BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

ROBERT CLAYTON,

Claimant,

vs.

NATURAL PRODUCTS, INC.,

Employer,

and

FARM BUREAU MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 5063319

ARBITRATION

DECISION

Head Note Nos.: 1108, 1400, 1802, 1803, 2500, 2502

STATEMENT OF THE CASE

This is a proceeding in arbitration. The contested case was initiated when claimant, Robert Clayton, filed his original notice and petition with the Iowa Division of Workers' Compensation. The petition was filed on February 24, 2017. Claimant alleged he sustained a work-related injury on September 11, 2015. (Original notice and petition)

For purposes of workers' compensation, Natural Products, Inc., is insured by Farm Bureau Insurance Company. Defendants filed their answer on April 14, 2017. The defendants denied the occurrence of the work injury on September 11, 2015.

The hearing administrator scheduled the case for hearing on May 4, 2018. The hearing took place at 150 Des Moines Street in Des Moines, Iowa. The undersigned appointed Ms. Dina Dulaney, as the certified shorthand reporter. She is the official custodian of the records and notes.

Claimant testified on his own behalf. Defendants elected not to call any witnesses at the hearing. A first report of the injury was filed on October 28, 2015. Joint Exhibits 1 through 15 were offered. Claimant offered exhibits 1 through 12. Defendants offered exhibits marked I through F. All proffered exhibits were admitted as evidence. The parties were afforded the opportunity to submit post-hearing briefs by June 1, 2018. The case was deemed fully submitted on that date. An official transcript of the proceedings was filed on May 30, 2018.

STIPULATIONS

The parties completed the designated hearing report. The various stipulations are:

1. There was the existence of an employer-employee relationship at the time of the alleged injury;

2. Claimant sustained an injury on September 11, 2015 which arose out of and in the course of his employment;

3. The injury is a cause of both temporary and permanent disability;

4. While healing period benefits are in dispute, the parties admit claimant was off work from September 20, 2016 through December 12, 2016;

5. If permanency is awarded, the permanent disability is an industrial disability;

6. The parties agree the weekly benefit rate for any benefits that may be owed is $357.18;

7. Defendants have waived any affirmative defenses that may have been available to them; and

8. The parties agree claimant has paid the costs listed.

ISSUES

The issues presented are:

1. Whether claimant is entitled to healing period benefits for the period from September 20, 2016 through December 13, 2016;

2. The extent of claimant's permanent partial disability, if any;

3. There is an issue as to the commencement date for permanent partial disability benefits; claimant states the date is December 13, 2016; defendants state the date is September 26, 2016;

4. Claimant seeks the cost of medical care pursuant to Iowa Code section 85.27;

5. Claimant is requesting the cost of an independent medical examination pursuant to Iowa Code section 85.39; and

6. Whether prior to the hearing claimant was paid 25 weeks of compensation at the rate of $357.18 per week.

FINDINGS OF FACT

This deputy, after listening to the testimony of claimant and after judging the credibility of claimant, plus after reading the evidence, and the post-hearing briefs, makes the following findings of fact and conclusions of law:

The party who would suffer loss if an issue were not established has the burden of proving the issue by a preponderance of the evidence. Iowa Rule of Appellate Procedure 6.14(6).

Claimant is 40 years old, single with six children. Only five of the children are dependent upon him for support. The other child is past the age of 18. Claimant completed the eighth grade. He does not have a general equivalency diploma, (GED). Claimant testified he is not proficient in reading and he does not possess computer skills. He is certified in arc and mig welding. He is unable to perform tig welding.

Claimant does have a prior history as a felon. However, it has been more than 10 years since he has been on parole. All of claimant's prior jobs have had a "hands on aspect". The jobs have all been labor intensive. Claimant has worked as a welder, a carpet installer, he has laid floors, remodeled homes, performed framing and trim work, laid tile, roofed homes, laid asphalt, worked as a machinist, worked in a hog confinement operation, and washed dishes in a restaurant. Claimant testified in every job, he has had to lift more than 50 pounds.

Claimant testified he applied for work at Natural Products, Inc., in April of 2015. His cousins owned the business. Claimant applied for the position of general laborer or bagger. (Claimant's exhibit 8) Claimant was required to lift 50 pounds on a continuous basis. (Cl. Ex. 8, p. 29) He was required to lift up to 35 pounds on a frequent basis. (Cl. Ex. 8, p. 29) At certain times, claimant was expected to climb ladders over 50 feet. (Cl. Ex. 8, p. 31) Claimant was paid $12.75 per hour.

Claimant was also asked to work on his cousin's house for $12.75 plus a differential which equaled $20.00 per hour. Claimant testified he often worked 50 to 60 hours per week on the house.

Claimant described what occurred on the date of the work injury, September 11, 2015. He was stacking 10 bags of flour on a skid. Each bag weighed approximately 50 pounds. Claimant threw a 50 pound bag. At the same time, he twisted his back. He described the pain as "a burn on the lower right side of his back." A co-worker asked if claimant was okay. Claimant described stiffness in his back on the low right side. (Transcript, page 30)

On Monday, claimant spoke to Dan Walker at Natural Products about twisting his back at work. Mr. Walker suggested claimant see a chiropractor for pain relief. (Tr., p. 31) On September 14, 2015, claimant visited B.J. Brown Chiropractic P.C. Dr. Brown diagnosed claimant with "Acute flare up of Chronic MR condition." (Joint Exhibit 2, page

60) Dr. Brown examined claimant and performed chiropractic manipulative treatment using activator method procedures. (Jt. Ex. 2, p. 62) Claimant returned to see Dr. Brown on September 16, 2015 and had activator procedures. That was the last appointment claimant had with Dr. Brown. (Jt. Ex. 2, p. 63) Claimant testified the activator procedures made his back worse not better. (Tr., p. 31)

Claimant went to Koenen Chiropractic Clinic in Grinnell, Iowa, on September 17, 2015. Matthew Koenen, D.C., diagnosed claimant with low back pain with sciatica. Claimant was restricted from working on September 17th. (Jt. Ex. 3, p. 67)

Claimant decided to see his personal physician, Brian Heineman, D.O., a physician who practices medicine in Brooklyn, Iowa. Claimant reported the following history to Dr. Heineman:

> Seen here with right sided sciatic pain. Pain and tenderness in low back. He lifts a lot of bags at the pellet mill and he's been building a house. He's been crawling all over the structure. He strained his right back and has developed acute pain and tenderness in the right low back with pain down the right leg. Range of motion of back, he has positive Lasage's test, good toe strength, no evidence of toe weakness. It appears that he has a possible disc pain on the right low back.

(Jt. Ex. 1, p. 4-5)

Dr. Heineman assessed claimant as having, "Acute lumbosacral strain with referred pain down the right leg." The physician ordered Magnetic Resonance Imaging (MRI testing). (Jt. Ex. 1, p. 5)

The MRI occurred on September 23, 2015. Silane Kraske, M.D., interpreted the test results as:

> IMPRESSION: There is mild disc degenerative change appreciated within the lower lumbar levels with evidence of an annular tear of the posterior longitudinal ligament at L4-5. No spinal canal stenosis. Mild bilateral foraminal narrowing is present at L4-5.

(Jt. Ex. 8, p. 96)

Dr. Heineman referred claimant to Lynn Nelson, M.D., an orthopedic surgeon at Des Moines Orthopaedic Surgeons, P.C. The appointment occurred on October 22, 2015. Claimant described his condition as:

> He describes his symptoms as severe, sharp, shooting in nature, occurring very frequently. He reports his symptoms are the same throughout the day, however, worsen depending on the day. He denies anything has made the pain better. Overall his symptoms have remained

> unchanged since the onset. He reports paresthesias throughout the right buttock. He denies bowel and bladder problems.
>
> . . . .
>
> The patient describes the pain as 100% from the back. The patient rates the pain as 5 when least bothersome and 10 when most bothersome (0-10 scale).

(Jt. Ex. 4, p. 70)

Dr. Nelson diagnosed claimant with:

1. Right low back pain, myofascial.
2. L4-5 annular tear
3. Obesity (BMI = 34)

(Jt. Ex. 4, p. 71)

Dr. Nelson opined claimant's symptoms were primarily myofascial in nature and would improve with time, medication, and conservative measures such as physical therapy. (J. Ex. 4, p. 71) Dr. Nelson did not recommend surgical intervention. The orthopedic surgeon opined claimant could work in the medium category of labor and would not need any work restrictions. No return appointment was necessary. (Jt. Ex. 4, p. 71)

Claimant returned to Dr. Heineman on December 2, 2015. Claimant was participating in physical therapy from 1 to 2 times per week at Total Rehab in Grinnell. Claimant was given a 10-pound weight restriction. (Jt. Ex. 1, p. 11) Claimant reported continued low back pain radiating into the right leg and down into the right knee. (Jt. Ex. 1, p. 11) The personal physician also prescribed a TENS unit for claimant. (Jt. Ex. 1, p. 12)

Dr. Heineman examined claimant on January 11, 2016. Claimant reported joint pain. (Jt. Ex. 1, p. 13) Claimant reported he was not improving with physical therapy. (Jt. Ex. 1, p. 14) The pain from his back was radiating from his back down his right leg and into his right ankle. (Jt. Ex. 1, p. 14)

Defendants referred claimant to Todd Troll, M.D. (Jt. Ex. 5, p. 73) Dr. Troll examined claimant on February 15, 2016. The physician found the active extension of the lumbosacral spine was decreased. (Jt. Ex. 5, p. 76) A straight-leg raising test on the right was positive. The lumbosacral spine exhibited no symmetry. There was tenderness at the midline at L5-S1. Active flexion of the lumbosacral spine was normal. A straight leg raising test of the left leg was negative. (Jt. Ex. 5, p. 76) Dr. Troll prescribed physical therapy again and drug therapy. (Jt. Ex. 5, p. 76)

Claimant saw Dr. Heineman on March 8, 2016. (Ex. 1, p. 15) The physician diagnosed claimant with strain of muscle, fascia, and tendon of lower back with a ruptured disk in the back. (Jt. Ex. 1, p. 16)

Dr. Troll examined claimant on March 14, 2016. (Jt. Ex. 5, p. 77) Claimant reported the physical therapy caused him more pain and no improvement. Claimant reported increased pain in his right leg. (Jt. Ex. 5, p. 77) Dr. Troll recommended physical therapy with a different clinic. (Jt. Ex. 5, p. 77)

Claimant returned to Dr. Troll on May 20, 2016. Claimant reported pain down the right leg with some numbness and tingling. Claimant had a 10-pound lifting restriction. (Jt. Ex. 5, p. 78) Dr. Troll diagnosed claimant with "Midline low back pain with right-sided sciatica." (Jt. Ex. 5, p. 78)

Claimant's next appointment with Dr. Heineman did not occur until June 6, 2016. (Jt. Ex. 1, p. 17) Claimant was advised to return to Dr. Troll. (Jt. Ex. 1, p. 18)

Dr. Troll examined claimant on June 17, 2016. Claimant reported he was slightly better since he had commenced a home exercise program. He still had some sciatica down his right leg and into his foot. Dr. Troll diagnosed claimant with: "Midline low back pain with right-sided sciatica." (Jt. Ex. 5, p. 80)

On July 15, 2016, claimant visited with Dr. Heineman. (Jt. Ex. 1, p. 19) The physician was under the mistaken impression surgery was warranted for claimant.

Ten days later, claimant met with Dr. Troll. Claimant had been missing work hardening sessions. His maximum lift was 28 pounds. Dr. Troll encouraged claimant to continue his work hardening sessions and to participate in his home exercise routine. (Jt. Ex. 5, p. 81)

On August 22, 2016, claimant returned to Dr. Heineman. Claimant reported the following history about his back:

> **Subjective**
>
> Seen here for ruptured disc. He continues to go to therapy. He goes to Newton where he gets therapy 2-3 times per week lasting 2-4 hours. This seems to be helping him. His back is better. He's more mobile. He's still qualifying for long term therapy for his chronic low back pain. He has gained a little weight.

(Jt. Ex. 1, p. 21)

Claimant was advised to continue with his therapy. Dr. Heineman asked claimant to return in two months. (Jt. Ex. 1, p. 22)

Dr. Troll examined claimant on August 29, 2016. (Jt. Ex. 5, p. 82) Claimant reported he only made modest gains in physical therapy. He was able to lift 30 pounds. Dr. Troll continued claimant's physical therapy for four more weeks. Claimant was again encouraged to continue with his current exercise regimen. (Jt. Ex. 5, p. 82)

On September 22, 2016, claimant saw Dr. Heineman for non-work-related issues. However, claimant did discuss his low back condition. Claimant reported his strength had improved but he was told by staff members at the therapy clinic that he had "some twisted vertebrae." The staff members at the therapy clinic indicated they were going to try to realign the vertebrae but it was a very painful process. (Jt. Ex. 1, p. 24)

Four days later, claimant presented to the office of Dr. Troll. (Jt. Ex. 5, p. 84) Claimant reported he had made some good gains in physical therapy but had a negative occurrence when he attempted to lift something during the prior week. (Jt. Ex. 5, p. 84) Claimant rated his pain as a 5 out of a possible 10 on an analog scale. Claimant also reported occasional numbness down his right leg. (Jt. Ex. 5, p. 84) Dr. Troll opined claimant's range of motion was normal. Dr. Troll wanted a functional capacity evaluation to determine claimant's work capabilities. (Jt. Ex. 5, p. 84)

On October 12, 2016, claimant participated in a WorkWell Functional Capacity Evaluation (FCE). The evaluation was administered by Troy Vander Molen, PT, DPT. (Jt. Ex. 13, p. 128) The therapist determined the following with respect to claimant's abilities and limitations:

Abilities:

1. Above average left UE coordination & average right UE coordination.

2. Grip and pinch strength values that are within normal limits for males in his age range.

3. Low range of medium physical demand tolerance for work near waist level.

4. Good tolerance to standing, walking, squatting, and elevated work.

Limitations/Deficits:

1. Light physical demand tolerance for work outside of strike zone and unilateral carrying tasks.

2. Significant limitation with forward bending.

3. Some limitation with sitting, crouching, kneeling, stair, & ladder climbing.

Job Description Explored:

The client has worked at Natural Products in Grinnell, Iowa at the time of his back injury. No job description was made available to me, so I am unable to classify this work and its physical demand characteristics according to Leonard N. Matheson, PhD's Physical Demand Characteristics of Work. (Table 1).

The client's current capabilities as determined by the FCE tasks place him in the **Light** category of physical demand characteristics for all tasks. If the work is near the mid-range (i.e. in his strike zone), he can handle forces just into lower ranges of the Medium category level.

(Jt. Ex. 13, p. 129)

Claimant saw Dr. Heineman on November 17, 2016. The visit was for the purpose of having his pain medications refilled. (Jt. Ex. 1, p.27)

On December 13, 2016, Dr. Troll examined claimant following the FCE claimant had in October. Dr. Troll noted:

> Pt. had FCE on 10-12-16 which was valid. He is physically capable of performing light to medium duty work with 30 lb max lift. Will make the physical capabilities outlined on the FCE as his permanent restrictions. He continues to have good and bad days with his back pain. Still takes occ. hydrocodone.

(Jt. Ex. 5, p. 85)

Dr. Troll determined the active extension of the lumbosacral spine was normal. A straight leg raising test was normal. Dr. Troll assessed claimant as having, "Chronic right-sided low back pain without sciatica." (Jt. Ex. 5, p. 85) Dr. Troll determined claimant had reached maximum medical improvement. No additional care was recommended. (Jt. Ex. 5, p. 85) Claimant was discharged from the care of Dr. Troll. (Jt. Ex. 5, p. 86)

Claimant returned to Dr. Heineman on January 5, 2017. Claimant reported his right leg would fall asleep when he rode in a car. (Jt. Ex. 1, p. 28) He engaged in a home exercise program. Claimant received a prescription for his pain medication. (Jt. Ex. 1, pp. 28-29)

On February 13, 2017, claimant presented to Dr. Heineman. Claimant complained of sciatica down the right leg and chronic low back pain. (Jt. Ex. 1, p. 31) The physician refilled claimant's prescription for pain medication. (Jt. Ex. 1, p. 32)

Claimant saw Dr. Heineman on March 23, 2017. He needed a refill of his pain medication. (Ex. 1, pp. 33-34) Claimant also visited his physician on April 5, 2017. On May 5, 2017, claimant reported back pain to Dr. Heineman. (Jt. Ex. 1, p. 38) Dr. Heineman noted it would be important to wean claimant from his pain medication. (Jt. Ex. 1, p. 39) On June 20, 2017, claimant returned to the physician for a refill of his pain medication.

On July 11, 2017, claimant appeared at the emergency department at Grinnell Regional Medical Center. (Jt. Ex. 6, p. 87) Claimant reported he bent over, heard a pop, and felt excruciating low back pain. Claimant reported his previous work injury at Natural Products, Inc. Claimant described his back pain as being moderate in degree and in the area of the right lower lumbar spine and radiating to the right thigh. The pain was characterized as dull. (Jt. Ex. 6, p. 88) Clayton Francis, M.D., diagnosed claimant with "Acute lumbar strain." Flexeril was prescribed for muscle spasms. Claimant was improved and stable when he was discharged from the hospital. (Jt. Ex. 6, p. 90)

On the following day, claimant reported to the emergency department at Mercy Medical Center in Des Moines. Claimant complained of back pain of two days in duration. Claimant informed the emergency staff he developed the pain after bending at home. Claimant indicated both sides of his lumbar spine had sharp pains which radiated down his legs. (Jt. Ex. 7, p. 91) Claimant indicated his back pain was unlike any other pain he had ever experienced with his prior back injury. (Jt. Ex. 7, p. 92) Anne Gonnerman, ARNP, recorded the following with respect to claimant's back:

> Back: Diffuse spinous process tip. Diffuse paraspinous spasm; No rash. Bilateral LE sensation intact. SLR negative bilaterally. Extensor Hall Longus strength symmetric bilaterally. Plantar reflexes downgoing bilaterally. Gait normal although has a slouching position.
>
> Musculoskeletal: Normal ROM, normal strength.

(Jt. Ex. 7, p. 93)

X-rays of the lumbar spine were taken in the hospital. Indunij Karunasekara, M.D., interpreted the results as:

> AP LATERAL VIEWS LUMBOSACRAL SPINE 07/12/2017 Clinical history: 39-year-old with back pain radiating into the right leg. No comparison studies. Normal segmentation of the lumbar spine with 6 nonrib-bearing lumbar type vertebral bodies. Minimal remote anterior wedging of T12 without retropulsion. Mild disc height loss at L5-S1 indicates mild disc degeneration. Pedicles are intact. S1 joints are symmetric. A few

> calcified phlebolithe in the low pelvis. Impression: No acute bony abnormality lumbar spine.

(Jt. Ex. 7, p. 94)

The emergency staff prescribed Prednisone and Diclofenc potassium. (Jt. Ex. 7, p. 95) Claimant was advised to follow up with his primary care physician. (Jt. Ex. 7, p. 95)

On July 13, 2017, claimant visited Dr. Heinemann because claimant had bent over on July 11th and something had popped in his back. As a result, claimant was unable to stand straight. He reported he had gone to the two emergency rooms but had not taken any of the medications that had been prescribed. (Jt. Ex. 1, p. 42) Claimant described his pain as 7 out of 10. (Jt. Ex. 1, p. 43) Claimant explained pain was radiating down both legs but the pain was worse on the right side. Claimant insisted this was part of his workers' compensation injury since his back pain had never resolved. (Jt. Ex. 1, p. 43) Dr. Heineman counseled claimant to have the prescriptions filled that were given to him by the emergency room personnel at the two hospitals. (Jt. Ex. 1, p. 44)

Claimant returned to his primary care physician on July 25, 2017 for a medication refill. The doctor refilled claimant's pain medication. Claimant reported pain at 6 out of 10. Dr. Heineman opined a referral for physical therapy would be beneficial. (Jt. Ex. 1, p. 46)

The next appointment claimant had with Dr. Heineman occurred on September 5, 2017. (Jt. Ex. 1, p. 47) The physician's assistant ordered a refill of the pain medication. Claimant returned to the clinic on October 11, 2017 for a refill of his pain medication. (Jt. Ex. 1, p. 49) Claimant reported he had been trying to lose weight in order to help his chronic low back pain. (Jt. Ex. 1, p. 49) The primary care physician diagnosed claimant with chronic low back pain, obesity, and hypertension. (Jt. Ex. 1, p. 50)

On November 29, 2017, claimant returned to his primary care physician. (Jt. Ex. 1, p. 51) There was a need for a refill of his pain medication. Claimant reported he had a difficult time sleeping if he did not take his medication at night. (Jt. Ex. 1, p. 51) Claimant reported tightness in his back with some shooting pain down his right leg. (Jt. Ex. 1, p. 51) Claimant's prescription was refilled. (Jt. Ex. 1, p. 52)

One month later, claimant returned to see Dr. Heineman for a medication refill. Claimant reported some shooting pain down his right leg. (Jt. Ex.1, p. 54). He was counseled on lifestyle changes in order to lose weight. (Jt. Ex.1, p. 54)

On February 15, 2018, claimant saw Dr. Heineman. Claimant had chronic low back pain but other non-work-related health issues as well. (Jt. Ex. 1, p.56) Claimant was encouraged to exercise and to obtain dietary counseling. (Jt. Ex. 1, p. 58)

Defendants requested a functional capacity evaluation from John Kruzich, MS, OTR/L, at Athletico Physical Therapy. (Jt. Ex. 14, p. 139) The FCE was conducted on April 23, 2018. Mr. Kruzich opined claimant could perform work in the medium category of labor. Additionally, Mr. Kruzich stated claimant could perform the following work-related activities in a safe manner:

Waist to floor lifting – 30 lbs. occasionally

Above shoulder lifting – 20 lbs. occasionally

Bilateral carrying – 30 lbs. occasionally

Dynamic pushing/pulling – 45/35 lbs. of force occasionally

Sitting – Frequently, with positional changes as required in order to maintain a reasonable level of comfort throughout the workday

Standing work (combination standing/walking) – Constantly, with positional changes as required in order to maintain a reasonable level of comfort throughout the workday

Stair climbing – Frequently L

Ladder climbing – Occasionally

Bending/Twisting - Occasionally

Kneeling – Occasionally

Squatting – Frequently

Crouching – Occasionally

(Jt. Ex. 14, p. 125)

EXPERT MEDICAL REPORTS

In his response to a letter from Mr. Steve Luft, Workers' Compensation Claims Specialist, Dr. Troll indicated claimant had reached maximum medical improvement on December 13, 2016. (Jt. Ex. 14, p. 151) Dr. Troll opined claimant had a maximum lift of 30 pounds and his abilities were identified in the first functional capacity evaluation. (Jt. Ex. 14, p. 152) Dr. Troll also rated claimant as having a 5 percent permanent impairment as defined by the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, DRE Lumbar Category II, "Non-Verifiable Radicular Complaints". (Jt. Ex. 14, p. 152)

Pursuant to Iowa Code section 85.39, claimant exercised his right to an independent medical examination. The examination occurred on March 6, 2018. Dr. Bansal found tenderness to palpation over the lower lumbar paraspinals with guarding noted. (Claimant's exhibit 1, page 12) With respect to range of motion, Dr. Bansal found:

	RANGE OF MOTION
Flexion:	73 degrees
Extension:	23 degrees
Left Lateral Flexion	29 degrees
Right Lateral Flexion	26 degrees

(Cl. Ex. 1, p. 13)

As far as the right lower extremity was concerned, Dr. Bansal opined there was a loss of sensory discrimination over the posterolateral lower leg. (Cl. Ex. 1, p. 13)

Dr. Bansal diagnosed claimant with a L4-L5 disk bulge with an annular tear. The evaluating physician also opined claimant experienced right hip and leg pain that radiated down the right leg. The right hip and leg pain were due to the back pathology. (Cl. Ex. 1, p. 14) Dr. Bansal causally related claimant's back, right hip pain and right leg pain to claimant's work injury on September 11, 2015. (Cl. Ex. 1, p. 14) Dr. Bansal placed claimant at maximum medical improvement on October 22, 2015, in accordance with the opinion of Dr. Nelson. (Cl. Ex. 1, p 15)

Dr. Bansal opined claimant had a permanent impairment. The following is Dr. Bansal's explanation for his rating of 8 percent to the body as a whole:

> With reference to the **AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (Guides),** Table 15-3, based on his current symptomatology and physical examination, he meets the criteria for a DRE Category II impairment and some from Category III. He has radicular complaints, guarding, and loss of range of motion. He has an MRI showing a disc protrusion at L4-5 with clinically relevant radiculopathy. Therefore, he is assigned an impairment at the higher end of DRE Category II at **8% of the whole person.**

(Cl. Ex. 1, p. 15)

Dr. Bansal agreed with the restrictions suggested after the functional capacity evaluation performed on October 12, 2016. (Cl. Ex. 1, p. 16) That was the WorkWell FCE performed by Troy Vander Molen, PT, DPT.

VOCATIONAL EXPERT REPORTS

Defense counsel retained the services of a vocational specialist, Mr. Scott Mailey, MS, CDMS, from the Alaris Group. (Defendants' Exhibits A and B) Mr. Mailey reviewed medical records, any permanent restrictions, and engaged in a two hour meeting with claimant and his female friend. Mr. Mailey looked at claimant's prior employment, his transferable skills under the Code of Federal Regulations (20CFR404.1568). Mr. Mailey also considered jobs within a 50-mile radius of Grinnell, Iowa where claimant resides.

Mr. Mailey agreed claimant could not return to the occupation of Labor/Bagger at National Products, Inc. However, Mr. Mailey opined claimant had relevant work experiences and residual functioning capability to qualify him for a number of semi-skilled and unskilled occupations within his labor market. Additionally, Mr. Mailey indicated there were existing jobs in claimant's job market which matched claimant's transferable skills. (Def. Ex. A, p. 6)

Some occupations were recommended to claimant. They were listed in Mr. Mailey's report at defendants' exhibit A, page 6. The occupations are duplicated below:

Optical Technician

Assembler-Production

Machine Operator-Metal

Truss Builder

Delivery Driver

Welding Machine Operator

Automatic Saw Operator

Molding Machine Operator

Cashier

Quality Control Technician

Counter Sales

Security Gate Guard

Mr. Mailey authored a subsequent report on May 1, 2018. He amended his discussion and conclusions based on the Athletico FCE performed on April 23, 2018. Mr. Mailey opined:

> Mr. Clayton is capable of working in the Sedentary, Light, Medium categories of work as defined by the US Department of Labor. This is based on the permanent restrictions suggested by the Athletico FCE dated April 23, 2018. Whereas the previous analysis considered a small portion of the Medium Category of Work the new FCE places Mr. Clayton

> solidly in the Medium Category of Work, virtually eliminating the need to winnow out occupations in the Medium Category which would fall outside Mr. Clayton's physical capabilities.
>
> The amended analysis utilizing the most recent FCE results indicates Mr. Clayton retains access to the labor market in excess of 70% for semiskilled positions for which he was fitted prior to injury. Mr. Clayton retains close to 75% access to the labor market for unskilled occupations. It is this evaluator's opinion that Mr. Clayton continues to have similar earning power (stated below). However, it is the opinion of this evaluator that given the change in physical capabilities Mr. Clayton would have a wider breath of occupational access, thereby enhancing his employability and the likelihood that he could earn wages greater than the $9.08 ($363/week) then stated in the previous report.
>
> Earning potential based on wage data provided by the US Department of Labor, Bureau of Labor Statistics, reveals Mr. Clayton would likely have the capability of earning wages in the $9.08 to $17.27 per hour range. This in turn equates to $363 to $691 per week. The illustration above represents lost earning capacity between 0% and 21% based on an estimated AWW of $524 per week.

(Def. Ex. B, p.12)

On direct examination, claimant testified the only work he had done since his work injury, was preparing the family building for mudding and taping. (Tr., p. 53) Claimant testified he applied for work at Richie Berman's Scrap Yard, McDonald's Restaurant and Chuck Griffith Home Builders. Claimant testified he did not get the jobs because of his lifting restriction. (Tr., pp. 54-55)

During cross examination, claimant was questioned whether he had applied for any of the job leads provided to him by Mr. Mailey. Claimant answered he had not. Claimant was also asked about his itemized statement of earnings for the Social Security Administration for the years 2005 through 2015. The records showed for the ten years covered, claimant was a very low wage earner. His highest income earned was in 2012 when he earned $28,753.08. There were periods of time when claimant was not working at all. Claimant also testified:

> A. Well, I never worked just one job. I've always had to do side jobs to make ends meet because of mistakes that I made in my past.
>
> Q. (By Mr. Russell) Side jobs that you weren't reporting income from?
>
> A. It could have been, yes.

(Tr., pp. 86-87)

RATIONALE AND 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). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4) (b); Iowa Code section 85A.8; Iowa Code section 85A.14.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its 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, 760-61 (1956). It the claimant had a preexisting condition or disability that is materially, 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, 135, 115 N.W.2d 812, 815 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 375, 112 N.W.2d 299, 302 (1961).

When an expert's opinion is based upon an incomplete history it is not necessarily binding on the commissioner or the court. It is then to be weighed, together with other facts and circumstances, the ultimate conclusion being for the finder of the fact. Musselman v. Central Telephone Company, 154 N.W.2d 128, 133 (Iowa 1967); Bodish v. Fischer, Inc., 257 Iowa 521, 522, 133 N.W.2d 867 (1965).

The weight to be given an expert opinion may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. St. Luke's Hospital v. Gray, 604 N.W.2d 646 (Iowa 2000).

The commissioner as trier of fact has the duty to determine the credibility of the witnesses and to weigh the evidence. Together with the other disclosed facts and circumstances, and then to accept or reject the opinion. Dunlavey v. Economy Fire and Casualty Co., 526 N.W.2d 845 (Iowa 1995).

Claimant has sustained a permanent impairment to his back. As a consequence, he is entitled to have his disability calculated using the industrial method. 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 Ry. Co. of Iowa, 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.

There are two impairment ratings for claimant. Dr. Troll found claimant had a 5 percent impairment rating. Dr. Bansal determined claimant had an 8 percent impairment rating. Both physicians relied on the same table of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, to calculate the respective ratings. In actuality, the two ratings are very close to one another.

Dr. Troll opined claimant was "physically capable of performing light to medium duty work with 30 lb. max liftin[g]." (Jt. Ex. 5, p. 85) Dr. Troll also relied on claimant's abilities as determined by the October 2016 functional capacity evaluation. (Jt. Ex. 15, p. 152)

Dr. Bansal, also relied on the same functional capacity evaluation to determine appropriate restrictions for claimant. However, Dr. Bansal placed claimant at the top end of the rating table.

Defendants wanted another functional capacity evaluation, even though the first FCE was deemed valid. The second FCE was performed by John Kruzich, MS, OTR/L. Mr. Kruzich determined claimant could work in the medium category of work, even though many of the recommended restrictions remained the same as with the earlier functional capacity evaluation.

Claimant is poorly educated. By his own admission, he is unable to read and write very well. It is unlikely he would be able to complete a general equivalency diploma. Claimant described himself "as a hands on" type person. He indicated he learned how to do something by tackling the project, not by reading the instructions.

Natural Products, Inc., did not accommodate claimant in the workplace with the restrictions imposed by Dr. Troll. Claimant has not been especially motivated to seek employment. He fears he will reinjure himself if he becomes gainfully employed. Mr. Mailey presented claimant with 25 job leads within a 50 mile radius of Grinnell. Unfortunately, claimant did not pursue any of the job leads.

For most of claimant's career, he was a low wage earner. (Cl. Ex. 4) He experienced gaps in his employment too. Claimant admitted during cross examination, he performed "side jobs" to make ends meet. (Tr., pp. 85-87) Apparently, he never reported the income from the side jobs to the Social Security Administration. (Cl. Ex. 4)

After considering all of the factors involving industrial disability; it is the determination of the undersigned; claimant has a permanent partial disability in the amount of thirty-five (35) percent. Defendants shall pay unto claimant one hundred seventy-five weeks of permanent partial disability benefits at the stipulated weekly benefit rate of $357.18 per week and commencing from December 14, 2016 as determined by Dr. Troll.

The next issue for resolution is the matter of healing period benefits. Healing period compensation describes temporary workers' compensation weekly benefits that precede an allowance of permanent partial disability benefits. Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999). Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events. These are: (1) the worker has returned to work; (2) the worker medically is capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period.

Defendants paid claimant healing period benefits from September 14, 2015 through September 19, 2016. As of September 20, 2016, claimant had not returned to work either for Natural Products, Inc. or for any other employer. Defendants selected Dr. Troll as one of the authorized treating physicians. Dr. Troll examined claimant on August 29, 2016. (Jt. Ex. 5, p. 82) The physician noted claimant had only made modest gains with physical therapy. Claimant could only tolerate lifting about 30 pounds. Claimant also had pain on the right side of his back with radiation down his right leg. It was more pronounced with extension. Dr. Troll ordered four more weeks of physical therapy. The physician indicated if there were no more gains in lifting tolerance, then Dr. Troll would likely declare claimant to be at maximum medical improvement. (Jt. Ex. 5, p. 82)

The next appointment occurred on September 26, 2016. Dr. Troll noted claimant had made gains with his spinal range of motion during his physical therapy sessions but his pain was rated 5 out of 10. (Jt. Ex. 5, p. 84) Dr. Troll ordered a FCE for claimant with a follow up appointment thereafter. (Jt. Ex. 5, p. 84)

Claimant had the functional capacity examination on October 12, 2016. (Jt. Ex. 13, pp. 128-130) Claimant returned to Dr. Troll on December 13, 2016. (Jt. Ex. 5, p.85) On that date, Dr. Troll declared claimant to be at maximum medical improvement. (Jt. Ex. 5, p. 85) Dr. Troll discharged claimant from additional care. (Jt. Ex. 5, p. 85) Additionally, Dr. Troll reiterated his opinion about the date of maximum medical improvement in his report of December 21, 2016 to Farm Bureau. (Jt. Ex. 15, p. 151)

It is the determination of the undersigned; defendants owe claimant additional healing period benefits for the period from September 20, 2016 through December 13, 2016 and payable at the rate of $357.18 per week. This is a period of twelve weeks and one day.

Defendants shall take credit for all weekly benefits paid to date.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology, File No. 5054686 (App. April 24, 2018).

Defendants agreed in their post hearing brief they would pay medical expenses listed on claimant's exhibit 9 so long as they were incurred after September 11, 2015. They stated they would not pay any medical bills incurred prior to September 11, 2015. At the time of the writing of the defendants' brief, defense counsel was contacting the various medical providers to make appropriate payments to them.

Claimant is also entitled to be reimbursed for the cost of independent medical examination performed by Dr. Bansal. The total amount is $2,560.00. The examination was performed in compliance with Iowa Code section 85.39. See Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839 (Iowa 2015).

The final issue is the matter of costs.

Iowa Code section 86.40 states:

> Costs. All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner.

Iowa Administrative Code Rule 876—4.33(86) states:

> Costs. Costs taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes. Costs of service of notice and

> subpoenas shall be paid initially to the serving person or agency by the party utilizing the service. Expenses and fees of witnesses or of obtaining doctors' or practitioners' reports initially shall be paid to the witnesses, doctors or practitioners by the party on whose behalf the witness is called or by whom the report is requested. Witness fees shall be paid in accordance with Iowa Code section 622.74. Proof of payment of any cost shall be filed with the workers' compensation commissioner before it is taxed. The party initially paying the expense shall be reimbursed by the party taxed with the cost. If the expense is unpaid, it shall be paid by the party taxed with the cost. Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery. This rule is intended to implement Iowa Code section 86.40.

Iowa Administrative Code rule 876—4.17 includes as a practitioner, "persons engaged in physical or vocational rehabilitation or evaluation for rehabilitation." A report or evaluation from a vocational rehabilitation expert constitutes a practitioner report under our administrative rules. Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010) The entire reasonable costs of doctors' and practitioners' reports may be taxed as costs pursuant to 876 IAC 4.33. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009).

Claimant is requesting certain costs as detailed on page 2 of the hearing report. The following costs are taxed to defendants:

Filing fee:	$100.00
Service Fee	$4.22
Deposition of claimant	$193.58
Total	$297.80

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the stipulated rate of three hundred fifty-seven and 18/100 dollars ($357.18) and commencing from December 14, 2016.

Defendants shall pay additional healing period benefits to claimant for the period from September 20, 2016 through December 13, 2016 at the stipulated rate of three hundred fifty-seven and 18/100 dollars ($357.18) per week.

Defendants shall take credit for all benefits previously paid to date.

Defendants shall pay medical costs pursuant to Iowa Code section 85.27 and as detailed in the body of this decision.

All past due benefits shall be paid in a lump sum together with interest as allowed by law and as described in the body of the decision.

Defendants shall pay the cost of claimant's independent medical examination pursuant to Iowa Code section 85.39.

Defendants shall pay costs as detailed in the body of the decision.

Defendants shall file all reports as required by law.

Signed and filed this 16th day of April, 2019.

Michelle A. McGovern

MICHELLE A. MCGOVERN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Fredd J. Haas
Attorney at Law
5001 SW 9th Street
Des Moines, IA 50315
freddjhaas1954@gmail.com

James W. Russell
Attorney at Law
5400 University Ave.
West Des Moines, IA 50266
James.Russell@fblfinancial.com

MAM/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.