BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES MORGAN,

Claimant,

vs.

BBU, INC. f/k/a SARA LEE,

Employer,

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Insurance Carrier,
Defendants.

File No. 5048083

ARBITRATION DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, James Morgan, has filed a petition in arbitration and seeks workers' compensation benefits from BBU, Inc. f/k/a Sara Lee, employer, and Indemnity Insurance Co. North America, insurance carrier, defendants.

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

ISSUE

The parties have submitted the following issues for determination:

1. The extent of permanent disability from the work injury of April 6, 2012.

FINDINGS OF FACT

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

The claimant was 66 years old at the time of hearing. He is a high school graduate and took about 5 semesters of community college classes. He is also a Vietnam War veteran. His work history is almost entirely in the baking industry,

including employment at Rainbow Baking Company, Old Country Bakery, and BBU f/k/a Sara Lee. His last position at BBU was as a division sales manager.

On or about April 6, 2012, the claimant suffered a stipulated injury arising out of and in the course of his employment with BBU when he slipped or stumbled down stairs and stopped the fall by grabbing the guard rail with his left hand. (Exhibit 8, page 3) As a result, the claimant injured his left shoulder. The employer sent the claimant to see Kenneth McMains, M.D., at Allen Occupational Health. (Ex. 1, pp. 3-5) An MRI was scheduled and conducted on May 21, 2012. The MRI showed a large full-thickness rotator cuff tear. (Ex. 2, p. 1) On August 3, 2012, the claimant was evaluated by David Tearse, M.D. Dr. Tearse described the tear as significant and not easily repaired by surgical intervention. An X-Ray taken on August 3, 2012 showed a Type II acromion with mild degenerative changes of the acromioclavicular (AC) joint. On August 23, 2012, Dr. Tearse performed a left shoulder arthroscopy, subacrominal decompression with extensive debridement, and mini open repair of massive rotator tear cuff tear on claimant's left shoulder. (Ex. 4, p. 6)

On June 10, 2013, Dr. Tearse placed the claimant at maximum medical improvement (MMI). (Ex. 4, pp. 9-10) Permanent restrictions of rare lifting of no more than five pounds to shoulder level and no lifting above that with the left arm were imposed. (Ex. 4, pp. 9-10) On August 29, 2013, Dr. Tearse opined a body as a whole (BAW) impairment of eight percent due to the left shoulder injury. (Ex. 4, p. 11)

The claimant had a functional capacity evaluation (FCE) on November 4, 2013. (Ex. 6) The FCE was considered valid and placed the claimant in the light category of work with lifting up to 35 pounds on a rare basis and 20 pounds in a front carry task on an occasional basis. (Ex. 6, p. 2)

On March 2, 2014, the claimant was seen by Robin Sassman, M.D., at claimant's counsel's request for an independent medical evaluation (IME). (Ex. 7) Dr. Sassman opined a 7 percent BAW impairment. (Ex. 7, p. 7) She also recommended permanent restrictions of 20 pounds occasionally floor to waist, 20 pounds occasionally waist to shoulder, 5 pounds rarely over shoulder level, limit gripping and grasping at or below shoulder height on an occasional basis. (Ex. 7, p. 7)

The claimant has not sought much additional work since working last at BBU. BBU, on more than one occasion, told the claimant they were trying to find him a position within his restrictions, and provided website instructions for applications for in-house positions. Some vocational services have been offered. (Ex. 10)

BBU, Inc.'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 very limited or no overhead lifting is perhaps the most restrictive imposed herein on the claimant's industrial ability. The claimant has supervisory and people skills that are transferable. 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 50 percent loss of earning capacity

On the date of injury, based on the claimant's gross earnings, single status, and entitlement to one exemption, his weekly benefit rate is $686.49. The parties stipulated that the commencement date for permanency benefits is June 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. 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 pay the claimant two hundred fifty (250) weeks of permanent partial disability commencing June 10, 2013 at the weekly rate of six hundred eighty-six and 49/100 dollars ($686.49).

Defendants shall receive credit for all benefits previously paid.

Costs are taxed to the defendants 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 4th 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.