

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

STEVEN POWELL,

Claimant,

vs.

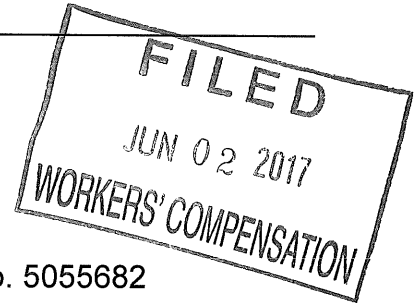
SMITH FERTILIZER & GRAIN,

Employer,

and

NATIONWIDE AGRIBUSINESS
INSURANCE COMPANY,

Insurance Carrier,
Defendants.



File No. 5055682

ARBITRATION

DECISION

Head Note No.: 1803

STATEMENT OF THE CASE

Claimant, Steven Powell, has filed a petition in arbitration and seeks worker's compensation benefits from Smith Fertilizer & Grain, employer, and Nationwide Agribusiness Insurance Company, insurance carrier, defendants.

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

ISSUES

The parties have submitted the following issues for determination:

The extent of permanent disability from the injury arising out of and in the course of employment on or about December 9, 2015.

The parties filed a hearing report at the commencement of the arbitration hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this arbitration decision and no factual or legal issues relative to the parties' stipulations will be raised or discussed in this decision. The parties are now bound by their stipulations.

FINDINGS OF FACT

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

The claimant was 60 years old at the time of hearing. He is a high school graduate and has an AA in agriculture business. His previous work history includes approximately 32 years in the agriculture industry, primarily grain elevators. Even management jobs in the grain elevator business include manual labor. He began work for the employer herein on August 10, 2015 at their Centerville, Iowa location. That position involved maintenance, dumping grain trucks, loading trucks, and cleaning.

On or about December 9, 2015 the claimant suffered a stipulated injury arising out of and in the course of his employment when he was helping his manager clear a clogged bin. Claimant stepped on the area where the inspection lid had been removed and fell. He last worked for the employer on December 23, 2015 when it was agreed he could not work at the elevator in his current condition.

Conservative care was first provided for the knee and shoulder injury. On March 30, 2016 surgery was performed by Bradley Scott, D.O., for repair of a type 4 superior labrum anterior and posterior tear, high grade partial thickness rotator cuff tear, and small partial thickness tear involving the anterior leading edge of the subscapularis. (Exhibit 4, page 27) On January 10, 2017, Dr. Scott thought the claimant was at maximum medical improvement (MMI) but maintained restrictions until a functional capacity evaluation (FCE) could be obtained.

Two FCE's are in the record. The February 7, 2017 FCE found the claimant at the sedentary level with 10 pound lift up to waist, and no lifting above the waist. (Ex. 7, p. 45) The other FCE was on February 23, 2017 and placed the claimant in the light work category with a two-hand lift limit of 15 pounds. (Ex. 8, p. 60) The examiner also noted knee pain which interrupted performance, but focused on the shoulder injury. Both FCE's are damning to the claimant's residual industrial capacity.

The claimant underwent an independent medical evaluation with Sunil Bansal, M.D., on March 3, 2017. (Ex. 9) Dr. Bansal opines an 8 percent body as a whole impairment. (Ex. 9, p. 87) He also adopted the sedentary restriction of the February 7, 2017 FCE. (Id.) It is so found.

Claimant is unable to return to any relevant past employment. He is an older worker who would require training and assistance to return to the workforce. But the loss of industrial capacity is not yet total, but is very substantial. Considering the claimant's medical impairments, training, permanent restrictions, as well as all other factors of industrial disability, the claimant has suffered a 70 percent loss of earnings capacity.

On the date of injury the claimant had gross weekly earnings of \$1,058.00, was married, and entitled to 2 exemptions. As such, his weekly benefit rate is \$666.60. The commencement date for permanent benefits was stipulated as February 21, 2017.

REASONING AND CONCLUSIONS OF LAW

The only issue is extent of permanent disability for the injury.

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 Electric 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. 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 70 percent loss of earning capacity, he has sustained a 70 percent permanent partial industrial disability entitling him to 350 weeks of permanent partial disability pursuant to Iowa Code section 85.34(2)(u).

ORDER

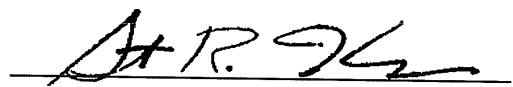
THEREFORE IT IS ORDERED:

That the defendants pay claimant three hundred fifty (350) weeks of permanent partial disability at the weekly rate of six hundred sixty-six and 60/100 dollars (\$666.60) commencing February 21, 2017.

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 2nd day of June, 2017.


STAN MCELDERRY
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

Copies To:

Randall Schueller
Attorney at Law
1311 – 50th St
West Des Moines, IA 50266
randy@loneylaw.com

Michael D. Reisbig
Attorney at Law
2120 South 72nd Street, Ste 640
Omaha, NE 68124
reisbm1@nationwide.com

SRM/kjw

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.

Let the record reflect, this is a hearing before the Iowa Workers' compensation Commissioner, Deputy Stan McElderry presiding.

Claimant, Steven Powell, has filed a petition seeking workers' compensation benefits from Smith Fertilizer & Grain employer, and Nationwide Mut. Ins. Co., Insurance carrier, as defendants.

The claimant appears personally and by attorney, Randall Schaeffer.

The defendant appears by attorney, ~~Doc Stein~~ Michael Reisbig.

The agency file numbers in this matter is 5055682.

In accordance with agency scheduling procedures, this matter commences on 4/25, 2017, in DSM,

Iowa.

At this time I appoint Roxanne Rigby, certified shorthand reporter, as the official reporter and custodian of the notes of this proceeding.

I have reviewed the pre-hearing report submitted by the parties. At this time I'll briefly go over the report to make certain I understand the issues the parties want decided. (GO OVER REPORT)

Are there any other pre-hearing matters that need to be addressed at this time.

(Exhibits).

DOB

on SSD

(Go to claimant's first witness).