BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DAVID PASTERSKI,

Claimant,

vs.

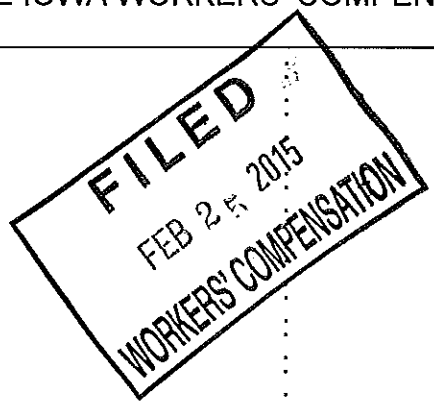
FRITOLAY, INC.,

Employer,

and

ACE INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.



File No. 5044852

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, David Pasterski, has filed a petition in arbitration and seeks worker's compensation benefits from FritoLay, Inc., employer, and Ace Indemnity Insurance Company of North America, insurance carrier, defendants.

Deputy Workers' Compensation Commissioner, Stan McElderry, heard this matter in Cedar Rapids.

ISSUE

The parties have submitted the following issue for determination:

The extent of permanent disability from the work injury of August 11, 2011.

FINDINGS OF FACT

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

The claimant was 62 years old at the time of hearing. Due to an injury suffered as a child, the claimant has no right eye. He is a high school graduate and attended two years of college. His first job was with Endicott-Johnson/Nobil Shoes where he worked from 1973 until 1993. When he left that employment he had reached the level of district manager where he oversaw 6 stores and approximately 20 employees. He

then worked a few months at Marion Plastics boxing parts on a factory line. He began working for FritoLay/Pepsi as a route sales representative in 1993 and worked until 2012. As of the date of hearing the claimant was still considered an employee, but not working. As a route sales representative the claimant usually worked about 50 hours and 6 days per week. The position involved ordering product, keeping inventory, organizing product, and loading and unloading his truck, to service 16 stores on his route.

On August 11, 2011, the claimant suffered a stipulated injury arising out of and in the course of his employment with FritoLay/Pepsi when he fell between the back of his truck and a delivery dock. After working another hour or so he went home. At home the pain became severe enough that he went to his personal physician Timothy Sagers, M.D. After the claimant reported the injury to the company the next day an appointment was scheduled with Mark Taylor, M.D. The claimant was eventually referred to orthopedic surgeon Sandeep Munjal, M.D. Dr. Munjal recommended a total leg hip replacement. Claimant wanted a second opinion because of his desire to return to work. Nicolas Noiseux, M.D. provided the second opinion and agreed with Dr. Munjal. The claimant then scheduled the surgery with Dr. Munjal. Before the surgery was performed the claimant heard of a less invasive total hip replacement technique that he thought might give him a greater chance of returning to work.

John Nettrour, M.D. recommended total hip replacement on December 21, 2011. He performed the hip replacement with the less invasive technique on March 1, 2012. (Exhibit 6, page 1) During his recovery he performed some seated light duty work in the FritoLay break room. (Ex. 6, p. 4) In May of 2012 the claimant tried to transition back to his previous job, but the stress on his hip was too great. He was eventually removed from work, as it was too much stress on the hip and slowing recovery. He did not return. On October 4, 2012 Physical Therapist Todd Neighbor stated: "I do not believe that he would be able to return to work full duty due to his hip replacement." (Ex. 7, p. 38)

The claimant underwent a functional capacity evaluation (FCE) on February 13, 2013. (Ex. 9) The FCE placed the claimant in the medium-heavy work category. It also found that he could not demonstrate all the ability to meet the essential physical demands of the route sales representative; mainly "inability to reach and/or perform a 2-hand occasional lift from less than a 9" height." (Ex. 9, p. 2)

On April 10, 2013 Dr. Nettrour imposed permanent restrictions of lifting over 70 pounds, no repetitive kneeling or stooping. (Ex. 5, p. 27) On June 28, 2013 Dr. Nettrour opined a 37 percent lower extremity impairment, which equates to 15 percent body as a whole (BAW) due the hip injury. (Ex. 5, p. 29) He also confirmed the claimant's inability to lift at low level. (Ex. 5, p. 29)

Dr. Taylor performed an independent medical evaluation (IME) on the claimant at claimant's counsel's request on December 5, 2013. (Ex. 10) Dr. Taylor opined that the

claimant's "prognosis for unrestricted return to work is nil." (Ex. 10, p. 8) He opined an MMI date of April 10, 2013 and opined permanent restrictions including 50-pound lift between knee and chest on a rare to occasional basis; avoid any lifting below knee level; lift no more than 30 pounds above shoulders on an occasional basis; must have option to alternate walking, standing, and sitting; avoid ladders; avoid uneven surfaces. (Ex. 10, pp. 9-10) He agreed with the impairment rating of Dr. Nettrour. (Ex. 10, p. 9)

The claimant has not sought any additional work since FritoLay. He is receiving short and long-term disability (including health insurance) that he would lose if he found other employment, and FritoLay on more than one occasion told the claimant they were trying to find him a position within his restrictions. They have failed to do so. Nor have vocational or rehabilitative services been offered.

Given claimant's efforts to return to work with FritoLay, he is not unmotivated. Financially, his decision to not look for work outside of FritoLay appears sound. FritoLay's inability to return the claimant to some position utilizing his skills evidences a large degree of industrial loss. However, that loss is not total, by either an odd lot or traditional analysis. The restriction of alternate walking, sitting, and standing is perhaps the most restrictive imposed herein on the claimant's industrial ability, as noted by Barbara Laughlin, M.A. (Ex. 11) Given the claimant's pain, claimant's medical impairment, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 60 percent loss of earnings capacity.

On the date of injury, based on the claimant's gross earnings, married status, and entitlement to two exemptions, his weekly benefit rate is $689.66. The parties stipulated that the commencement date for permanency benefits is April 10, 2013.

REASONING AND CONCLUSIONS OF LAW

Permanent disability.

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.2d 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 60 percent loss of earning capacity, she has sustained a 60 percent permanent partial industrial disability entitling him to 300 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

ORDER

Therefore it is ordered:

That the defendants pay the claimant three hundred (300) weeks of permanent partial disability commencing April 10, 2013 at the weekly rate of six-hundred eighty-nine and 66/100 dollars ($689.66).

Defendants shall receive credit for all benefits previously paid.

Costs are taxed to the defendants pursuant to 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 25th day of February, 2015.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

David A. O'Brien
Attorney at Law
3519 Center Point Rd. N.E.
Cedar Rapids, IA 52402
dobrien@willeylaw.com
dave@daveobrienlaw.com

Timothy W. Wegman
Attorney at Law
6800 Lake Dr., Ste. 125
West Des Moines, IA 50266
tim.wegman@peddicord-law.com

SRM/sam

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.