BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHAD UHLENHOPP, Claimant, vs. IOWA DEPT. OF TRANSPORTATION, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 5058838.01 REVIEW-REOPENING DECISION Head notes: 1302.1; 1402.40; 1802; 2905

STATEMENT OF THE CASE

Claimant Chad Uhlenhopp filed a petition for review-reopening seeking worker's compensation benefits against the Iowa Department of Transportation and State of Iowa, self-insured employer, for an accepted work injury date of February 29, 2016. The case came before the undersigned for hearing on August 4, 2022. The case proceeded to a live video hearing via Zoom, with all parties and the court reporter appearing remotely. The hearing proceeded without significant difficulties.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 6, Claimant's Exhibits 1 through 5, and Defendants' Exhibits A through I.

Claimant testified on his own behalf. The evidentiary record closed at the conclusion of the evidentiary hearing on August 4, 2022. The parties submitted post-hearing briefs on September 2, 2022, and the case was considered fully submitted on that date.

ISSUES

1. Whether claimant has established a substantial change in condition sufficient to justify reopening of the October 15, 2018 agreement for settlement;

2. Whether claimant is entitled to temporary disability and/or healing period benefits from November 16, 2018 to February 21, 2019;

3. Whether claimant is entitled to additional permanent disability benefits;

4. Whether claimant is entitled to reimbursement for an independent medical examination (IME) under Iowa Code section 85.39;

5. Whether a credit is due under Iowa Code section 85.38(2);

6. Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13; and

7. Taxation of costs.

FINDINGS OF FACT

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

Claimant's testimony was consistent as compared to the evidentiary record, and his demeanor at the time of hearing gave the undersigned no reason to doubt his veracity. Claimant is found credible.

At the time of hearing, claimant was a 46-year-old person. (Hearing Transcript, p. 13) He lives in Hansell, Iowa, with his wife, two siblings, and an older child attending college. (Tr., pp. 12-13) He is a high school graduate, and attended some college but did not obtain a college degree. (Tr., pp. 13-14) In the past, claimant has worked at Fareway Grocery as a meat cutter; Woodharbor Cabinets on the assembly line; Curries, making frames for windows and doors; Northern Pipe, making sewer pipe and culverts; and the Iowa Department of Natural Resources as a general maintenance worker. (Tr., pp. 14-18)

In 2008, claimant was hired by the Iowa Department of Transportation (DOT) as a Highway Technician Associate. (Tr., p. 66) His job duties include general road maintenance, including sign and shoulder maintenance, plowing snow, as well as general building maintenance. (Tr., pp. 18-19) According to the position description questionnaire (PDQ) for his job, he might also be involved with mowing roadside shoulders, cutting trees and brush, repairing guardrails and fences, and multiple additional duties. (Claimant's Exhibit 2, p. 25) It also states he may occasionally lift, carry, push, and/or pull various amounts of force within the "heavy work" category, and

"team lift or mechanical assist" is recommended for weights over 75-pounds. (Cl. Ex. 2, p. 27)

Claimant sustained an injury while working on February 29, 2016. (Tr., p. 21) He was preparing to paint a floor, and while cleaning the floor he slipped and fell, driving his left shoulder into the concrete floor. He immediately felt pain across the back of his shoulder into his neck, as well as in the left side of his lower back into his left hip. (Tr., pp. 21-22) He reported the incident right away, and was sent for treatment the following day. (Tr., p. 22)

Claimant initially saw Howard Kim, M.D., at Healthworks Occupational Health. (Joint Exhibit 2, p. 5) He was given medication and temporary restrictions. (Jt. Ex. 2, pp. 5-6) Claimant testified that his initial treatment included medication and physical therapy, but nothing helped his symptoms. (Tr., p. 22) He also saw Christopher Morse, D.O. (Jt. Ex. 4, pp. 20-26) He was eventually referred for MRIs of his neck, low back, and left shoulder, after which he was referred to Eric Potthoff, D.O., for his shoulder. (Tr., pp. 22-23; Jt. Ex. 5, pp. 27-33)

Claimant initially saw Dr. Potthoff on September 15, 2016. (Jt. Ex. 5, p. 31) Dr. Potthoff noted claimant denied any previous pain or injury to his left shoulder. He also documented claimant's neck and back pain, and that he was seeing Ronald Kloc, D.O., for his back. He reviewed claimant's MRI and noted a labral tear. (Jt. Ex. 5, p. 32) He discussed continuing with conservative treatment versus arthroscopic surgery, and advised him to call if he decided to have the surgery.

Claimant ultimately had surgery with Dr. Potthoff on November 7, 2016. (Jt. Ex. 5, p. 34) At his follow up appointment the surgery was described as left shoulder arthroscopy with repair of posterior, anterior, and superior labrum. Claimant participated in physical therapy, and was eventually released at maximum medical improvement (MMI) for his shoulder on August 15, 2017. (Cl. Ex. 1, p. 4) At that time, Dr. Potthoff recommended no permanent restrictions for the left shoulder. On August 28, 2017, using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, he issued an impairment rating of 7 percent of the left upper extremity, which converted to 4 percent of the whole person. (Defendants' Exhibit I, p. 50) The rating was based on deficits in range of motion. Dr. Potthoff did not anticipate the need for any further treatment of the left shoulder at that time.

At the same time claimant was seeing Dr. Potthoff for his shoulder, he also saw Dr. Kloc for his low back. (Cl. Ex. 1, p. 3) Dr. Kloc provided at least three epidural steroid injections over the course of several months. (Cl. Ex. 1, pp. 3-4) Claimant also noted pain in his neck, but Dr. Kloc could not determine whether the pain was related to the shoulder injury or to a separate neck problem. (Cl. Ex. 1, p. 4; Jt. Ex. 3, p. 18) Dr. Kloc placed claimant at MMI for his back on February 14, 2017, and deferred to Dr. Potthoff with respect to restrictions. (Jt. Ex. 3, p. 19)

Claimant had an independent medical evaluation (IME) with Mark Taylor, M.D., which took place on January 24, 2018. (Cl. Ex. 1) Dr. Taylor's report is dated February 20, 2018. Dr. Taylor reviewed claimant's medical records and performed a physical examination. (Cl. Ex. 1, pp. 1-7) He noted claimant's symptoms at that time included shoulder pain when he extended his arm up or away from his body; neck stiffness and soreness on the left side and into the superior trapezius; and consistent low back pain, generally over the left low back, that occasionally radiates toward the left hip, buttock, and thigh. (Cl. Ex. 1, pp. 4-5) On physical examination, Dr. Taylor observed decreased range of motion in the left shoulder compared to the right. (Cl. Ex. 1, p. 6) He recorded the following measurements:

Shoulder Right/Left	**Flexion**	**Extension**	**Abduction**	**Adduction**	**Internal Rotation**	**External Rotation**
Value	175/140 degrees	60/40 degrees	170/110 degrees	40/35 degrees	70/40 degrees	95/70 degrees

He also recorded tenderness over various areas of the left shoulder, neck, and lower left lumbar spine. (Cl. Ex. 1, pp. 6-7)

Dr. Taylor agreed with Dr. Potthoff regarding the date of MMI. (Cl. Ex. 1, p. 8) Using the AMA Guides, he provided a 9 percent upper extremity impairment rating related to the left shoulder, which is equal to 5 percent of the whole person. He recommended a 6 percent whole person rating related to the lumbar spine. Finally, he recommended an additional 6 percent impairment related to the cervical spine. (Cl. Ex. 1, pp. 8-9) Using the combined values chart, he assigned total permanent impairment of 16 percent of the whole person. (Cl. Ex. 1, p. 9)

Dr. Taylor thought claimant might benefit from additional evaluation for his neck and back pain. He further recommended claimant continue with any home exercise he learned in physical therapy for his shoulder. Finally, with respect to restrictions, Dr. Taylor noted that claimant is "a strong individual" who had performed fairly physically demanding work for a number of years, but he had to alter how he performs his work activities. Therefore, he stated that as long as claimant was able to "continue in his current capacity and self-restrict when needed and/or obtain help if needed," he would more than likely be able to continue in his current position. However, he added that if claimant were to seek alternate employment, he would recommend lifting predominately occur only between knee and chest level, and he recommended no more than 20 pounds of force with the left arm above head level. (Cl. Ex. 1, pp. 9-10) He recommended most lifting activities occur with the left arm as close to his body as possible, and only rare to occasional overhead reaching with the left arm. (Cl. Ex. 1, p. 10)

On February 6, 2018, shortly after his IME with Dr. Taylor, claimant returned to Dr. Potthoff complaining of a return of pain in his left trapezius. (Jt. Ex. 5, p. 37) He said the pain started in his neck, and extended laterally toward the acromioclavicular (AC)

joint. He also stated that the shoulder itself felt good. On physical examination, Dr. Potthoff noted active range of motion to "maybe 150 degrees in abduction" on the left, versus 170 degrees on the right. He noted good strength and internal and external rotation. Radiographs showed no evidence of complication of his previous labral repair.

Dr. Potthoff opined that claimant's trapezius pain could be coming from his neck. (Jt. Ex. 5, p. 38) He stated claimant could have some degenerative disc disease of the cervical spine, or it could be postural from the way he was holding his shoulder. He recommended additional physical therapy. They also discussed which of claimant's work duties bring on the pain, including wood chipping and lifting over shoulder level. Based on that discussion, Dr. Potthoff assigned restrictions of no wood chipping, and no lifting, pushing, or pulling greater than 25 pounds at or above shoulder level with the left upper extremity. He had nothing additional to offer, and recommended further workup of the cervical spine if his pain continued.

The same day, claimant returned to Dr. Kloc for a follow up regarding his neck pain, but declined the trigger point injections that were offered as they had not been helpful previously. (Cl. Ex. 1, p. 13) Claimant also resumed physical therapy and sought out chiropractic care. He also saw David Beck, M.D., at Mercy Neurosurgery on February 14, 2018. (Def. Ex. H, p. 48) Dr. Beck reviewed claimant's previous MRI studies of his cervical, thoracic, and lumbar spine, and noted minimal degeneration in the cervical and lumbar spine. He opined that "there is really nothing wrong." He explained that while claimant may have some residual pain, it was not worth pursuing, and gave him a Medrol dose pack to see if it would help. He also recommended he add physical therapy to his low back. He did not believe claimant needed any restrictions for his back or neck.

Claimant returned to Dr. Potthoff on April 10, 2018. (Jt. Ex. 5, p. 40) He reported that claimant had participated in therapy, which included dry needle modalities in the trapezius. Claimant felt that had helped with his shoulder range of motion. He had also been seeing a chiropractor, which also helped his shoulder range of motion. He reported that after three visits with the chiropractor he had no pain and excellent motion. Dr. Potthoff recorded active abduction of "maybe 130 degrees" in the left shoulder.

Dr. Potthoff opined that because the chiropractic care was so helpful for range of motion and pain, claimant's symptoms were coming from his neck. (Jt. Ex. 5, p. 41) Claimant expressed pain in the neck going into the trapezius, and tightness in the shoulder as a result. As such, Dr. Potthoff did not have anything more to offer. He recommended claimant continue with the chiropractor. He recommended no lifting, pushing, or pulling more than 30 pounds at or below waist level, and no more than three pounds above shoulder level with the left upper extremity. He also restricted claimant from wood chipping. (Jt. Ex. 5, pp. 41-42) He advised claimant to follow up as needed, and again reiterated his opinion that "the issue is more cervical in etiology than left shoulder based." (Jt. Ex. 5, p. 41)

Dr. Potthoff's findings regarding claimant's range of motion are somewhat confusing, especially when compared to Dr. Taylor's findings on January 24, 2018. On that date, Dr. Taylor found left shoulder abduction at 110 degrees, and significantly reduced internal and external rotation. (Cl. Ex. 1, p. 6) However on February 6, 2018, about two weeks later, Dr. Potthoff documented "maybe 150 degrees" in abduction, and good internal and external rotation. (Jt. Ex. 5, p. 37) Two months later, on April 10, 2018, after claimant participated in physical therapy, Dr. Potthoff notes he had excellent motion in the shoulder, but then documents "maybe 130 degrees" of abduction. (Jt. Ex. 5, p. 40) This calls the accuracy of Dr. Potthoff's range of motion measurements into question.

On May 4, 2018, Dr. Beck authored a letter to defendants' claim representative and confirmed that claimant's cervical spine diagnosis was cervical strain, presumably from the February 29, 2016 injury. (Def. Ex. H, p. 49) He did not believe claimant needed any additional treatment for his neck. He placed claimant at MMI, and did not recommend any permanent restrictions or assign any permanent impairment related to the cervical spine.

On June 15, 2018, Dr. Potthoff wrote to defendants' claim representative, and indicated he assigned claimant's restrictions "secondary to his left shoulder pain." (Def. Ex. G, p. 42) He stated that claimant should continue the restrictions "as long as he feels he needs them," and he would be allowed to do more when he felt that he could. He reiterated that the restrictions were "just secondary to the pain that he feels," and stated that he was not able to attribute the pain to claimant's work injury on February 29, 2016. He indicated claimant would be allowed to participate in activity as tolerated, and saw no reason to change his prior impairment rating.

On July 9, 2018, defendants' representative wrote to Dr. Potthoff seeking clarification regarding claimant's restrictions. (Def. Ex. G, p. 43) Dr. Potthoff provided a Iowa DOT Patient Status Report (PSR) on July 25, 2018, and wrote claimant's restrictions were 30 pounds lift, carry, push, and pull below shoulder level, and three pounds over shoulder level with the left upper extremity. (Def. Ex. G, p. 44) He stated that whether the restrictions were temporary or permanent was "up to patient."

The parties attended mediation and reached a settlement agreement in September of 2018. (Tr., p. 24) On October 16, 2018, the agreement for settlement was approved by the Workers' Compensation Commissioner. (Def. Ex. C, p. 8) In addition to temporary benefits, the parties agreed that claimant was entitled to permanent partial disability (PPD) for 24 percent of the body as a whole, resulting in 120 weeks of compensation under Iowa Code section 85.34(2)(u).[1] (Def. Ex. C, p. 7)

Claimant was back working at the DOT, and in November of 2018 he applied for a highway technician position. (Tr., pp. 28-29) During the interview, claimant testified

[1] As the injury occurred on February 29, 2016, the amendments to the workers' compensation code passed in 2017 do not apply to this case.

they were reviewing the lifting requirements, and he mentioned his restrictions from Dr. Potthoff. (Tr., p. 28) He testified that Ron Reichter, his supervisor, advised that he was not aware of any restrictions, and terminated the interview. (Tr., pp. 28-30) The following day, about halfway through his shift, he was sent home. (Tr., p. 29) He stated that Mr. Reichter advised he would have to use his sick leave, and go to his personal doctor to determine what weight restrictions were appropriate. (Tr., p. 31) Claimant testified that he tried to see his personal doctor, but when he said it involved a workers' compensation claim, his doctor would not see him. (Tr., p. 33) He then tried to go back to physical therapy to see what his lifting limits were, but he was not able to get an appointment.

Eventually, in February 2019, claimant sat down with Mr. Reichter and Randy Taylor, who he described as his "boss's boss," and completed a reasonable accommodation form. (Tr., p. 34) Claimant testified that Mr. Reichter and Mr. Taylor completed the form, and he was not aware of any medical professional being involved with completing the form. (Tr., pp. 34-35) The form states that the following accommodations were approved:

1. Team lifting will be utilized in situations of both arms needed to lift above head.
2. Lifting of 75lbs with one hand is not an essential function. Breaks will be granted as needed when operating a weed trimmer.
3. Extra time or assistance will be available when servicing equipment.
4. Team lifting is available and encouraged at all times.
5. Team lifting is available and encouraged at all times.[2]

The accommodations were signed by Randy Taylor on February 14, 2019. (Cl. Ex. 2, p. 30)

Claimant testified that he has continued to work at the DOT since the accommodation form was completed. (Tr., p. 35) However, there are certain activities that give him difficulty. He testified that heavy lifting for long periods of time will cause problems. (Tr., p. 36) Also long periods of weed whacking and pulling or removing trees causes issues. He explained further that when windstorms come through and blow trees over, they will have to "yank and pull" tree limbs out from piles of trees to take them to the woodchipper, and at times they get too heavy for his shoulder. He testified that the woodchipper can fit a ten-inch log, up to 20 or 30 feet long. (Tr., p. 37) Some are smaller, and he can handle them, but the larger logs get heavy. He said there are times when he pulls or lifts too much and he feels his shoulder "pull," like it is separating. When this happens, the next day it becomes swollen, stiff, and sore. (Tr., pp. 37-38) As a result, he has to go home and sit in a chair and take ibuprofen. (Tr., p. 38)

Claimant testified that if he has the option, he will use a loader and dump truck to move trees and avoid the chipper, opting to burn the trees instead. (Tr., pp. 38-39) He

[2] It is unclear why the last two items on the list are identical.

cannot drag the trees, so he has to lift them and carry them to the chipper, which can cause his back to become sore. (Tr., p. 39) His back also gets sore from sitting too long, using an older tractor without an Air Ride seat, and working in cold weather. (Tr., pp. 39-40) Claimant testified that at times he has to see his chiropractor immediately due to the pain in his back. (Tr., pp. 41-42) He has continued to see a chiropractor on his own since the settlement, as no care has been authorized through workers' compensation since that time. (Tr., p. 42)

Outside of working for the DOT, claimant does some farming on his own land. (Tr., p. 42) He has a few cattle he tends, and has CRP that he has to mow and care for. (Tr., p. 43) He testified that this year he hired out all of his planting and fieldwork. He has also purchased a small utility tractor to use for dealing with logs on his property, rather than moving them by hand.

On August 27, 2021, he filed the petition for review-reopening currently at issue. He returned to see Dr. Taylor on June 21, 2022, and Dr. Taylor's report is dated June 23, 2022. (Cl. Ex. 1, p. 12) Dr. Taylor reviewed medical records from claimant's treatment since the prior IME. (Cl. Ex. 1, p. 13) He noted claimant had been back in physical therapy starting February 7, 2018, for his left neck, shoulder, and low back pain. He also reviewed the chiropractic records, and noted claimant continued with chiropractic care even after he finished the workers' compensation approved visits. He also noted the updated letters from Dr. Potthoff regarding restrictions, as well as the accommodations form claimant was provided at work. (Cl. Ex. 1, p. 14)

At the time of his 2022 IME with Dr. Taylor, claimant expressed pain in the lateral and posterolateral aspect of his left shoulder. He stated he had minimal pain if his arm is at his side and if he is inactive, which was similar to the prior evaluation. However, he complained that cold weather was associated with increased pain regardless of his activities. He complained of increased pain when extending his arm away from his body, and a sharp pain with his shoulder "slipping" if he forcefully pulled anything. (Cl. Ex. 1, p. 15) Dr. Taylor noted that claimant's range of motion had decreased, and he was unable to rotate. He demonstrated decreased internal rotation and especially decreased external rotation.

Claimant also complained of pain over the left neck and upper trapezius that can extend up toward the skull. He explained that he "completely changed" how he performs his work activities in order to avoid aggravating his pain. With respect to his low back, he described persistent pain in the left low back and buttock, which can extend into the upper thigh as it intensifies. He stated that his pain levels were similar to his prior exam, but felt that the pain remained low due to the chiropractic care and remaining cautious. He felt that his pain increased with less activity than compared to his prior evaluation.

Claimant advised Dr. Taylor that his work had not been pushing him as hard, as his new assistant supervisor had been helpful. With respect to the wood chipping, he explained that it was not the actual woodchipper that was the problem, but dragging the trees and branches to the chipper that bothered him. He also discussed driving the

tractor through ruts and grooves when spraying, which aggravates his back pain. Overall, he told Dr. Taylor he generally self-restricts and works with his employer to try to avoid activities that are known to aggravate his symptoms. (Cl. Ex. 1, pp. 15-16)

Dr. Taylor noted that claimant's low back symptoms had gradually worsened with time, and his left shoulder had become "a bit more noticeable." (Cl. Ex. 1, p. 16) He stated that on average, his neck had remained the same.

On physical examination, Dr. Taylor documented the following range of motion values:

Shoulder Right/Left	**Flexion**	**Extension**	**Abduction**	**Adduction**	**Internal Rotation**	**External Rotation**
Value	170/135 degrees	70/40 degrees	175/100 degrees	45/30 degrees	80/40 degrees	105/15 degrees

(Cl. Ex. 1, p. 17) Claimant's cervical spine demonstrated 40 degrees of flexion and 50 degrees of extension. Side-bending to the right aggravated his pain on the left side of the neck. He noted claimant had an element of scapular dyskinesia when elevating his arm. He had tenderness in several areas of his shoulder and upper trapezius, as well as the left mid to lower neck.

Dr. Taylor's diagnoses were chronic cervicalgia, left side; left shoulder labral tear status post surgery; persistent left shoulder arthralgia and decreased range of motion, as well as an element of scapular dyskinesia; and chronic low back pain status post prior injections and therapy.[3]

Dr. Taylor opined that claimant's continued need for chiropractic care was still related to the work injury. (Cl. Ex. 1, p. 18) With respect to impairment, again using the AMA Guides, Dr. Taylor recommended a 12 percent upper extremity impairment for the left shoulder, which converts to a 7 percent whole person impairment. He indicated the increased impairment was mainly due to a decrease in abduction, a slight decrease in adduction, and a significant change regarding external rotation.

With respect to the cervical spine, Dr. Taylor recommended the same value as previous; 6 percent of the whole person. Regarding the lumbar spine, however, he felt claimant had experienced a slow, but consistent, worsening of his left lower back and buttock pain, with less activity needed to aggravate his symptoms. As such, he recommended a rating of 7 percent of the whole person. When combined, Dr. Taylor recommended a total impairment of 19 percent of the whole person, as opposed to his prior combined rating of 16 percent.

[3] He also noted asymmetry of leg circumferences, but that does not appear to be a part of the workers' compensation claim. (Cl. Ex. 1, p. 18)

As for restrictions, Dr. Taylor noted that claimant had learned to self-restrict his activities at work, and also obtains help as needed. (Cl. Ex. 1, p. 19) He also tries to utilize equipment for heavy lifting, such as trees. Dr. Taylor recommended that claimant use heavy equipment whenever feasible for any heavier lifting or moving larger items such as trees. He stated that if claimant can continue to self-restrict, and if his employer continues to work with him in avoiding problematic tasks, he should be able to continue in his current position. He stated that specific lifting amounts were challenging to define, but if claimant was able to maintain his arms against his body, he can perform "quite a bit of lifting because he uses the right arm for the lifting and the left arm to stabilize the load." However, if the lifting requires extending his arms away from the body, then his lifting limitations decrease, unless he is mainly using the right arm.

Dr. Taylor ultimately agreed with Dr. Potthoff's estimate that claimant can lift 30-pounds on an occasional to frequent basis up to chest level, with the assumption that he can keep his left arm close to his body. He felt claimant could handle more than that on a rare or rare to occasional basis. As he extends his arm away from his body, especially when fully extended, he recommended ten pounds or less below shoulder level and five to ten pounds or less above shoulder level with the left arm. He recommended claimant avoid forceful pushing and pulling with the left arm extended outward away from his body, and no more than occasional overhead reaching with the left arm and only within his available range of motion. Finally, he noted that due to claimant's significantly decreased external rotation, and moderately decreased internal rotation, claimant's movements when performing certain activities would be limited, as he will have to reposition his entire body. As such, he will be slower performing certain tasks.

Dr. Taylor did not recommend any additional restrictions related to the cervical spine, but reiterated that claimant should not perform more than occasional overhead tasks due to a combination of his neck and left shoulder. With respect to the low back, claimant should alternate sitting, standing, and walking as needed for comfort, and squat, bend, kneel, crawl, and climb ladders occasionally. He should also have the ability to stop and move around if sitting for a long period, such as when traveling. Dr. Taylor also noted that if he could use a tractor with an Air Ride seat, he could return to spraying on a limited basis. (Cl. Ex. 1, p. 20) As for the woodchipper, he stated that the main issue is not running the machine, but lifting and maneuvering the large parts of trees. As such, he should utilize equipment and machinery to assist whenever possible.

Dr. Taylor further opined that given the additional decrease in claimant's range of motion, especially external rotation, as well as the possible component of scapular dyskinesia, he recommended consideration of a second opinion with a different orthopedic specialist. He further suggested if his back pain continued to worsen, he should be seen by a specialist. Otherwise, he should continue with chiropractic care.

Claimant testified that Dr. Taylor's examination lasted about two hours, and he used specific tools to measure range of motion. (Tr., p. 46) Given that Dr. Taylor's 2022 examination was the most recent, and apparently most thorough with respect to measurements and physical examination, I find it to be the most reliable when

assessing claimant's current condition and permanent impairment. Dr. Potthoff has not examined claimant since April 10, 2018, and his office note does not reflect that he used any tools to take precise measurements regarding strength or range of motion, and he was not as thorough in providing his estimates for the various planes of motion. (Jt. Ex. 5, p. 40)

Claimant testified that since the 2018 settlement, he has become more sensitive to cold weather. (Tr., p. 44) When he is in the cold, he becomes more stiff and sore, and it slows him down. He also notices more pain in his back, which affects his sleep. His shoulder range of motion has decreased, and he feels he is getting weaker. He believes this impacts him at work when he has to work outside in the cold. He agrees with the most recent restrictions recommended by Dr. Taylor, and testified that he presented them to Barry Thede at the DOT in July of 2022. (Tr., pp. 45-47) Mr. Thede is a supervisor who took over Randy Taylor's position. (Tr., p. 47) Claimant testified that Mr. Thede told him he would discuss them with human resources and get back to him. At the time of hearing, claimant had not heard back from anyone at work regarding the restrictions. (Tr., pp. 47-48)

That being said, claimant has not returned to any of the authorized treating providers since the settlement, and does not plan to do so. (Tr., p. 57) The only treatment he has had is chiropractic care, which is focused on his neck and low back. (Tr., pp. 57-58) The chiropractic care is not authorized, and claimant is not seeking alternate care for future treatment or reimbursement of expenses for the care he obtained on his own. (Tr., p. 58; Hearing Report) Claimant does not take any prescription medication for his work injury; only over-the-counter ibuprofen. (Tr., p. 60) At his deposition in May of 2022, he testified that his left shoulder symptoms were "about the same" as they were in 2018. (Def. Ex. E, p. 35; Deposition Transcript, p. 51) He said he still has pain in his shoulder, and it gets worse when it is cold outside. The same was true for his neck; he testified the pain remained about the same as at the time of settlement. With respect to his low back, he said the pain is "maybe a little worse," and again indicated it seemed to be related to cold weather. (Def. Ex. E, p. 35; Depo. Tr., p. 52)

In reviewing and comparing claimant's first deposition, taken on July 20, 2018, prior to the agreement for settlement, it does not appear that claimant's condition has significantly changed since that time. (See Def. Ex. D) He testified at that deposition that he did not believe he would be able to return to his prior work at Fareway, Curries, or Northern Pipe due to the heavy lifting involved. (Def. Ex. D, pp. 11-12; Depo. Tr., pp. 12-16) He acknowledged that testimony at hearing. (Tr., pp. 71-72) At his 2018 deposition, he also testified that he had limited range of motion in his left shoulder, and could not raise it over shoulder height. (Def. Ex. D, p. 20; Depo. Tr., p. 46) He also testified at the 2018 deposition regarding the difficulties he had at work, including dragging trees from the ditch for wood chipping, and lifting anything too heavy. (Def. Ex. D, p. 21; Depo. Tr., p. 52) Again, he confirmed that testimony at hearing. (Tr., p. 72)

Claimant also testified, however, that his shoulder is stiffer and sorer, and his range of motion is not as good as it was in 2018. (Tr., p. 78) However, he continues to work in the same job he had at the time of settlement, and makes more money having received raises. (Tr., pp. 66-67) He continues to work overtime hours, and there have been no changes to his schedule or benefits. (Tr., pp. 67-68) He has not had any disciplinary issues or complaints about his job performance, and he plans to stay in his job for the foreseeable future. (Tr., pp. 68-69)

Claimant's supervisor, Ron Reichter, provided a sworn affidavit for hearing. (Def. Ex. A, pp. 1-2) The affidavit states that Mr. Reichter did not believe claimant was working under any work restrictions at the time of his November 2018 interview for the highway technician position. (Def. Ex. A, p. 1) He further stated that all highway technician associates, including claimant, are required to lift more than 30-pounds, and accurate lifting requirements for claimant's position are set forth in the PDQ. (Def. Ex. A, p. 2) The affidavit is dated July 6, 2022.

Amy Sturm, an affirmative action and equal employment opportunity officer for the DOT, also provided an affidavit. (Def. Ex. B) The affidavit states that if a DOT employee wishes to work under any restrictions or accommodations, whether recommended by a doctor or based on the employee's perception of his or her physical capabilities, the employee is required to go through the Request for Reasonable Accommodation interactive process. (Def. Ex. B, p. 3) She indicated that claimant's request for reasonable accommodation was received on November 15, 2018, seeking to follow the restrictions set forth in Dr. Potthoff's July 25, 2018 patient status report. At that time, claimant's supervisor, Mr. Reichter, responded to the request by seeking additional medical information. (Def. Ex. B, p. 4) Claimant was taken off work effective November 16, 2018, while his request was processed. According to Ms. Sturm, on December 21, 2018, claimant advised that he had arranged to undergo "capacity and range of motion testing" with his personal doctor. However, on February 5, 2019, claimant consented to using the patient status report from Dr. Potthoff rather than seeking additional information from his doctor. As such, on February 14, 2019, claimant's request for reasonable accommodation was completed, as outlined above. (See also Cl. Ex. 2, p. 30) Ms. Sturm's affidavit states that claimant continues to work under the approved accommodations. The affidavit is dated July 12, 2022.

The affidavit is somewhat confusing, as it states the accommodations are based on Dr. Potthoff's patient status report, which restricts claimant from lifting, carrying, pushing, or pulling more than 30 pounds below shoulder level, and 3 pounds above shoulder level with the left upper extremity. (Def. Ex. B, p. 5) However the approved accommodations, as noted above, state that team lifting will be utilized for overhead lifting, and lifting 75 pounds with one hand is not an essential function. (Cl. Ex. 2, p. 30) There is nothing about lifting over 30 pounds below shoulder level, but it does state that team lifting is available and encouraged at all times. It also contradicts Mr. Reichter's affidavit, where he states that he was not aware of any restrictions at the time of the 2018 interview. Regardless, claimant testified both at his 2022 deposition, and at hearing, that he does not believe he has worked outside of Dr. Potthoff's recommended

restrictions from 2018 to the present time. (Tr., pp. 60-61; Def. Ex. E, p. 26; Depo. Tr., pp. 15-16) He testified that he is always careful about what he does. (Tr., p. 61)

It is unclear from the evidence why claimant was taken off work from November 16, 2018 through February 21, 2019. Claimant repeatedly testified that he was unclear as to why he was sent home and kept off work. (See Def. Ex. E, pp. 32-35; Depo. Tr., pp. 38-50; Tr., p. 76) While it seems there may have been some type of misunderstanding on the part of Mr. Reichter with respect to claimant's restrictions, the evidence is not clear enough to determine whether claimant is entitled to healing period benefits for those dates.

Dr. Taylor's updated restrictions are essentially the same as the restrictions provided by Dr. Potthoff in 2018. (Cl. Ex. 1, p. 19; Def. Ex. B, p. 5) They both recommend claimant avoid lifting more than 30 pounds below shoulder level, and Dr. Potthoff recommended lifting no more than three pounds over shoulder level with the left arm, while Dr. Taylor said no more than five to ten pounds. While it does appear from Dr. Taylor's 2022 IME that claimant's range of motion has gotten worse since the settlement, he has continued to do his job with no discipline or complaints regarding his performance. He also testified that it takes less activity to increase his symptoms, and he is more sensitive to cold weather, but again, these issues do not prevent him from continuing to do his job in the same manner as he was doing at the time of the settlement. In fact, he testified that had he been offered the highway technician job he applied for, he believed he could physically perform that job. (Tr., p. 62) He said the job was similar to his current position, but involves more work with asphalt and construction materials. Finally, claimant testified in his deposition and at hearing that he has been careful to work within Dr. Potthoff's restrictions since before the 2018 settlement, up through the present time. (Tr., pp. 60-61; Def. Ex. E, p. 26; Depo. Tr., pp. 15-16) As such, he has not met his burden to prove that he sustained a change in condition such that he is entitled to increased compensation.

CONCLUSIONS OF LAW

Claimant brings this review-reopening proceeding. A review-reopening proceeding is appropriate whenever there has been a substantial change in condition since a prior arbitration award or settlement. Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387 (Iowa 2009). Under Iowa Code section 86.14(2), this agency is authorized to reopen a prior award or settlement to inquire about whether the condition of the employee warrants an end to, diminishment of, or increase of compensation. Id.

Upon review-reopening, claimant has the burden to show a change in condition related to the original injury since the original award or settlement was made. The change may be either economic or physical. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury is not sufficient to justify a different determination on a petition for review-reopening. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). Rather,

claimant's condition must have worsened or deteriorated since the time of the initial award or settlement. Id. A failure of a condition to improve to the extent anticipated originally may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, Iowa, 272 N.W.2d 24 (Iowa App. 1978).

The Iowa Supreme Court has addressed situations where a claimant returns to work with an accommodation. The Court stated:

> We note that when a settlement is reached in a worker's compensation case, the injured's loss of earning capacity is properly viewed "in terms of the injured worker's present ability to earn in the competitive job market without regard to the accommodation furnished by one's present employer."

See US West Communications, Inc. v. Overholser, 566 N.W.2d 876 (1997)(citing Thilges v. Snap-On Tools Corp., 528 N.W.2d 614, 617 (Iowa 1995)).

A review-reopening proceeding is not a reevaluation of the facts and circumstances that were known at the time of the original settlement. See Kohlhaas, 777 N.W.2d at 392. The claimant need not prove that the current extent of his disability was not contemplated by the prior arbitration or appeal decision. Id. The industrial disability award or agreement necessarily contemplated claimant's earning capacity in the general labor market at the time the agreement for settlement was entered and approved. Id.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In this case, I found that claimant did not meet his burden to prove that he sustained a substantial change in his physical condition such that an increased award is warranted. The physical activities that aggravated his symptoms prior to the 2018 settlement have remained the same. Prior to settlement, claimant did not believe he would be capable of returning to his prior jobs at Fareway, Curries, or Northern Pipe. At the time of settlement, claimant believed he was working under Dr. Potthoff's restrictions, and testified that he was careful not to work outside of those restrictions. Whether his supervisor understood that to be true is not relevant. Claimant was self-restricting, and has continued to do so with no disciplinary actions or complaints about his job performance. He works the same job, at higher pay, with the same schedule, overtime opportunities, and benefits as he did at the time of settlement.

Additionally, claimant has not sought any additional medical treatment for his shoulder since the time of settlement. The only medical care he has received is chiropractic care for his neck and low back, which was not authorized, and for which he has not sought reimbursement. He is not seeking alternate medical care. At his May 23, 2022 deposition, he testified that his shoulder and neck symptoms were "pretty much" the same as they were at the time of settlement, other than when it is cold. He further testified his low back is "maybe a little worse," but this has not stopped him from continuing to work. While Dr. Taylor documented some decreased range of motion in claimant's shoulder, and provided a slightly higher impairment rating, that does not rise to the level of increased industrial loss under Iowa law.

I conclude that claimant did not meet his burden to prove that he sustained a substantial change in his physical condition such that an increased award is warranted. Therefore, I conclude that claimant has not established entitlement to reopening or increase of his prior industrial disability award due to a physical change of condition. Iowa Code section 86.14(2).

The next issue to determine is whether claimant is entitled to additional healing period benefits for the time he was taken off work from November 16, 2018 through February 21, 2019. Section 85.34(1) provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) the worker has returned to work; (2) the worker is medically capable of returning to substantially similar employment; or (3) the worker has achieved maximum medical recovery. The healing period can be considered the period during which there is a reasonable expectation of improvement of the disabling condition. See Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Healing period benefits can be interrupted or intermittent. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

In this case, I found that the evidence was not clear as to the reason claimant was taken off work from November 16, 2018 through February 21, 2019. Claimant repeatedly testified that he was unclear as to why he was sent home and kept off work. It is possible there was a misunderstanding on the part of Mr. Reichter with respect to claimant's restrictions, but the evidence is not clear enough to determine whether claimant is entitled to healing period benefits for those dates. As claimant did not meet

his burden to prove entitlement to healing period benefits during this period, his claim for penalty benefits based on non-payment of those benefits is moot.

The final issues to determine are whether claimant is entitled to reimbursement of his 2022 IME with Dr. Taylor, and taxation of costs. Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated permanent disability and the employee believes that the initial evaluation is too low. In the review-reopening setting, defendants do not owe an independent medical evaluation unless they have obtained another permanent impairment rating from a physician of their own choosing since the prior award or settlement. Kohlhaas, 777 N.W.2d 387 at 394-395.

In this case, defendants did not obtain a medical report from any physician regarding permanent impairment after the agreement for settlement and before Dr. Taylor's 2022 IME. I conclude that claimant failed to establish entitlement to reimbursement of Dr. Taylor's IME pursuant to Iowa Code section 85.39.

Finally, claimant seeks reimbursement of costs. (Cl. Ex. 5) Assessment of costs is a discretionary function of the agency. Iowa Code section 86.40.

Based on the above findings of fact, I exercise the agency's discretion and I conclude that each party should bear its own costs.

ORDER

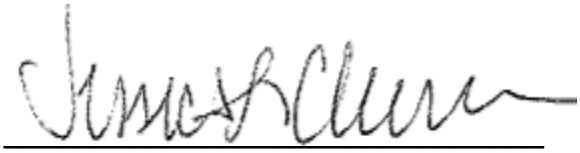
THEREFORE, IT IS ORDERED:

Claimant shall take nothing further from these proceedings.

The parties shall bear their own costs.

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1 (2) and 876 IAC 11.7.

Signed and filed this ___6th___ day of January, 2023.



JESSICA L. CLEEREMAN
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Casey Steadman (via WCES)

Nate Willems (via WCES)

Sarah Timko (via WCES)

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 filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation 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 legal holiday.