BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

EDUARDO JIMENEZ, Claimant, vs. JBS SWIFT, Employer, Self-Insured, Defendant.	FILED SEP 12 2016 WORKERS COMPENSATION	File No. 5052294 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Eduardo Jimenez, has filed a petition in arbitration and seeks workers' compensation benefits from, JBS Swift, self-insured employer, defendant.

Deputy workers' compensation commissioner, Stan McElderry, heard this matter in Des Moines, Iowa.

ISSUES

The parties have submitted the following issues for determination:

1. The extent of permanent disability from the injury arising out of and in the course of employment on February 27, 2013;

2. Temporary benefits; and

3. Benefit rate.

The parties did stipulate that the claimant was entitled to the temporary benefits claimed if the defendant was liable for the injury.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

The claimant was 56 years old at the time of hearing. He was born in Mexico and speaks only a few words in English. He is unable to read or write in any language, and he had only 3 years of elementary education in Mexico. His previous employment prior to the employment herein was in Mexico harvesting cactus and guava in season.

He went to work at JBS Swift on December 19, 2011 stacking boxes of meat weighing from about 10 to 105 pounds from ground level to his head.

On February 27, 2013 he suffered an injury that was stipulated to have arisen out of and in the course of his employment when he slipped on ice and injured his right shoulder while leaving work from a "scanner" position. He went to the Marshalltown hospital. (Exhibit 2)

On March 1, 2013 the claimant was sent to Daniel C. Miller, D.O. (Ex. 3) Dr. Miller ordered an MRI and medication. (Ex. 3, pages 13-15) The MRI was performed on March 15, 2013 and showed a minimally displaced fracture of the greater tuberosity with mild comminution and bursal side tearing of the anterior 2/3rds of the supraspinatus tendon. (Ex. 3, p. 16) The claimant was referred to Timothy Vinyard, M.D., an orthopaedic surgeon. (Ex. 5)

Dr. Vinyard noted that the fracture did not require surgery and performed an injection into the right shoulder. (Ex. 5, pp. 53-57) On June 4, 2013, Dr. Vinyard ordered work hardening. When that failed, Dr. Vinyard ordered a second MRI which showed a partial tear in the supraspinatus tendon and a tear in the superior aspect of the glenoid labrum. (Ex. 5, p. 70) Dr. Vinyard performed surgery on September 20, 2013. (Ex. 6, pp. 110-111) Post-operative diagnosis was right partial-thickness tear, right rotator cuff tear, superior labral anterior to posterior tear, proximal biceps tendinopathy, and shoulder impingement. (Ex. 6, pp. 111) Dr. Vinyard performed another injection to the right shoulder on February 18, 2014. (Ex. 5, pp. 87-90) A third MRI was performed on May 16, 2014. (Ex. 5, pp. 98-99)

The claimant had a functional capacity evaluation (FCE) on June 27, 2014. (Ex. 8) The results were considered valid and suggested ability to lift 100 pounds floor to waist occasionally, 70 pounds waist to crown occasionally, 100 pounds two-handed carrying occasionally, forward reaching constantly, and overhead lifting frequently. (Ex. 8) On August 19, 2014, Dr. Vinyard opined a 1 percent impairment to the right shoulder.

Sunil Bansal, M.D. performed an independent medical evaluation/examination (IME) on November 21, 2014. (Ex. 9) Dr. Bansal opined a 3 percent permanent right upper extremity impairment rating. He also agreed with the FCE restrictions except he further restricted overhead lift with right arm to 20 pounds. (Ex. 9, p. 136)

The restrictions imposed at first glance to not appear to be greatly limiting. However, they would exclude the claimant from all past relevant work even if the FCE restrictions are utilized over the more restrictive restrictions of Dr. Bansal. The claimant is still working in the "scanner" position. His testimony that he requires the help of co-workers with heavier boxes was unchallenged. With his very limited education, limited language skills, history of heavy work, and work restrictions from this injury, he would find it difficult to find employment if the JBS Swift employment were to end, or if the accommodations to remain in that job were eliminated. Considering the claimant's medical impairments, training, permanent restrictions, cognitive disorder, daily pain, as

well as all other factors of industrial disability, the claimant has suffered a 50 percent loss of earning capacity.

On the date of injury the claimant was married, and entitled to 3 exemptions. The claimant had no wages for the weeks ending January 13 and 20, 2013. Yet defendant would include those weeks as representative for an average weekly wage of $839.63 and a benefit rate of $562.59. Claimant would exclude those weeks and substitute the weeks ending November 11 and 18, 2012 for average weekly gross earnings of $871.60 and a weekly benefit rate of $581.42. Claimant was off work for the work injury from August 31, 2013 through May 23, 2014. The commencement date for permanent disability was stipulated as May 24, 2014.

REASONING AND CONCLUSIONS OF LAW

The first issue is the extent of permanent disability.

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 Elec. 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).

Based on the finding that the claimant has suffered a 50 percent loss of earning capacity, he has sustained a 50 percent permanent partial industrial disability entitling him to 250 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Temporary benefits.

Since this decision finds and concludes that the defendant is liable for the work injury, the stipulation that the healing period/temporary benefits are for August 31, 2013 through May 23, 2014 is in effect.

Rate.

Under section 85.36, the gross weekly earnings of an employee who has worked for the employer for the full 13 calendar weeks immediately preceding the injury are determined by looking at the earnings over those 13 weeks, unless the wages do not fairly and accurately reflect the employee's customary earnings. See Griffin Pipe Products Co. v. Guarino, 663 N.W.2d 862 (Iowa 2003).

Including two weeks where no pay was earned does not accurately and fairly reflect the claimant's customary earnings. Those weeks ending January 13 and 20, 2013 must be excluded. The claimant's calculations in an attachment to the hearing report, which excludes those weeks and substitutes the weeks ending November 11 and 18, 2012, are correct. The claimant's average gross earnings were $871.60 per

week. He was married and entitled to 3 exemptions on the date of injury; as such, his weekly benefit rate is $581.42.

ORDER

THEREFORE IT IS ORDERED:

That the defendant shall pay the claimant healing period benefits from August 31, 2013 through May 23, 2014 at the weekly rate of five hundred eighty-one and 42/100 dollars ($581.42).

That the defendant shall pay the claimant two hundred fifty (250) weeks permanent partial disability commencing May 24, 2014 at the weekly rate of five hundred eighty-one and 42/100 dollars ($581.42).

Costs are taxed to the defendant pursuant to rule 876 IAC 4.33.

Accrued benefits shall be paid in lump sum together with interest pursuant to Iowa Code Section 85.30 with subsequent reports of injury pursuant to rule 876 IAC 3.1.

Signed and filed this 12th day of September, 2016.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

James C. Byrne
Attorney at Law
1441 – 29th St., Ste. 111
West Des Moines, IA 50266-1309
jbyrne@nbolawfirm.com

Mark A. King
Attorney at Law
505 – 5th Ave., Ste. 729
Des Moines, IA 50309-2318
mking@pattersonfirm.com

SRM/srs

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.