BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

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| JOSEPH R. BECKMANN, | FILED | |
| Claimant, | MAR 17 2015 | File No. 5047087 |
| vs. | WORKERS COMPENSATION | ARBITRATION |
| JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY, | | DECISION |
| Employer, Self-Insured, Defendant. | | Head Note No.: 1803 |

STATEMENT OF THE CASE

Claimant, Joseph R. Beckmann, has filed a petition in arbitration and seeks workers' compensation benefits from John Deere Dubuque Works of Deere & Company, 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 work injury of December 23, 2008; and

2. Gross earnings.

FINDINGS OF FACT

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

The claimant was 65 years old at the time of hearing. He is a high school graduate and attended some college. He is a veteran, having spent 4 years in the United States Navy. The claimant began employment with John Deere in 1972 and after an 8,000 hour apprenticeship became an electrician. He last worked for Deere on December 31, 2009.

On December 23, 2008, the claimant suffered a stipulated injury arising out of and in the course of his employment with John Deere when he injured his neck and left shoulder when he clipped a guard rail with his body and up-ended.

Medical care was provided by Scott Cairns, M.D. Eventually Dr. Cairns performed a surgical repair of the acromioclavicular (AC) joint and the torn rotator cuff. Dr. Cairns opined a 7 percent body as a whole (BAW) impairment for the left shoulder and 6 percent for the neck for a combined 13 percent BAW impairment. (Exhibit 2, page 7) Dr. Cairns had the claimant undergo a functional capacity evaluation (FCE). (Ex. B) The FCE showed a light to light-medium work classification ability for the left shoulder. (Ex. 5, p. 26) Primary shoulder weakness was in extension. (Ex. 5, p. 27)

An independent medical evaluation (IME) was provided by Mark Taylor. M.D. (Ex. 6, Ex. D) Dr. Taylor opined a combined impairment of 13 percent BAW. (Ex. D, p. 34) Restrictions he opined include a 35 pound lifting limit for floor to waist, 30 pounds waist to chest, and 20 pounds or less above chest level. (Ex. D, p. 34)

John Deere's doctor, Dr. Luke, reviewed the FCE. Based on the FCE, he imposed work restrictions of no lifting more than 18 inches from the body, no work overhead with left arm, and no work more than 18 inches from chest with left arm/hand. (Ex. 4, p. 25)

The claimant has not sought much, if any, additional work since John Deere. He and his wife are serious gardeners on their 1-1/2 acre home lot on the Mississippi River bluffs north of Dubuque. He continues to perform his own lawn and snow removal work. He has stained his home's deck since retirement. He walks regularly in warm weather and goes to a fitness club in cold weather.

Given the claimant's pain, claimant's medical impairment, training, permanent restrictions, lack of motivation to return to work, as well as all other factors of industrial disability, the claimant has suffered a 25 percent loss of earning capacity

The parties stipulated that the commencement date for permanency benefits is January 4, 2010. On the date of injury the claimant was married and entitled to 2 exemptions. Claimant asserts gross average weekly earnings of $1,606.00 for a weekly rate of $962.85. The employer asserts gross weekly average earnings of $1,330.53 for a weekly benefit rate of $815.43. The difference in the parties' calculations is whether certain bonuses and other payments should be included or not. Claimant asserts that his shift differential pay, paid vacation bonus, Christmas bonus, annual lump sum payment, and profit-sharing payment should be included.

## 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. 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 25 percent loss of earning capacity, he has sustained a 25 percent permanent partial industrial disability entitling him to 125 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

Gross earnings.

For years, Noel v. Rolscreen, 475 N.W.2d 666, 668 (Iowa App. 1991) in consideration of whether a bonus is to be considered regular or irregular, was the precedent. The division's interpretation of the very-limited scope of the Noel decision was later affirmed by the Iowa Supreme Court, which held that the division should not

be handcuffed to such a limited inquiry as afforded by Noel but should be afforded a greater ability to apply the law to the facts of each individual case. Burton v. Hilltop Care Center, 813 N.W.2d 250 (Iowa 2012). In Burton the Supreme Court held that the division, as trier of fact, should not be handcuffed to a limited inquiry, but should be afforded a greater ability to apply the law to the facts of each individual case in order to most accurately determine the gross-wages used to calculate the average weekly wage and rate of compensation under Iowa Code section 85.36.

Iowa Code section 85.36 describes the basis for calculating an employee's compensation rate. "The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." Iowa Code section 85.36.

> In the case of an employee who is paid on a daily or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of the employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. If the employee was absent from employment for reasons personal to the employee during part of the thirteen calendar weeks preceding the injury, the employee's weekly earnings shall be the amount the employee would have earned had the employee worked when work was available to other employees of the employer in a similar occupation. A week which does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week with earnings that fairly represent the employee's customary earnings.

Iowa Code section 85.36(6).

The Continuous Improvement Pay Plans (CIPP) and profit-sharing bonuses have regularly over a number of years been found to be part of the customary and average wages for John Deere employees. The undersigned first faced the issue in Hammersley v. John Deere Des Moines Works, File Nos. 1282734, 1282735, 1282736 (Arb. Dec. September 25, 2003) for example. Shift differential payments are included by statute. Exclusion of the shift differential, bonuses and other pay would fail to replicate the true income of the claimant. As such, defendant's argument fails, as it has before. The gross earnings are $1,606.00 for a weekly rate of $962.85.

ORDER

THEREFORE IT IS ORDERED:

That the defendant pay the claimant one hundred twenty-five (125) weeks of permanent partial disability commencing January 4, 2010 at the weekly rate of nine hundred sixty-two and 85/100 dollars ($962.85).

Defendant shall receive credit for all benefits previously paid.

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 17th day of March, 2015.

STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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**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.