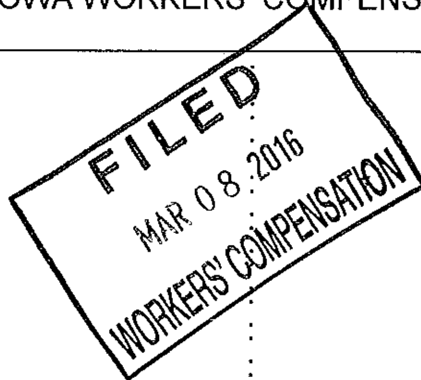
BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER



MIKE BISSELL, Claimant, vs. HY-VEE, Employer, and EMC INS. CO., Insurance Carrier, Defendants.	File No. 5048967 ARBITRATION DECISION Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Mike Bissell, has filed a petition in arbitration and seeks worker's compensation benefits from, Hy-Vee, employer, and EMC Ins. Co., insurance carrier, defendants.

Deputy Workers' Compensation Commissioner, Stan McElderry, heard this matter in Council Bluffs, Iowa.

ISSUE

The parties have submitted the following issue for determination:

The extent of permanent industrial loss from an injury arising out of and in the course of employment on or about January 7, 2011.

FINDINGS OF FACT

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

The claimant was 58 years old at the time of hearing. The claimant did graduate high school. He began working for Hy-Vee in 1973 while still in high school and as of the date of the hearing was still working for a Hy-Vee. He became a full-time meat cutter in about 1975 in Ottumwa, Iowa. He then worked that position in Sioux City and Council Bluffs, Iowa. He became a meat department/market manager in about 1983

and was the manager or assistant manager in various Hy-Vee stores in the Omaha/Council Bluffs area until 2014 when he took a demotion to meat specialist.

He suffered a stipulated injury arising out of and in the course of his employment with Hy-Vee on or about January 7, 2011 when he injured his left shoulder moving frozen turkeys. Initial treatment was at Allegiant Occupational Medicine in Council Bluffs, Iowa where physical therapy and cortisone shots were tried. Following an MRI the claimant was referred to Michael Gross, M.D., an orthopedic specialist for evaluation. Dr. Gross performed a partial left shoulder replacement on September 7, 2011. The claimant did not really see any improvement from the surgery and continued to have loss of range of motion, weakness, and pain. The claimant was eventually sent to Steven X. Goebel, M.D., for a second opinion. Dr. Goebel recommended a full shoulder replacement which was finally performed on February 5, 2013.

The claimant testified credibly that the surgery did somewhat decrease his pain and increase his range of motion, but essentially no strength was regained. Dr. Goebel released the claimant on September 9, 2013 and opined a permanent impairment rating of 30 percent of the left upper extremity. (Exhibit 4, page 24) He imposed no formal restrictions.

The claimant was a very credible witness. His body movements, eye contact, cadence of testimony, speech patterns, general demeanor, and general consistency were all consistent with a very credible witness. The claimant testified that he stepped down from the meat manager position at about $1,200.00 per week in October of 2014 to a meat specialist position at about $880.00 per week to reduce job stress, spend more time at home, and because his shoulder was not getting better and was impairing his ability to perform job tasks. Further, the claimant was credible in his testimony of ongoing pain, loss of strength, and loss of range of motion in his left shoulder.

Claimant is a long-term and motivated employee who converted a high school job into a lifetime career and achieved a management level that he was successful at. Knowing better than anyone his abilities and the responsibilities and duties in a Hy-Vee Meat Department he voluntarily stepped down in position and pay at last in part due to the work injury. He earns less than 75 percent of what he did before. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 50 percent loss of earnings capacity.

On the date of injury the claimant was married, entitled to two exemptions, and had gross earnings of $1,200.00 per week. As such, his weekly benefit rate is $759.20. The parties stipulated that the commencement date for permanent partial disability was September 9, 2013.

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 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.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).

ORDER

Therefore it is ordered:

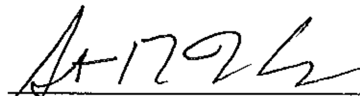
That the defendants shall pay the claimant two hundred fifty (250) weeks of permanent partial disability commencing September 9, 2013 at the weekly rate of seven hundred fifty-nine and 20/100 dollars ($759.20).

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 8th day of March, 2016.



STAN MCELDERRY
DEPUTY WORKERS'
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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.