

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JEFF SEMELROTH,

Claimant,

vs.

GENERAL MILLS,

Employer,

and

OLD REPUBLIC INSURANCE CO.,

Insurance Carrier,  
Defendants.

File No. 5058406.01

REVIEW-REOPENING  
DECISION

Head Note Nos.: 2905 1803 2502

## STATEMENT OF THE CASE

Claimant, Jeff Semelroth has filed a petition for arbitration seeking worker's compensation benefits against General Mills, employer, and Old Republic Insurance Company, Inc., insurer, both as defendants.

In accordance with agency scheduling procedures and pursuant to the Order of the Commissioner in the matter of the Coronavirus/COVID-19 Impact on Hearings, the hearing was held on December 14, 2021, via Zoom. The case was considered fully submitted on January 21, 2022, upon the simultaneous filing of briefs.

The record consists of Joint Exhibits 1-5, claimant's 1-7, Defendants' Exhibits A-F, along with the testimony of claimant, Jennifer Carrillo, and Chad Vineyard.

## ISSUES

1. Whether there has been a change of condition since the agreement for settlement approved on February 8, 2018, that might entitle claimant to additional permanent partial disability under a review-reopening and, if so,
2. The extent of claimant's industrial disability;
3. Whether claimant is entitled to reimbursement of an independent medical examination pursuant to Iowa code section 85.39

### STIPULATIONS

The parties filed a hearing report at the commencement of the review-reopening hearing. On the hearing report, the parties entered into various stipulations. All of those stipulations were accepted and are hereby incorporated into this review-reopening 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.

The parties stipulate claimant's injury arose out of and in the course of his employment with the defendant employer on July 18, 2015. As a result of the work related injury, claimant sustained temporary disability entitlement which is no longer in dispute. The resulting permanent disability is industrial in nature.

At the time of the injury, claimant's gross earnings were \$1,640.57 per week. He was married and entitled to five exemptions. Based on the foregoing, the weekly benefit rate is \$1,020.82.

Defendants waive all affirmative defenses.

Prior to the hearing the claimant was paid 73.4895 weeks of permanent partial disability benefits at the rate of \$1,020.82 per week.

### FINDINGS OF FACT

At the time of the hearing, claimant was a 53 year old person. His educational background includes graduation from high school and a year at the University of Iowa.

Prior to working for General Mills for the past 21 plus years, claimant worked in the restaurant industry as a line supervisor for a fast-food restaurant before moving up to an assistant manager. (Tr. 38:18–39:13) Following work in the restaurant industry, claimant worked at a grain elevator doing heavy manual labor before working at a steel factory as a hammer operator. (Tr. 40–41)

In 2012, claimant sustained a rotator cuff tear in the right shoulder that was repaired surgically. (JE 2:3-4) Daniel C. Fabiano, M.D., assessed a 6 percent whole person impairment as a result. (JE 2:5)

On July 18, 2015, claimant was working as a slurry operator for the defendant employer. A slurry operator makes a sugar coating that is baked onto cereal. As part of his duties, he would have to add apple puree that was stirred by a metal wand. In the process of moving the wand, he suffered an injury to his left shoulder. On November 18, 2015, claimant underwent a left shoulder MRI that revealed fraying of the rotator cuff, mild AC degenerative changes, and tendinosis of the long head of the bicep tendon. (JE 1, p. 2) Claimant underwent surgery on his left shoulder on June 21, 2016. (JE 3, p. 17) The procedure included a left shoulder arthroscopic debridement, superior labral SLAP repair, biceps tenodesis, synovectomy, and SAD. (JE. 3, p. 17) On September 12, 2016, claimant was discharged from therapy after 34 appointments. (JE 4:19-22) At this

time, he was able to occasionally lift 50 pounds floor to waist and 10 pounds overhead. (JE 4:19) He could carry 50 pounds 100 feet and reach forward and overhead occasionally. (JE 4:19) He still had pain in his shoulder in the mornings, was not able to do a belt loop, and felt fatigue in the left shoulder if he used it overhead. (JE 4:19-20) Following this, claimant was released to full work duty on September 14, 2016. (Def. Ex. B, p. 2) On November 30, 2016, he was placed at maximum medical improvement with no work restrictions. (JE 2, p. 11) He reported that he was performing his regular duties "ok." (JE 2:11)

On March 1, 2017, Gregory Hill, M.D., assigned a 2 percent body as a whole impairment rating for the left shoulder injury. (Claimant Ex. 4, p. 18) On June 29, 2017, Mark Taylor, M.D., claimant's IME physician, opined claimant had sustained a 5 percent body as a whole impairment rating for the left shoulder injury. (CE 1, p. 5) On January 29, 2018, claimant and defendants entered into a settlement agreement for 14.6979 percent body as a whole for the July 18, 2015 left shoulder injury. (CE 5, p. 19; Trans. pp. 5-6)

In November 29, 2017, claimant was seen at his family medicine clinic for sleep issues. (JE 5:24) Claimant was working third shift. Id. He was scheduled for a sleep study. Id. He was placed on a CPAP machine and reported it was helping him sleep but he still had insomnia issues due to his shift work. (JE 5:28) There was no mention of any pain or discomfort with the left shoulder. (JE 5:29) He continued to treat for insomnia through 2018. (JE 5:33) During a September 2018 medication management visit for his insomnia, there were no concerns mentioned regarding the left shoulder. (JE 5:32) In March 2019, claimant returned for a medication management visit and other than his insomnia, he was doing well. (JE 5:42) He had even ceased using his CPAP machine. Id.

During the same month, claimant sought treatment for a "lump" on the posterior left shoulder. (JE 5:48) He had full range of motion of the arm and shoulder. Id. He exhibited no tenderness or edema. (JE 5:51) On March 26, 2020, claimant visited the family medicine clinic for a rash on the left calf and foot. (JE 5:63) There was no mention of shoulder pain. (JE 5:65)

On July 22, 2020, claimant requested to see Dr. Hill again due to problems with his left shoulder. (JE 2:13) Claimant was cleared to revisit Dr. Hill on October 12, 2020, and during that visit reported pain in the shoulder upon waking up. (JE 2:14) The pain improved after waking and typically claimant had no pain through the day. Id. He was able to sleep on his side, work without restrictions, and described using the shoulder without limitation. Id. Current work duties at the time included chest to waist level activity. Id. Dr. Hill administered an injection. Id. Claimant testified the injection provided relief for a couple of weeks, but the benefit then wore off. (Tr. 36:10-20) Dr. Hill also gave him some anti-inflammatories that provided little benefit. (Tr. 36:21-24)

During a November 2020 annual examination, claimant reported problems sleeping due to his third shift and soft tissue masses on the left side of scalp and on his

back. (JE 5:72) There was no mention of his left shoulder pain. Id.

On August 16, 2021, claimant returned to Dr. Taylor for re-evaluation. (CE 2 at 9) Dr. Taylor noted that claimant's left shoulder pain was "now constant" and especially intense in the morning. (Id. at 10.) Additionally, it was noted his strength had diminished and decreases to his range of motion were observed. (Id. at 10–11.)

Dr. Taylor opined that there had been a change in functional impairment to claimant's left shoulder since January of 2018. (CE 2 at 13.) Dr. Taylor's measurements showed the most significant changes to range of motion with flexion and abduction. (Id.) Ultimately, Dr. Taylor calculated claimant's impairment had increased to 7 percent whole person. (Id.)

Dr. Taylor was asked about permanent restrictions and limitations. He opined claimant should be "able to self-restrict, and assuming no further worsening of his symptoms, then he can likely continue in his current position at General Mills." (Id.) Additionally, Dr. Taylor recommended only "occasional overhead reaching with the left arm" and most lifting activities should "occur with the left arm as close to his body as possible, as this will place less strain over the glenohumeral area." (Id.)

Dr. Taylor's reports from 2017 and 2021 are compared below:

2017	2021
<p>At rest, with his arm at his side, the pain is minimal, or absent. He has difficulties climbing ladders with the left arm, and any overhead lifting with the left arm is also difficult. It has impacted his sleep because he described himself as a "side sleeper", and thus he periodically wakes up with pain in the left shoulder. Grooming is also challenging, such as washing his back and shaving his head. Putting on belts is also difficult due to the reaching behind that is required. Most of the pain tends to occur over the anterior/anterolateral shoulder and into the upper biceps musculature. When the pain occurs, it can reach up to 4 or 5/10, depending on activities. (CE 1:3)</p>	<p>Claimant describes the pain is constant whereas before the pain was a bit more intermittent. Pain is especially intense in the morning when he first awakens. The left shoulder pain in the morning is often 8/10 in severity and he described decrease sensation parts of the left arm and hand. The pain wakes him up several times per night. He finds that he has inadvertently rolled onto his left side which results in increased pain and then he wakes up. He describes slowly worsening range of motion and difficulties with overhead lifting and was certain repetitive movements, especially if the arm is extended away from the body. It feels as if his strength is diminished.</p> <p>Pain is commonly 5 or 6/10. (CE 2:10)</p>

2017	2021
<p>Claimant noted difficulties with lifting, pushing, carrying, working between floor and waist level, working above shoulder level, and working on ladders. To improve the symptoms, he stated that he has adapted and generally tries to use the right arm. He also performs a few stretches and gets help, if needed. (CE 1:3)</p>	<p>Claimant works the same position as she did prior to his injury, but with a different pump system. The vast majority of his work activities occur between waist and shoulder height. He occasionally has to move bags of product, but this occurs at waist level. He is able to self-restrict his activities to protect the ongoing left shoulder pain. (CE 2:11)</p>
<p>Claimant noted difficulties with personal hygiene, lifting, pushing and pulling. To control the symptoms at home, he avoids using the left arm above head level and also continues with stretches. He also avoids heavy lifting, pushing or pulling. (CE 1:3)</p>	<p>Claimant noted difficulties with lifting, pulling, carrying, working between floor and waist level, working above shoulder level, and working on ladders. To improve the symptoms, he avoids those types of positions or movements that aggravate the shoulder and he tries to use the right arm. (CE 2:11)</p>
<p>He enjoys camping, boating, hunting, and watching his children's activities. He does not bow hunt. He sold his motorcycle because it aggravated his shoulder. He has not returned knee boarding. His exercise is also more limited. (CE 1:4)</p>	<p>Claimant noted difficulties with personal hygiene, lifting, pushing, pulling and feeling with his fingers. To improve the symptoms, he takes Tylenol engages and less activity. (CE 2:11)</p> <p>He enjoys boating, camping and hunting. His hunting is now more limited and he no longer hunts from a tree stand. He changed his motorcycle to one with lower bars and one with cruise control that so that he can still ride occasionally. He used to enjoy knee boarding but has not returned to that type of activity. His exercise is now more limited. (CE 12:12)</p>

2017	2021
<p>Claimant had symmetric range of motion of the left elbow compared to the right. He has good strength with the exception of possible mild weakness associated with supination of the left arm compared to the right. His sensory examination was unremarkable to pin prick, vibration, and light touch. His reflexes were somewhat difficult to elicit bilaterally. Inspection of the left shoulder revealed well-healed portal sites. He had mild tenderness over the lateral shoulder, as well as over the anterior shoulder and bicipital groove. He had positive Yergason's, Neer's and Hawkins's test on the left. Jobe's was negative. There is no evidence of scapular winging. Hoffman's sign was negative. (CE 1:5)</p>	<p>Claimant had full and symmetric range of motion of the elbows. There's a symmetry of the bicep on the left compared to the right. Palpation revealed tenderness over the left AC joint and just inferior to the lateral tip of the acromion. Despite his pain, he overall had good strength. (CE 2:12)</p>
<p>5% impairment rating from Dr. Taylor. (CE 1:5)</p> <p>4% impairment rating from Dr. Hill. (CE 4:18)</p>	<p>7% whole person impairment rating from Dr. Taylor.</p>
<p>Pain diagram: aching, stabbing pain and numbness in the left shoulder (CE 1:8)</p>	<p>Pain diagram: Aching, stabbing, pins &amp; needles, numbness, and burning sensation in left arm/shoulder. (CE 2:15)</p>
	<p>Dr. Taylor recommended self-restriction with occasional overhead reaching with the left arm. Most lifting activities should preferentially occur with the left arm as close to the body as possible as this will place less strain over the glenohumeral area. (CE 2:13)</p>

2017	2021
<p>Dr. Hill:</p> <p>Flexion 180°</p> <p>Abduction 120°</p> <p>Internal Rotation 80°</p> <p>External Rotation 30°</p> <p>(CE 4:18)</p>	<p>Dr. Taylor:</p> <p>Flexion 125° with 50° of extension</p> <p>Abduction 110° with 30° of adduction</p> <p>Internal Rotation 40°</p> <p>External Rotation 80°</p> <p>(CE 2:12)</p>

After the work release in 2016, claimant returned to his same position on the third shift. Since that time, claimant testified that he has had increased pain and decreased mobility. His arm and shoulder are sore on a constant basis and he has reduced range of motion. Repetitive reaching or pulling increases his soreness.

In the hearing, claimant was asked whether grooming, shaving his head, putting his belt on or reaching behind his back still pained him as it did in 2018. He replied that it did and that it may have gotten more difficult. (Tr. p 19)

This pain and reduced range of motion affects his day-to-day activities including hobbies such as hunting. He can no longer use a deer stand or ladders and hunts primarily on the ground. He uses a riding lawnmower and a snowblower and leaves the shoveling of sidewalks to another person. Sleep has been a battle for him. He has bought a different motorcycle with lower handlebars and a bigger front tire.

At home, he does most of the lifting and reaching with his right arm. Similarly, at work he relies more on his right side, using his left as an assist. He is right-handed.

Currently, claimant works first shift in twin screw since the beginning of the 2021. He testified that the previous positions he worked such as puff would be too physically demanding for him. In puff, they are required to change machines which can mean lifting over 50 pounds and because of the dust pollution, there is more manual labor involved.

Prior to working in twin screw, claimant worked in puff but left to find a position that fit his children's school schedule better. That resulted in him taking a third shift in the warehouse where he worked as a fork lift operator, a position he believes he could still do today.

In twin screw, the system is primarily automated. From 10-15 percent of the time, he will need to dump in ingredients and clean when the types of cereals change. He works with three other people and can ask for assistance from his coworkers if necessary.

He is not currently receiving any official accommodations.

In 2015, the year of the injury, claimant earned \$104,176.47 from General Mills. (DE E, p. 10). From 2016 through 2018, claimant earned \$95,859.93; \$101,271.92; and \$106,604.47, in each year, respectively. (DE E, pp. 11-13). After the settlement agreement in 2018, claimant earned \$105,078.18 in 2019 and \$113,605.00 in 2020. (DE E, pp. 14-15). In each respective year since the settlement agreement, claimant has earned more than he did during the year he was injured.

Jennifer Carrillo testified at the hearing. She does the same job as the claimant since August 2020 in the twin screw system. She testified that most of the job is spent in the control room monitoring the screens. They then clean the machines between processes. She testified that he has asked for assistance to lift barrels that are over 50 pounds or to deal with pipes overhead. She has observed him having difficulty lifting overhead. She also testified that she was in puffs, like claimant, and that she bid out of it because twin screw was an easier, less physically demanding job.

Chad Vineyard, claimant's direct supervisor, also testified at hearing. He shared that claimant was a good worker and did not complain. Claimant was the best worker on the third shift. At the present time, to Mr. Vineyard's knowledge, claimant is working without special assistance or accommodations.

### CONCLUSIONS OF LAW

The party who would suffer loss if an issue were not established ordinarily has the burden of proving that issue by a preponderance of the evidence. Iowa R. App. P. 6.904(3).

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. Rather, claimant's condition must have worsened or deteriorated since the time of the initial award or settlement. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). 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 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); Dunlavy 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).

Claimant's basis for the review-reopening is increased pain and reduced range of motion in his left shoulder rather than an economic loss. Claimant earns more today than at the time of the settlement and thus there has not been a change in circumstances that would warrant a review-reopening. One of claimant's concerns is that should he not be able to work for defendant employer, his employability may decrease. However, since that has not yet happened, an increased award on something that is speculative would not be appropriate.

As for his physical state, while claimant maintains that his pain has increased, his lack of function as expressed at hearing and during his examination with Dr. Taylor in 2021 was largely the same as in 2018. In 2018, claimant had difficulty fastening his belts, washing his back, shaving his head. He had trouble sleeping and would periodically awaken due to pain in the left shoulder. He had difficulties with ladders and overhead lifting with the left arm. To improve his symptoms, he used the right arm instead of the left. He sold his motorcycle and did not return to knee boarding. In 2021, claimant had a new motorcycle better suited to his post injury state.

The restrictions that Dr. Taylor recommended of only occasional overhead reaching with the left arm and lifting with the left arm close to the body were practices that claimant employed in 2018 per the 2018 report of Dr. Taylor.

The increased pain and self-reported decreased range of motion are not substantial enough to warrant a review-reopening.

Claimant seeks reimbursement for the IME of Dr. Taylor. However, pursuant to the Iowa Supreme Court, "Iowa Code section 85.39 does not expose the employer to liability for reimbursement of the cost of a medical evaluation unless the employer has obtained a rating in the same proceeding with which the claimant disagrees." Kohlhaas v. Hog Slat, Inc., 777 N.W.2d 387, 394 (Iowa 2009). Defendants did not obtain a rating in the review-reopening procedure and thus, the trigger for Iowa Code section 85.39 was not engaged. Even if the review-reopening was not considered to be a new procedure distinct from the underlying claim, a second IME would not be warranted. Iowa Code section 85.39.

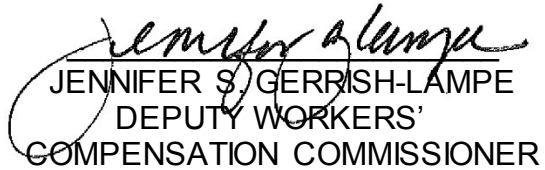
ORDER

THEREFORE, it is ordered:

Claimant shall take nothing.

Each party shall bear their own costs with the cost of the transcript split evenly between claimant and defendants with each party bearing fifty (50) percent.

Signed and filed this 18<sup>th</sup> day of February, 2022.

  
JENNIFER S. GERRISH-LAMPE  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Emily Anderson (via WCES)

Dillon Besser (via WCES)

Peter Thill (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.