mullen and Exhibit A in reaching the conclusion that claimant had a work injury. Claimant did not identify any specific work on his farm that caused him his pain. He was on probation and did not want to jeopardize his job. He was more specific when he was seeking medical care about attributing his injury to work activities.

I found Dr. Kuhnlein's IME the most convincing of the medical reports. His evaluation is the most thorough in scope. Certainly, Dr. Jackson provided significant

information, but I do not find it as factually accurate as Dr. Kuhnlein. Dr. Kuhnlein's evaluation best comports with claimant's medical history and report of symptoms. I did not find that either Dr. Jackson's or Dr. Kimelman's conclusions that claimant did not have a permanent work injury convincing. Neither adequately explained the onset of radicular symptoms in the fall of 2013 in light of the credible medical evidence.

Notice

The Iowa Court of Appeals has held that payment of weekly benefits waives a defendant's notice defense.

> We believe that the construction given to Iowa Code section 86.13 by the commissioner and the district court that voluntary payments mean the employer has notice only from the date of the payments are made to be illogical. We believe the clear intent of the legislature is that voluntary payments waive any objection to notice, but preserve other defenses regarding liability. The distinction between notice and other defenses in the wording of the statute clearly indicates that the legislature intended to retain the prior law that payments establish notice and preclude a defense based on the lack of timely notice while giving the employer the right to raise other defenses.

Hawkins v. TMC Transportation, 674 N.W.2d 683 (Iowa App. 2003) (Table) 2003 WL 22701375. The defendant's notice defense fails for this reason. Claimant formally reported an injury on March 4, 2014. This is within 90 day of his injury as well.

Since 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 R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

Claimant has permanent lifting restrictions. He is intelligent and has experience in supervising workers. The only vocation evidence in the record shows a significant

restriction in claimant's labor market. He has no college degree, but some college credits. His work search has not been extensive. He operates his own horse boarding farm, although is not able to do all the work he did before his work injury. He was able to go to Missouri to do horse trail riding. I previously found claimant has a 20 percent loss of earning capacity. I find claimant has a 20 percent industrial disability. This entitles claimant to 100 weeks of permanent partial disability benefits. These benefits commence on July 23, 2014.

Costs were not identified as in dispute in the hearing report so none are awarded.

I find that the claimant weekly rate for workers' compensation benefit for this injury is $564.74.

ORDER

THEREFORE, IT IS ORDERED:

Defendant shall pay claimant one hundred (100) weeks of permanent partial disability benefits commencing on July 23, 2014 ant the weekly rate of five hundred sixty-four 74/100 dollars ($564.74).

Defendant shall pay any past due amounts in a lump sum with interest provided by law.

Defendant shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this 5th day of December, 2016.

JAMES F. ELLIOTT
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies to:

Mark Hedberg
Attorney at Law
100 Court Ave., Ste. 425
Des Moines, IA 50309
mark@hedberglaw.com

Roger Kuhle
Attorney at Law
111 Court Ave., Room 340
Des Moines, IA 50309
Roger.kuhle@polkcountyiowa.gov

JFE/kjw

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876 4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.