BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVEN POWELL, Claimant, vs. SMITH FERTILIZER & GRAIN, Employer, and NATIONWIDE AGRIBUSINESS INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED JUN 13 2018 WORKERS' COMPENSATION File No. 5055682 APPEAL DECISION Head Note Nos: 1803; 5-9999

Claimant Steven Powell appeals from an arbitration decision filed on June 2, 2017. Defendants Smith Fertilizer & Grain, employer, and its insurer, Nationwide Agribusiness Insurance Company, cross- appeal. The case was heard on April 25, 2017, and it was considered fully submitted in front of the deputy workers' compensation commissioner on June 1, 2017.

The deputy commissioner found claimant sustained 70 percent industrial disability as a result of the stipulated injury which arose out of and in the course of claimant's employment with defendant-employer on December 9, 2015, which entitles claimant to receive 350 weeks of permanent partial disability (PPD) benefits, commencing on February 21, 2017. The deputy commissioner found claimant failed to carry his burden of proof that he is permanently and totally disabled as a result of the work injury. The deputy commissioner ordered defendants to pay claimant's costs of the arbitration proceeding.

Claimant asserts on appeal that the deputy commissioner erred in finding claimant sustained 70 percent industrial disability as a result of the work injury. Claimant asserts the award for industrial disability should be reversed and claimant asserts he should be awarded permanent total disability benefits.

Defendants assert on cross-appeal that the deputy commissioner erred in finding claimant sustained 70 percent industrial disability as a result of the work injury. Defendants assert the award for industrial disability should be reduced substantially.

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Having performed a de novo review of the evidentiary record and the detailed arguments of the parties, I reach the same analysis, findings, and conclusions as those reached by the deputy commissioner.

Pursuant to Iowa Code sections 17A.5 and 86.24, I affirm and adopt as the final agency decision those portions of the proposed arbitration decision filed on June 2, 2017, which relate to the issues properly raised on intra-agency appeal.

I find the deputy commissioner provided sufficient analysis of the issues raised in the arbitration proceeding. I affirm the deputy commissioner's findings of fact and conclusions of law pertaining to those issues. I affirm the deputy commissioner's finding that claimant sustained 70 percent industrial disability as a result of the work injury. I affirm the deputy commissioner's finding that claimant failed to carry his burden of proof that he is permanently and totally disabled as a result of the work injury. I affirm the deputy commissioner's order that defendants pay claimant's costs of the arbitration proceeding. I affirm the deputy commissioner's findings, conclusions and analysis regarding those issues with the following additional analysis:

FINDINGS OF FACT

Claimant was 60 years old at the time of hearing. (Hearing Transcript page 13) He is a high school graduate and he has a two-year associate degree in agriculture business. (Id.) His previous work history includes approximately 32 years in the agriculture industry, primarily working at grain elevators. (Id.) Management jobs in the grain elevator business typically include manual labor. (Tr. p. 14) Claimant began work for defendant-employer on August 10, 2015, at their Centerville, Iowa, location. (Tr, p. 16) That position involved maintenance, dumping grain trucks, loading trucks, and cleaning. (Tr. pp. 17-18)

On December 9, 2015, claimant sustained injuries to his right knee, low back and left shoulder resulting from the stipulated work injury. (Tr. pp. 18, 22) He last worked for defendant-employer on December 23, 2015. (Tr. p. 17)

The injuries to claimant's right knee and low back eventually resolved completely. (Tr. pp. 22-23) Following conservative treatment, Bradley Scott, D.O., orthopedic surgeon, performed surgery on claimant's left shoulder on March 30, 2016, for repair of a type 4 superior labrum anterior and posterior tear, high grade partial thickness rotator cuff tear, and small partial thickness tear involving the anterior leading edge of the subscapularis. (Exhibit 4, page 27)

Claimant had follow-up evaluations with Dr. Scott on June 14, 2016 (Ex. 4, pp. 29-30), July 12, 2016 (Ex. 4, p. 30), August 16, 2016 (Ex. 4, pp. 31-32), September 16, 2016 (Ex. 4, p. 32, and February 23, 2017 (Ex. 4, pp. 36-39.

At the request of his attorney, claimant had a functional capacity evaluation (FCE) with Jason Augustine, DPT, on February 7, 2017. That FCE found claimant to be capable of performing sedentary work with an occasional ten-pound lift from floor to waist, and no lifting above the waist. (Ex. 7, p. 45)

At the request of defendants, claimant had a second FCE with Ryan Domeyer, PT, on February 13, 2017. That FCE found claimant to be capable of performing light work with a two-hand lifting limit of 15 pounds. (Ex. 8, p. 60)

In response to questions posed by defendant-insurer in a letter dated February 22, 2017, Dr. Scott stated the following in a report dated February 26, 2017:

> In response to your questions: 1.) patient reached MMI 2/21/17. 2.) Diagnosis: left shoulder rotator cuff tear and superior labral tear. 3.) Impairment Rating: 13% upper extremity which converts to 8% whole person. This is based upon class 1 deficit for the rotator cuff tear with grade 3 modifier for functional history and clinical exam and grade 2 modifier for clinical studies. 4.) Both [FCE] reports result in fairly similar findings with respect to each other. Ryan Domeyer recommended light duty work and Jason Augustine recommended sedentary work. The strength and rom are similar to what I have seen in the office and Ryan Domeyer's reports would be a bit more similar to what I have seen the last couple of visits than Jason Augustine. 5.) Permanent restrictions would be occasional lifting of 20 lbs and frequent lifting of 10 lbs near body and no lifting greater than 5 lbs overhead or outstretched. 6.) Pt would be at higher risk for retear of the rotator cuff tendon.

(Ex. 4, p. 39)

Claimant underwent an independent medical evaluation (IME) with Sunil Bansal, M.D., on March 3, 2017. (Ex. 9) Dr. Bansal provided an impairment rating of eight percent body as a whole. (Ex. 9, p. 87) Dr. Bansal also adopted the sedentary restrictions of the February 7, 2017 FCE. (Id.)

I find Dr. Scott's opinions regarding claimant's permanent restrictions to be more convincing than Dr. Bansal's opinions because Dr. Scott was claimant's authorized treating physician, he is an orthopedic surgeon, he performed claimant's surgery and he saw claimant on a number of occasions, whereas Dr. Bansal is not an orthopedic surgeon and he saw claimant only one time.

Claimant introduced a vocational assessment report from Phil Davis, M.S. dated March 22, 2017 (Ex. 10) Without delineating between the light work restrictions opined by Dr. Scott or the more restrictive sedentary restrictions opined by Dr. Bansal, Mr. Davis stated he believes claimant has lost access to 90 percent of the labor market. Mr. Davis did not indicate he conducted a job search to support his opinion.

Defendants introduced a vocational assessment report from Scott Mailey, MS, CDMS. (Ex. 11) Relying on the opinion of Dr. Scott regarding permanent restrictions, Mr. Mailey opined that claimant's "relevant work experience and residual functioning capability (Residual Vocational Profile) qualifies him for a number of skilled, semi-skilled and unskilled occupations that exist within his labor market." (Ex. 11, p. 99) Mr. Mailey performed a labor market survey to support his position which revealed specific current job openings which claimant could perform given his restrictions, and Mr. Mailey provided a representative sampling in his report. (Ex. 11, pp. 99-100) Mr. Mailey opined claimant can "gain and maintain full-time employment should he so choose." (Ex. 11, p. 100) Mr. Mailey concluded that claimant maintains access of up to 50 percent of the pre-injury labor market despite his injury and disability. (Ex. 11, p. 101)

While I find Mr. Mailey's opinion to be somewhat overly-optimistic, I find his opinion to be much closer to reality and more convincing than the unsupported and overly-pessimistic opinion of Mr. Davis.

CONCLUSIONS OF LAW

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

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.

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.

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, 76 N.W.2d 756 (1956). If 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, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961). Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935).

There is no real dispute claimant is unable to return to any relevant past employment. Based on the opinions of Dr. Scott and Mr. Mailey, I find that while claimant's loss of industrial capacity is not total, it is substantial. Considering claimant's impairment rating, his permanent restrictions provided by Dr. Scott the authorized treating surgeon, claimant's transferable skills which include a two-year college degree, and considering all of the other factors of industrial disability, I affirm the deputy commissioner's finding that claimant has sustained 70 percent industrial disability as a result of the work injury, which entitles him to receive 350 weeks of PPD benefits pursuant to Iowa Code section 85.34(2)(u).

ORDER

IT IS THEREFORE ORDERED that the arbitration decision filed on June 2, 2017, is affirmed in its entirety.

Defendants shall pay claimant three hundred fifty (350) weeks of permanent partial disability at the weekly rate of six hundred sixty-six and 60/100 dollars ($666.60) commencing February 21, 2017.

Defendants shall be entitled to a credit for all 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. Apr. 24, 2018).

Pursuant to rule 876 IAC 4.33, defendants shall pay claimant's costs of the arbitration proceeding, and the parties shall split the costs of the appeal, including the cost of the hearing transcript.

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

Signed and filed on this 13th day of June, 2018.

JOSEPH S. CORTESE II
WORKERS' COMPENSATION
COMMISSIONER

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