

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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MENARD, INC. and PRAETORIAN  
INSURANCE COMPANY,

Petitioners,

vs.

DENNIS MAY,

Respondent

Case No. CVCV059553

**ORDER ON JUDICIAL REVIEW**

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Telephonic oral argument in this matter was held on June 19, 2020. Attorney Charles Blades represented Petitioners Menard, Inc. and Praetorian Insurance Company (together, Menards). Attorney Ryan Beattie represented Respondent Dennis May (Dennis). Oral argument was not reported.

Upon review of the Petition, the final agency record as submitted September 15, 2020, and the court file in light of the relevant law, and after careful consideration of the respective statements of counsel, the court enters the following Order affirming the agency's final decision and dismissing the Petition for the following reasons.

**BACKGROUND PROCEEDINGS**

On January 20, 2012, Dennis sustained a bilateral shoulder injury while working for a Menards' subsidiary. (06/02/15 Arb. Dec. at 9). He subsequently filed a petition in arbitration seeking workers' compensation benefits from Menards. (06/02/15 Arb. Dec. at 1).

The arbitration hearing was held before a deputy workers' compensation commissioner (Deputy I) on March 12, 2015. (06/02/15 Arb. Dec. at 1). Several of the nine issues presented at the arbitration hearing were disputed, including whether

Dennis had sustained work injuries, and the extent of his injuries if they were work related. (06/02/15 Arb. Dec. at 2).

On June 2, 2015, Deputy I issued the Arbitration Decision finding a work incident caused the conditions of Dennis's right and left shoulders, along with the need for his many shoulder surgeries. (06/02/15 Arb. Dec. at 9). Deputy I further found that as a result of a November 21, 2014, shoulder replacement surgery, Dennis was still in his healing period at that time. (06/02/15 Arb. Dec. at 9-10). Deputy I issued a running order for healing period benefits. (06/02/15 Arb. Dec. at 10-11). He also awarded medical care and costs. (06/02/15 Arb. Dec. at 11-12).

Menards appealed the Arbitration Decision. Under an Iowa Code section 86.3 delegation of authority, a different deputy commissioner (Deputy II) issued the Appeal Decision on December 20, 2016. (12/20/16 App. Dec. at 3). The Appeal Decision adopted the Arbitration Decision as the final agency decision. (12/20/16 App. Dec. at 2).

Menards did not seek judicial review of the Appeal Decision. The court accepts the findings of fact from the agency's June 2, 2015, Arbitration Decision and December 20, 2016, Appeal Decision as true and accurate.

Dennis eventually reached maximum medical improvement (MMI) and subsequently sought additional benefits through filing a review-reopening petition. (03/22/17 Pet.). The review-reopening hearing was held on April 2, 2018, before a third deputy commissioner (Deputy III). (05/23/18 Rev. Reopen. Dec. at 11). On May 23, 2018, Deputy III issued a decision finding Dennis was permanently and totally disabled under the odd-lot doctrine. (05/23/18 Rev. Reopen. Dec. at 11). Deputy III awarded Dennis permanent total disability (PTD) benefits. (05/23/18 Rev. Reopen. Dec. at 11).

Menards sought intra-agency review of this decision. On November 15, 2019, a fourth deputy commissioner (Deputy IV) under a section 86.3 delegation of authority issued the Appeal Decision upholding the Review-Reopening Decision. (11/15/19 Rev. Reopen. App. Dec. at 1-2). Deputy IV adopted the Reviewing-Reopening Decision in its entirety and made an additional finding pertaining to Menards' expert Lana Sellner. (11/15/19 Rev. Reopen. App. Dec. at 2).

Menards' application for rehearing was denied. (12/12/19 Order Denying Motion). Menards then sought judicial review. (01/10/20 Petition).

### **BACKGROUND FACTS**

Family practice provider Dr. Lee Fagre saw Dennis on February 6, 2012. (Arb. Ex. 9 at 1).<sup>1</sup> The medical record note for that date says, "Having pain [in] both shoulders after pushing a garage door over his head 3 weeks ago and had sudden pain in the shoulders bilaterally and has had pain since that time. . . ." (Arb. Ex. 9 at 6). Dr. Fagre assessed rotator cuff syndrome and strain of long head [of] biceps. (Arb. Ex. 9 at 8). He ordered right and left shoulder MRI's. (Arb. Ex. 9 at 9).

Dennis underwent bilateral shoulder MRI's at a Waterloo hospital on February 9, 2012. (Arb. Ex. 8 at 1-3). The right shoulder MRI revealed, "[s]ignificant supraspinatus tendinosis with a full thickness marginal rotator cuff tear along the distal margin of the supraspinatus tendon." (Arb. Ex. 8 at 3). The left shoulder MRI showed "[s]upraspinatus tendinosis with a small marginal rotator cuff tear along the distal margin of the supraspinatus tendon." (Arb. Ex. 8 at 1). Upon seeing the results, Dr.

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<sup>1</sup> Relevant arbitration hearing exhibits are identified in this Order as "Arb. Ex. \_\_\_\_." Dennis' review-reopening exhibits are identified in this Order as "Ex. \_\_\_\_." Joint review-reopening exhibits are identified in this Order as "JEx. \_\_\_\_."

Fagre referred Dennis to Dr. Richard Naylor, an orthopedic surgeon with the hospital. (Arb. Ex. 10 at 1).

Dr. Naylor first saw Dennis on February 22, 2012. (Arb. Ex. 10 at 1). Dr. Naylor's medical record for this date indicates, "[r]ight shows complete rotator cuff tear with slap tear. Left shows a partial thickness rotator cuff tear and slap tear." (Arb. Ex. 10 at 1). The plan was to address Dennis' right shoulder and then the left. (Arb. Ex. 10 at 2). Dr. Naylor scheduled a scope surgery for the right shoulder and injected the left shoulder. (Arb. Ex. 10 at 2). On March 2, 2012, Dr. Naylor performed the scope surgery on Dennis' right shoulder. (Arb. Ex. 10 at 3).

A few days after surgery, Menards required Dennis to take an extended leave of absence. (Arb. Ex. 13 at 2). On March 8, 2012, Dennis, a Menards unit manager and a division manager signed the leave of absence form. (Arb. Ex. 13 at 2). Under the "Manager's Comments" section of the form, the Menards manager wrote, "Dennis just had 2 surgery's (sic)." (Arb. Ex. 13 at 2).

Dennis had his first post right shoulder surgery follow-up with Dr. Naylor on May 6, 2012. (Arb. Ex. 3 at 1). During the appointment Dennis and Dr. Naylor discussed Dennis' first post-surgical physical therapy appointment where the therapist raised Dennis' right arm above his head. (Arb. Ex. 3 at 1). That movement caused Dennis immediate pain and weakness. (*Id.*). Dr. Naylor noted the therapist's lifting Dennis' right arm above shoulder level over-extended that arm, violating Dr. Naylor's prior restrictions. (*Id.*). Dr. Naylor eventually ordered a right shoulder arthrogram for Dennis' continued right shoulder pain. The April 24, 2012, arthrogram showed another "full thickness rotator cuff tear." (Arb. Ex. 7 at 2).

At the May 6, 2012, appointment, Dr. Naylor performed an open right shoulder rotator cuff repair and subacromial decompression on Dennis. (Arb. Ex. 3 at 1). During this surgery, Dr. Naylor found the sutures from Dennis' prior surgery were pulled out and that Dennis had some recurrence of his acromion. (Arb. Ex. 3 at 2).

Dennis' last appointment with Dr. Naylor occurred on September 11, 2012. (Arb. Ex. 10 at 14). Right shoulder exam findings other than the previous stock "musculoskeletal" findings showed "[h]e has forward flexion to about 160, abduction the same. External rotation strength and abduction strength is 4/5+." (Arb. Ex. 10 at 15). Dennis was released on an "as needed" basis for his right shoulder. (Arb. Ex. 10 at 15). Dr. Naylor instructed Dennis to follow-up for his left shoulder in Iowa City due to his health insurance situation. (Arb. Ex. 10 at 15).

On February 8, 2013, Dennis saw Dr. Matthew Bollier at the University of Iowa. (Arb. Ex. 11 at 1). On July 2, 2013, Dr. Bollier performed a left shoulder rotator cuff repair. (Arb. Ex. 4 at 1). During the surgery, Dr. Bollier found a "large supraspinatus rotator cuff tear that involved anterior infraspinatus" and a "torn lateral pulley" in the biceps tendon. (Arb. Ex. 4 at 3). Dr. Bollier's surgery did not provide Dennis relief. (Arb. Ex. 11 at 23). As of September 23, 2013, Dennis was still complaining of significant left shoulder pain. (*Id.*).

Dr. Bollier also had Dennis' neck and left shoulder evaluated by Dr. Joseph Smucker. (Arb. Ex. 11 at 32). Upon examination, Dr. Smucker opined:

It appears that the left shoulder pain and weakness is due to a peripheral nerve injury to the suprascapular nerve, rather than a radiculopathy from the cervical spine. Recent studies also show a post-surgical full-thickness massive rotator cuff tear.

(Arb. Ex. 11 at 36). Dr. Bollier concurred and said the EMG documented nerve injury likely related to Dennis' rotator cuff retraction. (Arb. Ex. 11 at 39). He recommended a second rotator cuff repair revision surgery. (Arb. Ex. 11 at 39).

On January 7, 2014, Dr. Bollier performed the second left shoulder rotator cuff repair. (Arb. Ex. 5 at 1). Upon surgical inspection, Dr. Bollier found Dennis' tearing so significant that he could not fully repair the rotator cuff. (Arb. Ex. 5 at 3). Dr. Bollier's post-surgical diagnosis was left rotator cuff tear and shoulder stiffness. (Arb. Ex. 5 at 1). Dennis had continuing significant pain following surgery.

On May 19, 2014, orthopedic surgeon Dr. James Nepola evaluated Dennis for a left shoulder replacement. (Arb. Ex. 11 at 62). Upon examination, Dr. Nepola opined "61 y.o. with irreparable rotator cuff tear on the left. We are planning on performing a left reverse total shoulder arthroplasty." (Arb. Ex. 11 at 64). After Dennis was cleared for surgery, Dr. Nepola performed a total left shoulder replacement on November 20, 2014. (Arb. Ex. 6 at 1-2).

On April 13, 2015, pain specialist Dr. Esther Benedetti noted physical therapy was helping Dennis' shoulder. (JEx. 3-55). However, his pain continued to be sharp on active movement of his left shoulder. (JEx. 3-55; 3-56). Dr. Benedetti gave Dennis trigger point injections in his left trapezius. (JEx. 3-60).

Dennis has treated in the University of Iowa pain clinic with various specialists since then.<sup>2</sup> (04/02/18 Trans. at 31-32). He complains of multiple pain problems in his bilateral shoulders, the left side of his neck and the back of his neck. (04/02/18 Trans.

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<sup>2</sup> Pain clinic treatment providers included Dr. Rahul Rastogi on October 5, 2015 (JEx. 3-69); Dr. Shuchita Garg on October 22, 2015 (JEx. 3-78); and Dr. Anureet Walla, on March 14, 2018 (JEx. 3-93).

at 30-36). Dr. Nepola says Dennis' left-sided neck and trapezius pain is caused by the way Dennis' body compensates because of his left shoulder surgical care. (Ex. 1-1).

Dr. Sunil Bansal performed two independent medical evaluations (IME) of Dennis at his request. In his first evaluation performed on January 9, 2015, Dr. Bansal said Dennis suffered a 7% body as a whole impairment due to the right shoulder, and a 19% body as a whole impairment due to the left shoulder. (Arb. Ex. 1 at 15-16). Dr. Bansal recommended restrictions, but opined that restrictions for the left shoulder would change in the future due to continued treatment. (Arb. Ex. 1 at 16-17). Regarding the right shoulder, Dr. Bansal said Dennis is permanently restricted from lifting greater than 10lbs. occasionally, with 5 lbs. frequently to table height, avoidance of lifting overhead or repetitive reaching, and no pushing/pulling greater than 10 pounds with the right arm. (Arb. Ex. 1 at 16).

Dr. Bansal performed a second IME on August 10, 2017. (Ex. 3-1). He examined both of Dennis' shoulders. (Ex. 3-8; 3-9). After the second evaluation, Dr. Bansal said the impairment in Dennis' right shoulder remained the same. (Ex. 3-8). However, Dennis' left shoulder had a 22% whole person impairment. (*Id.*). Dr. Bansal recommended the following permanent restrictions:

Left Shoulder: I would place a restriction of no lifting greater than 10 pounds occasionally, or 5 pounds frequently with the left arm, along with no lifting above shoulder level or away from the body with the left arm. No frequent reaching with the left arm. Avoid pushing, pulling greater than 20 pounds with the left arm occasionally. No repetitive pushing, pulling. Avoid large vibratory tools that cause arm vibration such as jack hammering.

Right shoulder: I would place a restriction of no lifting greater than 10 pounds with the right arm, along with no lifting greater than 5 pounds above shoulder level with the right arm. Avoid frequent over shoulder work with the right arm. No repetitive reaching with the right arm. No pushing or pulling greater than 20 pounds with the right arm occasionally.

Avoid large vibratory tools that cause arm vibration such as jack hammering.

(Ex. 3-9).

Dr. Nepola—who treated Dennis’ left arm—also opined about left arm restrictions:

In your opinion, due to the left reverse total shoulder arthroplasty, Dennis should permanently avoid and limit left shoulder activities as follows:

- i. Occasional lifting with the left shoulder of 10 lbs., especially with outstretched arm and above head level;
- ii. 20 lbs. pushing occasionally;
- iii. No repetitive heavy work;
- iv. No use of significant vibratory tools such as an impact wrench, hammer, or jack hammer. Use of a small personal drill would be okay as long as such use was not for sustained periods.

(Ex. 1-2).

Dennis completed two vocational evaluations. His expert Carma Mitchell conducted the first evaluation. Menards’ expert Lana Sellner conducted the second evaluation. Ms. Mitchell interviewed Dennis on March 1, 2018, and reviewed his employment history, educational history and his medical restrictions.

(Ex. 2-1 to 2-6). She concluded Dennis “would not be able to perform any of his past work or have any acquired skills that would transfer to other work.” (Ex. 2-6). She further noted Dennis’ restrictions alone regarding lifting and reaching with his arms caused him to lose “access to over 99% of the jobs he had access to prior to his work-related injury.” (Ex. 2-6). Ms. Mitchell ultimately said it was “unlikely that [Dennis] would be able to obtain or sustain full-time competitive employment.”

(Ex. 2-6).



Ms. Sellner met with Dennis in November 2017. (04/02/18 Trans. at 72). She reviewed his work history and education and performed a job analysis. (04/02/18 Trans. at 72-75). Ms. Sellner performed a job search for Dennis and identified several positions she said Dennis could perform. (04/02/18 Trans. at 73-81). Ms. Sellner testified the only jobs she identified adhering to the restrictions imposed by Dr. Bansal were security and shuttle van driver positions. (04/02/18 Trans. at 91-93). She conceded on cross-examination that the security positions have lifting requirements Dennis would not meet under Dr. Bansal's restrictions. (04/02/18 Trans. at 95-97). Dennis testified he has significant problems driving for long periods, and holding onto the steering wheel for extended periods in a driver position would be untenable. (04/02/18 Trans. at 41).

#### **STANDARD OF REVIEW**

Iowa Code chapter 17A governs judicial review of an administrative agency action. The appeal issues in this case challenge the findings of fact in the agency decision. Accordingly, the applicable the standard of review is for substantial evidence. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). Substantial evidence is “[t]he quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.” Iowa Code § 17A.19(10)(f)(1). Further,

[e]vidence is not insubstantial merely because different conclusions may be drawn from the evidence. To that end, evidence may be substantial even though we may have drawn a different conclusion as fact finder. Our task, therefore, is not to determine whether the evidence supports a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made.

*Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W. 2d 839, 845 (Iowa 2011) (internal citations omitted).

### CONCLUSIONS OF LAW

In the review-reopening proceeding, the agency found Dennis was entitled to PTD benefits under Iowa Code section 85.34(3) because he is an odd-lot worker. (05/23/18 Rev. Reopen. Dec. at 11). Under the odd-lot doctrine,

when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of fact finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability.

*Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 106 (1985).

**A. Prima facie case.** The first step in an odd-lot doctrine analysis is determining whether the injured worker produced a prima facie case that he or she can only perform work so limited in “quality, dependability or quantity that a reasonably stable market for them does not exist.” *Guyton*, 373 N.W.2d at 105. Further,

[t]here are other factors that are also important in determining whether someone falls in the odd-lot category such as the claimant’s physical impairment, intelligence, education, training, ability to be retrained and age. Substantial evidence that these factors show the worker is capable only of odd-lot work can suffice to prove a prima facie case and shift the burden of producing evidence of suitable work to the employer. We point out that it is not necessary that the employee’s evidence be so strong as to compel a finding that he is an odd-lot employee as a matter of law; it is merely necessary that he generate a fact question on this issue, through the introduction of substantial evidence, to establish a prima facie case.

*Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 268 (Iowa 1995) (internal citations omitted).

Dennis continues having significant problems with his left shoulder, trapezius, the left side of his neck, and his right shoulder caused by his work injury.

(04/02/18 Trans. at 24-25; 30-31; 34-37). Dennis has significant problems with the center of his neck and with his right ankle arising from conditions other than his work injury. (04/02/18 Trans. at 30; 38-39). In 2011, Dennis underwent a right ankle replacement that causes soreness and limits him to standing or walking no more than 15 minutes at a time. (04/02/18 Trans. at 38-39).

Regarding his left neck, trapezius and shoulder, Dennis testified “I’ve got pain leading all the way down my – the left of my neck, leading to my shoulder. The doctor said it was due to the muscles that are deteriorating in here are – these muscles trying to compensate for, is what he said.” (04/02/18 Trans. at 24). His pain never goes away and is always at an 8 on a 1-to-10 scale. (04/02/18 Trans. at 26). Dennis’ right shoulder is the same now as it was the last time he saw Dr. Naylor in 2012. (04/02/18 Trans. at 21-22). This shoulder has some movement but is still weak. (04/02/18 Trans. at 21).

Dennis lacks functionality. He gets headaches from his left side neck and shoulder pain. (04/02/18 Trans. at 25). Sleeping is difficult. (04/02/18 Trans. at 25). Housework is challenging. (04/02/18 Trans. at 26-27). Dennis avoids reaching and can only reach out in front him below shoulder level with his left arm. (04/02/18 Trans. at 27). Dennis’ shoulder difficulties are so extensive that that he cannot put dishes into his upper kitchen cabinets. (04/02/18 Trans. at 29). He puts dishes in his lower kitchen cabinets to avoid reaching above his shoulder. (04/02/18 Trans. at 29). Driving is problematic because Dennis’ left arm becomes tired while he attempts to hold the wheel. (04/02/18 Trans. at 40-41). On the day of the arbitration hearing, Dennis stopped halfway through his two-hour trip from Waverly to Des Moines to give his left shoulder a twenty-minute break. (04/02/18 Trans. at 42-43).

Menards has not offered Dennis a position at any time since his 2012 work-related injury. (04/02/18 Trans. at 112-13). Dennis has a high school diploma. (04/02/18 Trans. at 9). His job history consists of physical work he cannot perform today and includes the following positions. (04/02/18 Trans. at 9-19). Between 1969 and 1980, Dennis worked as a painter and as a bus boy. (Ex. 2-1). From 1981 to 1982, he worked for a corrugated box company loading cardboard into a machine. (Ex. 2-2). From 1982 to 1983, he worked as an attic insulation installer. (Ex. 2-2). Between 1983 and 1989, Dennis was a working foreman for a roofing company. (Ex. 2-2). From 1989 to 1991, he worked as a yardman and delivery driver. (Ex. 2-2). From 1991 to approximately 1995, he delivered light bulbs and related equipment. (Ex. 2-2).

Between roughly 1995 and 1997, Dennis was a long-haul driver. (Ex. 2-2). Between 1998 and 2000, he worked on a fishing boat in Alaska. (Ex. 2-2). From 2000 to 2005, he worked for a cabinet company where he eventually was promoted from a line worker pinning doors together to a forklift operator. (04/02/18 Trans. at 13; Ex. 2-2). In 2005 and 2006, Dennis operated a stand-up forklift for Ryder Logistics that also involved lifting. (04/02/18 Trans. at 11-12; Ex. 2-2). At Menards and its predecessor between 2006 and 2012, he operated a forklift for 87% of the day and stacked blocks onto pallets the rest of the day. (04/02/18 Trans. at 10-11; Ex. 2-3).

Dennis receives social security disability benefits. (04/02/18 Trans. at 36, 83-84). His significant work restrictions issued by Dr. Nepola and Dr. Bansal were consistent with those given by Dr. Broghammer, Menards' IME provider.<sup>3</sup> Dennis has

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<sup>3</sup> Dr. Broghammer's restrictions included a lifting restriction stating "[l]ifting weight as tolerated with the right and left upper extremities." (Ex. D at 18). Dr. Bansal lists Dennis' "as tolerated" weights. Accordingly, there was no effective difference between the restrictions issued by Dr. Bansal and Dr. Broghammer, a point conceded by Ms. Sellner. (04/02/18 Trans. at 91-92).

not worked and cannot work in a capacity allowing him to support himself. Substantial evidence supporting his odd-lot status include all of the following: (1) his accepted restrictions, (2) his testimony, and (3) the findings of his vocational expert Ms. Mitchell. As noted above, Ms. Mitchell said Dennis “would not be able to perform any of his past work or have any acquired skills that would transfer to other work.” (Ex. 2-6). She further said, “At this time it would be unlikely that [Dennis] would be able to obtain or sustain full-time competitive employment.” (Ex. 2-6).

In affirming Deputy III’s Review-Reopening Decision, Deputy IV reasonably found that

[Dennis’] physical condition would allow him to perform sedentary work, if at all, based on the restrictions of the three medical experts and [his] self-professed tolerance levels. I likewise affirm the deputy commissioner’s finding that only a few of the positions identified by defendants’ vocational expert, Lana Sellner, fell within the work restrictions identified by Sunil Bansal, M.D.: clerk, courier, delivery driver, host, security guard and sales associate. I affirm the deputy commissioner’s finding that [Dennis] credibly testified driving – one of the positions identified by Ms. Sellner – causes pain to his arms. I also affirm the deputy commissioner’s finding that [Dennis] credibly testified he would have difficulty performing the essential duties of many of the other positions identified by Ms. Sellner. It is for these reasons that I affirm the deputy commissioner’s finding that [Dennis] presented a prima facie case of total disability.

(11/15/19 Rev. Reopen. App. Dec. at 2). Under this record when it is considered as a whole, Dennis has clearly established his prima facie case of odd-lot disability.

**B. Prima facie case rebuttal.** Once an injured worker establishes a prima facie case of odd-lot disability, the employer is then required to rebut the same by showing that suitable employment exists for the worker. *Guyton*, 373 N.W.2d at 106.

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Dr. Bansal’s restrictions are listed above at page 7, paragraph 2, and Exhibit 3-9.

Menards has failed to show suitable employment exists for Dennis for the following reasons.

Menards' evaluating physician Dr. Broghammer confirmed rather than rebutted Dr. Bansal's opinion containing comprehensive restrictions for Dennis. (See p. 7, ¶ 2; Ex. 3-9). Menards' vocational expert Ms. Sellner also failed to rebut the prima facie case of odd-lot disability. Deputy III reasonably found "the positions that Ms. Sellner identified often explicitly stated job requirements that were outside of [Dennis'] restrictions." (05/23/18 Rev. Reopen. Dec. at 11).<sup>4</sup> Ms. Sellner testified the only jobs she could find in Dennis' geographic area complying with Dr. Bansal's restrictions were a couple of security guard positions and a single position as a shuttle driver for the YMCA. (04/02/18 Trans. at 92). She admitted the security guard job descriptions required lifting in excess of Dennis' restrictions. (04/02/18 Trans. at 94-96). The driving job Ms. Sellner identified is also unrealistic given that Dennis must stop and take a break for his shoulders after extended driving. (04/02/18 Trans. at 42-43).

Menards' human resources coordinator Elizabeth Pirillo testified she could not identify a single available position for Dennis in his geographic area, nor could she indicate whether Menards was willing to make Dennis an offer for employment. (04/02/18 Trans. at 112-113).

Deputy IV further affirmed

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<sup>4</sup> In making this finding, Deputy III acknowledged it was unfortunate that Dennis has not attempted to look for work nor expressed a desire to work. But, she found his position was offset by Ms. Sellner's inability to identify jobs accommodating Dennis' restrictions, Ms. Pirillo's testimony that any job Menards could offer Dennis would be a "make-work" one, and Ms. Pirillo's further testimony that, even though she believed Menard's could accommodate Dennis, Menard's had failed to offer Dennis work during the five plus years he had been off work due to his injury. (05/23/18 Rev. Reopen Dec. at 11).

[t]he deputy commissioner's finding that the positions identified by Ms. Sellner often explicitly stated job requirements that were outside of [Dennis'] restrictions. As mentioned above, I also affirm the deputy commissioner's finding that only a few of the positions identified by Ms. Sellner fell within Dr. Bansal's restrictions. With respect to the testimony from Elizabeth P[i]rillo, a human resources coordinator for defendant-employer, I affirm the deputy commissioner's finding that any position offered by defendant-employer would require accommodation, and defendant-employer failed to offer [Dennis] a job in the years since his work injury. For these reasons, I specifically find defendant failed to produce evidence showing the availability of suitable employment.

(05/23/18 Rev. Reopen. App. Dec. at 2).

As noted above, Menards has not offered Dennis work. Menards has not shown available work exists in Dennis' geographic area which he could perform on a consistent basis. Because Menards has not produced evidence of suitable employment for Dennis, his prima facie case remains un rebutted.

**C. Burden of persuasion that Dennis is permanently and totally disabled.** As noted above, Dennis has a replaced right ankle that prevents him from being on his feet more than 15 minutes at a time. (04/02/18 Trans. at 38-39). He has a replaced left shoulder that causes constant pain throughout the left arm, neck and causes headaches. (04/02/18 Trans. at 24-26). He also has a surgically repaired right shoulder that is functionally deficient. (04/02/18 Trans. at 20-21).

As discussed above, Dennis has little education, a physical work history, and is advanced in age. He was 65 years old at the time of the 2018 review-reopening hearing. (04/02/18 Trans. at 9). He has not worked since March 2, 2012, because of his work injury. (06/02/15 Arb. Dec. at 9). Menards has offered him no work since his January 2012 work injury. (05/23/18 Rev. Reopen. Dec. at 11).

Deputy III listened to the live testimony of Dennis, Lana Sellner and Elizabeth Pirillo, and judged their credibility first hand. Deputy III considered the job positions

proffered by Ms. Sellner, but found that “[Dennis] has credibly testified that based on the job descriptions, he would have difficulty performing the essential duties of each one.” (05/23/18 Rev. Reopen. Dec. at 10). Under this record, the discreet jobs put forth by Menards as available for Dennis to perform are simply not performable by him.

Dennis is incapable of full time employment in his area. Deputy III did not err in finding “that the types of services [that Dennis] can perform are so limited in quality, dependability or quantity that a reasonably stable market for him does not exist.” (05/23/18 Rev. Reopen. Dec. at 11). Deputy III noted, “[e]ven under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether a worker’s burden of persuasion has been carried . . .” (05/23/19 Review Reopen. Dec. at 11) (citing *Guyton*, 373 N.W. 2d at 106).

The agency decided in both the Review Reopening Decision and Review Reopening Appeal Decision that Dennis met his burden of persuasion because his physical condition precludes him from obtaining meaningful work. The court agrees. When this record is considered as a whole, Menards’ substantial rights have not been prejudiced and the agency’s findings on all issues raised are supported by substantial evidence. Iowa Code §§ 17A.19(10), 17A.19(10)(f)(1).

### **CONCLUSION**

Deputy IV’s final agency decision should be affirmed, the Petition should be dismissed, and costs should be assessed to Menards and Praetorian Insurance Company.

### **ORDER**

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Deputy IV’s Review-Reopening Appeal Decision granting Respondent Dennis May permanent



total disability benefits under the odd-lot doctrine is affirmed and the Petition for Judicial Review filed by Petitioners Menard, Inc. and Praetorian Insurance Company is dismissed.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that costs are assessed to Petitioners Menard, Inc. and Praetorian Insurance Company.



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number** CVCV059553  
**Case Title** MENARD INC AND PRAETORIAN INS CO VS DENNIS MAY

So Ordered

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Jeanie Vaudt, District Court Judge,  
Fifth Judicial District of Iowa