BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THEODORE J. MALGET, Claimant, vs. JOHN DEERE WATERLOO WORKS, Self-Insured Employer, Defendant.	File No. 5048441 A R B I T R A T I O N D E C I S I O N Head Note No: 1803

STATEMENT OF THE CASE

Claimant, Theodore Malget, has filed a petition in arbitration and seeks worker's compensation benefits from John Deere Waterloo Works, self-insured employer, defendant.

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

ISSUES

The parties have submitted the following issues for determination:

1. Whether the injury of September 8, 2011, resulted in any permanency and if so, the extent;
2. Medical Expenses; and
3. Alternate Care.

FINDINGS OF FACT

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

The claimant was 64 years old at the time of hearing. He is a high school graduate and attended six months of electrical technology courses before entering the Air Force. He is a veteran. While in the Air Force the claimant took a number of electrical related classes. After discharge from the Air Force after just over 4 years, the

claimant took a position at the Donaldson Company for approximately 25 years. The last decade he was the facility manager. When Donaldson closed he went to Parr Manufacturing for about six months in a managerial position. He then went to Exide where he worked a managerial position for about a year. He went to work for John Deere in 2001. His positions at John Deere were largely spent in managerial and office settings. There was some physical work involved, though substantially less than claimant testified to.

On September 8, 2011, the claimant suffered a stipulated injury arising out of and in the course of his employment with John Deere Waterloo Works when he fell to a concrete floor onto his back when the ladder he was on collapsed. He was initially directed to the nurse's station and then sent to Allen Memorial Hospital in Waterloo, Iowa. He reported acute back pain radiating into his left thigh. (Exhibit 2, page 7) It was noted that claimant had no prior history of back injury.

Robert Broghammer, M.D., imposed restrictions and recommended physical therapy. (Ex. 2, p. 8) When the therapy did not relieve claimant's pain, an MRI was ordered. The MRI showed a severe compression at L4 with a burst fracture and facet arthropathy bilaterally at L3-4 and L4-5. (Ex. 2, p. 8) The claimant was referred to Russell L. Buchanan, M.D., a neurosurgeon, who evaluated the claimant on October 10, 2011. (Ex. 2, p. 8) Dr. Buchanan diagnosed a L4 burst fracture with subsequent spinal stenosis. (Ex. 2, p. 8) Dr. Broghammer ordered a new MRI which was unchanged from the first. In a follow-up appointment with Dr. Buchanan on January 26, 2012, the claimant reported no improvement in the location or severity of his pain.

On February 24, 2012, the claimant obtained an opinion regarding his back from Chad Abernathey, M.D., neurosurgeon. Dr. Abernathy described the fracture as stable and without neurological deficit. On February 28, 2012, Dr. Broghammer increased the 25 pound lifting restriction he had imposed earlier to 40-50 pounds. A TENS unit was prescribed on April 17, 2012. Claimant last saw Dr. Broghammer on November 13, 2012. At that time Dr. Broghammer stated the fracture was healed and that the claimant's problem was now chronic. A restriction of sit as needed was provided.

The claimant was sent by his attorney for an independent medical evaluation with Ray F. Miller, M.D. (Ex. 2) Dr. Miller opined a 23 percent body as a whole (BAW) impairment from the back injury. (Ex. 2, p. 12) Dr. Miller recommended restrictions of being on feet limited to 5 minutes, no lifting below knees or above shoulders, lift 30 pounds at knee to waist and 50 pounds waist to shoulder level, 2 handed push/pull 80 pounds occasionally with sustained efforts at 35 pounds, overhead work with light parts limited to 30-45 seconds occasionally, waist level transfers limited to 50 pounds, carry 30-40 pounds occasionally at waist level for maximum of 20 feet, walking of a maximum of 100-150 yards, vertical fixed ladder climb of 10-12 rungs without carrying any weight. (Ex. 2, p. 12)

Kent Jayne, vocational expert, provided a vocational assessment of the claimant. (Ex. 3) The preliminary report is dated December 24, 2013, and the supplemental

report is dated December 12, 2014. The ultimate conclusion was "given the new information as understood, we are further convinced that Mr. Malget remains incapable of obtaining employment in any reasonably stable branch of the labor market. Secondary to his limitations as a result of injury, Mr. Malget has been wholly disabled from performing work that his pre-injury abilities would have otherwise allowed. At hearing claimant testified that he had not informed Mr. Jayne that his position at John Deere was about 75 percent office and managerial work. Claimant has no difficulty sitting for extended periods of time, useful in office and managerial jobs, as he evidenced at hearing. This is also confirmed by several road trips for vacations since.

The claimant's last day of work at John Deere was May 16, 2014. Claimant testified that the retirement was due to being unable to continue due to pain from the work injury. However, his retirement was on a non-occupational disability plan at his request. The claimant had worked for over 2-1/2 years in a position post-injury that was consistent with his restrictions and he was making more than he had pre-injury. He has applied for no paying jobs post-retirement. However, he is a city councilman for the City of Oelwein and is involved in planning and analyzing projects relevant to a budget of approximately 12 million dollars per year.

Claimant has requested an odd-lot award. The claimant is not an odd-lot. He has not looked for work post-retirement. His retirement was voluntary. He retains managerial skills as evidenced by his position with the City of Oelwein. He has physical restrictions and impairment. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a fifty percent loss of earnings capacity.

On the date of injury, based on the claimant's gross earnings, married status, and entitlement to 2 exemptions, his weekly benefit rate is $700.70. Claimant also seeks alternative medical care of ongoing pain medications. Claimant also seeks payment of medical expenses as detailed in exhibit 18.

REASONING AND CONCLUSIONS OF LAW

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 R. App. P. 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.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 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).

The next issue is that of medical expenses for the work injury.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-reopen October 16, 1975).

Claimant seeks payment of medical bills associated with treatment of his back injury. Those expenses were for treatment of the claimant's back injury which I found arose out of and in the course of employment. The bills are itemized in exhibit 18. The listed expenses were fair and reasonable, and necessary for the treatment of the work injury herein. The defendants are responsible for those expenses.

Next is alternative medical care.

Under Iowa law, the employer is required to provide care to an injured employee and is permitted to choose the care. Pirelli-Armstrong Tire Co. v. Reynolds, 526 2 N.W.2d 433 (Iowa 1997).

> [T]he employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App .P 14(f)(5); Long v. Roberts Dairy Co., 528 N.W.2d 122 (Iowa 1995). Determining what care is reasonable under the statute is a question of fact. Id. The employer's obligation turns on the question of reasonable necessity, not desirability. Id.; Harned v. Farmland Foods, Inc., 331 N.W.2d 98 (Iowa 1983). In Pirelli-Armstrong Tire Co. v. Reynolds, 562 N.W.2d 433 (Iowa 1997), the court approvingly quoted Bowles v. Los Lunas Schools, 109 N.M. 100, 781 P.2d 1178 (App. 1989):

> [T]he words "reasonable" and "adequate" appear to describe the same standard.
>
> [The New Mexico rule] requires the employer to provide a certain standard of care and excuses the employer from any obligation to provide other services

only if that standard is met. We construe the terms "reasonable" and "adequate" as describing care that is both appropriate to the injury and sufficient to bring the worker to maximum recovery.

The commissioner is justified in ordering alternate care when employer-authorized care has not been effective and evidence shows that such care is "inferior or less extensive" care than other available care requested by the employee. Long; 528 N.W.2d at 124; Pirelli-Armstrong Tire Co.; 562 N.W.2d at 437.

Claimant requires further treatment that defendants are not providing. The alternative medical care is granted.

ORDER

THEREFORE IT IS ORDERED:

That the defendant pay the claimant two hundred fifty (250) weeks permanent partial disability commencing September 8, 2011, at the weekly rate of seven hundred seventy and 70/100 dollars ($700.70).

That the alternative care request is granted as detailed above.

Defendant shall pay/reimburse as appropriate medical expenses as detailed above.

Defendant shall receive credit for all benefits previously paid. September 8, 2011, when claimant was paid his full wages is also credited.

Costs are taxed to the defendant 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 5th day of August, 2015.

STAN McELDERRY
DEPUTY WORKERS'
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