BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

THOMAS MYERS, Claimant, vs. SHINN CONSTRUCTION, INC., Employer, and TECHNOLOGY INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 20008643.01 ARBITRATION DECISION Head Note Nos.: 1108, 1200, 1402.30, 1600, 1601, 1602, 1801, 1802, 1803, 1804, 1806, 2206, 2502

STATEMENT OF THE CASE

Claimant, Thomas Myers, filed a petition for arbitration seeking worker's compensation benefits against Shinn Construction, Inc., employer, and Technology Insurance Company, 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 November 3, 2021, via Court Call, and considered fully submitted on December 2, 2022 upon the simultaneous filing of briefs.

The record was left open to allow statements and/or depositions from witnesses Alicia Loman and Ryan Bates.

The record consists of Joint Exhibits 1-11, claimant's exhibits 1-15, and defendants exhibits A-M along with the testimony of the claimant, Sandy Carlson, Alesha Nikky Maddison, and Michael Church.

ISSUES

1. Whether claimant sustained an injury on July 20, 2020, which arose out of and in the course of employment;
2. Whether claimant's claim is barred because of the affirmative defense of intentional effort to injure oneself under Iowa Code section 85.16;
3. Whether claimant's claim is barred because of the affirmative defense of intoxication under Iowa Code section 85.16(2);

4. Whether the alleged injury is a cause of temporary disability and, if so, the extent;
5. Whether the alleged injury is a cause of permanent disability and, if so;
6. The appropriate commencement date of permanent disability benefits;
7. Whether the alleged disability is a scheduled member disability or an unscheduled disability;
8. The extent of claimant's scheduled member/industrial disability;
9. Whether there is a causal connection between claimant's injury and the medical expenses claimed by claimant;
10. Whether claimant is entitled to reimbursement of an IME under Iowa Code section 85.39;
11. Whether defendants are entitled to a reimbursement of medical expenses;
12. Whether defendants are entitled to apportionment for successive disabilities and/or a credit pursuant to Iowa Code section 85.34(7);
13. Whether defendants are entitled to an order under Iowa Code section 85.21 and/or Iowa Code section 85.22 for reimbursement or subrogation;
14. Whether claimant is entitled to penalty benefits;
15. And costs.

STIPULATIONS

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.

The parties stipulate claimant sustained an injury on July 20, 2020, and that he was an employee at the time of that injury.

Following the July 20, 2020, injury, claimant was off work from July 20, 2020, through August 19, 2021, the period of time for which claimant seeks temporary total disability benefits.

At the time of the injury, claimant's gross earnings were $1,200.00 per week. He was married and entitled to two exemptions. Based on the foregoing the parties believe the weekly benefit rate to be $771.91.

The parties agree that the claimant was not paid any benefits prior to the hearing including medical expenses.

FINDINGS OF FACT

Claimant dropped out of high school after the ninth grade and entered the labor force. He began working for a bowling alley in his local town, moved onto construction work and eventually settled into a position as a concrete laborer. He worked in concrete until approximately 2004 to 2005 when he began work as an equipment operator.

From the age of approximately 28 to the present time, claimant worked as a truck driver in some fashion. He obtained his first chauffeur's license in 1985. He has worked for Ben Shinn Trucking or Shinn Construction for approximately 15 years.

For approximately 12 to 14 weeks prior to July 20, 2020, claimant's truck sat in his driveway. His wife had suffered a major stroke and he cared for her. He also underwent a knee replacement surgery. At one point during his recuperation period, claimant served as a dispatcher for Shinn Construction.

In 2014, claimant suffered from right sided low back and quadriceps weakness and pain. (JE1:1) MRIs later showed that he had large disc herniation at L2-3 and smaller herniation at L4-5. (JE 1:5) On April 3, 2014, claimant underwent decompression and discectomy surgery with Lynn M. Nelson, M.D. (JE 1:7) Claimant was found to be at maximum medical improvement (MMI) on July 22, 2014. (JE 1:11) At that time he had pain in his low back and weakness in his right quadriceps. (JE 1:11) He had difficulty climbing ladders and had concerns about being able to work full time. (JE 1:11)

The functional capacity evaluation (FCE) conducted in 2015 placed claimant in the light work category with restrictions of no lifting greater than 20 pounds from floor to waist and frequently lifting 10 pounds from floor to waist. (DE H:30-31)

He was awarded 40 percent industrial disability as a result of his work injury.

In January 2015 and then again in January 2017, claimant underwent injection in the left shoulder for impingement syndrome. (JE 2:24, 25)

In 2019, claimant had complaints of bilateral knee pains. David A. Vittetoe, M.D., found claimant was suffering from advanced degenerative disease, particularly in the right knee. (JE 1:16) Claimant had been using a walker at times (JE 1:14) In addition to his knee difficulties, he has a history of Charcot-Marie-Tooth and wore bilateral lower extremity AFOS. (JE 1:14) Claimant underwent right total knee replacement surgery on May 21, 2020. (JE 1:20) On July 17, 2020, claimant was seen by his surgery Thomas D. Dulaney, M.D., in follow up. (JE 1:23) "He is very pleased with the results of his total knee replacement," Dr. Dulaney documented. "Tom is doing great. He will continue activities as tolerated. Any recurrent concerns, he will simply call. He is very comfortable with this plan." (JE 1:23)

Claimant has been on and off depression medication for approximately 10 years. He attributed this to the stress of life, working 90 hours a week and trying to keep the home fires burning.

In summer of 2017, claimant underwent marriage counseling. (JE 3:48) The therapist noted that claimant was experiencing panic attacks, mood swings, grief and loss, anxiousness and worry, pessimism, irritability, lying and sadness. (JE 3:48) He had no history of mental hospital hospitalizations and no current or past self-harm ideation. He did have thoughts such as "as wishing he was dead out of distress, but has no plan or intention." (JE 3:51) The therapist noted that claimant desired to reclaim his

wife and marriage and that he was a hard worker, a dedicated employee and strong leader. (JE 3:51)

As he was recuperating from his surgery, claimant regularly took Oxycodone and then medical marijuana. Approximately four days prior to his return to work, he stopped taking narcotics and the marijuana so that his blood stream would be clean. However, there was THC in his system at the time of the collision. (JE 5:87) Claimant did not exhibit any signs of impairment or altered state according to Deputy Shadduck. (DE M p. 63)

Based on claimant's testimony that he ingested the marijuana gummy several days before the collision, the remnant result would not have intoxicating results. (CE 1:22) Marijuana can be detected in a person for up to 3-5 days for an occasional user and up to 14 days for a chronic user or even up to 30-45 days for a chronic user who is a large person. (CE 1:22, 42)

On the day of July 20, 2020, claimant planned to drive to the shop in Eddyville, find a belly dump trailer and then haul rock and sand to a highway project in Eastern Iowa on Highway 2. The shop in Eddyville is a Ben Shinn Trucking stop although claimant testified that the shop served both Ben Shinn Trucking and Shinn Construction vehicles.

He had spoken to Troy DeJong, an employee of Ben Shinn Trucking, about his work plans as well as Roger Shinn but not to Sandy Carlson at Shinn Construction. Roger Shinn is the president for Shinn Construction and Ben Shinn Trucking.

At home with him on the morning of July 20, 2020, were his sister and daughter. The sister, Martha, had moved into to help watch claimant's wife while he returned to work. His daughter, Alesha "Nikky" Maddison, lived close by.

In preparation for his work plans, claimant left the house and climbed into his 2015 Peterbilt 389. He started the engine, performed his pre check, and began to back out of his property when the brakes locked up. He attempted to work the breaks by going from first gear to reverse gear several times. When that did not work, he got out of the truck and thumped on them with a hammer. That maneuver was unsuccessful so he returned to the driver's seat and worked the brakes again until they released. He did not inform his employer that his brakes were not working that morning.

A home health aide, Alicia Loman, was present at the time waiting to enter the driveway. Ms. Loman had begun providing care for claimant's wife shortly before July 20, 2020. (JE P:61) She has no relationship with the claimant or claimant's family and no longer provides care to Ms. Myers. She has never spoken with claimant prior to the deposition nor with claimant's attorney. She is acquainted with claimant's daughter, Ms. Maddison, who is Ms. Loman's hair stylist.

She testified that when she pulled into the claimant's driveway, claimant was in his vehicle attempting to back out. He spent five to ten minutes trying to back out and was getting in and out of his semi-truck at least three times. She observed him working

on his brakes while he was out of the semi-truck. She believed that he was working on the brakes due to the brake lights coming on while he was in the truck. She also observed the semi-truck lurch. It would jerk, then stop, and repeat that sequence.

Ms. Madison also testified that she saw her dad the morning of July 20, 2020. She described him as "the happiest I had seen him in a while. My dad loves to work. So he was very excited about a sense of normalcy, being able to go and work again since my mom's stroke." (Tr. 124) She also testified that he was walking well, as well as she had seen him walk her adult life. Claimant himself gave the same account. He testified he was excited to return to work and that his knee replacement surgery was life changing for him. For the first time in a decade, he could walk around a grocery store with a cart and traverse a parking lot.

Claimant testified that he drove along a gravel road, 165th Street, for approximately three and a half to four miles until he reached Wappello County Line Road, a paved roadway. From the intersection of 165th Street, Wappello County Line Road has a slight slope down and continues uphill to a stop sign where the road intersects with the highway. At the bottom of an incline and before the road intersects with the highway, there is a train track. Claimant has driven this route hundreds of times and is aware that trains run all day long.

Claimant testified that he did not use his brakes at the stop sign. Instead, he would shift into first gear until he was barely rolling and possibly then use his engine brake (Jake Brake) to help slow the vehicle down. He testified that unless you are in a hurry, he would use the clutch to slow to a stop, and then turn left onto the highway, accelerating to highway speed. The speedometer was at 49-50 at the scene. (JE 8:216)

Claimant's memory then cuts out until he awakens from his coma in Des Moines 17 days later. On July 20, 2020, Ms. Maddison shared via Facebook that her father's brakes failed in his semi and he hit a train at a railroad crossing. (DE I:43) This is also what was relayed to the emergency services team. (JE 4:58)

Defendants argue that claimant was impaired because of his marijuana usage or, in the alternative, claimant accelerated, or, failed to break, into the train in an attempt to take his own life.

In June or July 2020, claimant called to see if he could access his 401(K) and he transferred property to a revocable trust in June 2020. He also set up a living will in June 2020.

Deputy Sheriff Christopher Shadduck was deposed on October 1, 2021. (DE M:56) He been part of law enforcement for over 23 years. (DE M:56, p. 4) He has limited educational experience as an accident investigator having undergone only basic accident investigation training at the Iowa Law Enforcement Academy but he has undertaken several hundred actual accident investigations. (DE M:56, p. 5)

Deputy Shadduck described the scene as chaotic when he arrived. (DE M:56 p. 8). According to his investigation, claimant's semi did not stop and struck the side of an empty coal train. The semi was then drug quite a distance to the west of the intersection. (DE M:56, p. 10) Deputy Shadduck was not certain the speed at which claimant was going at the time of the collision. The speedometer showed 50 mph. (JE1 8:216)

Claimant was pinned inside the vehicle on the passenger side. When questioned by Deputy Shadduck, claimant maintained he did not remember what happened.

The County-Line Road is usually highly traveled, particularly between 6:30 a.m. and 7:00 a.m. Deputy Shadduck was surprised that there was no one else on the road at that time. (DE M:56, p. 13)

The day was clear with no visibility issues. The crossing arm was snapped off, lying on the ground to the left of the intersection. Someone, either Mr. Shinn or an office person, relayed to Deputy Shadduck that it was claimant's first day back at work after a long period of being off.

There were no skid marks on the roadway that indicated claimant braked prior to the collision. Deputy Shadduck testified that air pressure holds the calipers away from the brakes so that if there was a malfunction of the brakes and air pressure is lost, the brakes automatically engage. Based on his investigation, he concluded the driver, a/k/a the claimant, did not apply the regular brakes nor did he engage the emergency braking system. That stop switch was still in position after the collision. While the engine brake would not have stopped the semi, it could have slowed the vehicle. Further downshifting could have slowed the vehicle. It was unknown how fast claimant was going at the time of the collision. Deputy Shadduck also concluded that the brakes were functional prior to the accident.

Deputy Shadduck testified that Mr. Shinn relayed claimant was on his way to Eddyville to have the shop look over his vehicle. (DE M:56 p. 53) There was no damage to the seatbelt and no indication such as ligature marks that claimant was restrained at the time of the collision. Claimant testified that he was "very good" about wearing his seatbelt.

At the time of the collision, claimant's vehicle was in the northbound lane. This lane was the appropriate lane for the path of his travel. He testified that it would be difficult to keep his vehicle on the road going downhill if he was not engaged in steering.

Deputy Shadduck stated that Officer Davidson was an expert on certain types of inspections that Deputy Shadduck was not. (DE M: p. 55) Officer Michael Davidson was deposed on October 1, 2020. (DE N:57) He is currently a DOT motor vehicle enforcement officer and has been since January 2007. (DE N:57, p. 5) Officer Davidson testified that when the brake pedal is applied, air is pushed into the brake chamber. The chamber puts a certain amount of pressure against the slack adjuster and the slack adjuster has a push rod that rotates the brake camshaft. On the end of the brake

camshaft, there is an S-shaped end that spreads the brake linings. The brake linings then come in contact with the inside of the brake drum and when those two friction surfaces come together, braking occurs. (DE N:57, p. 19)

If the system is working properly, when the air press is low enough the springs inside the brake chamber will engage the brakes. (DE N:57, p. 20)

The emergency stop switch is a red knob made out of plastic that is about one and a half or two inches wide. It is meant to be pulled out. When it is pulled out, a valve is closed thereby engaging the brakes. (DE N:57, p. 21) Officer Davidson noted that there was rust on the brakes consistent with claimant's testimony that the semi-truck had not been in use for some time but that there was also evidence that the two friction surfaces were coming together at some point as the rust was smooth with lines indicating contact. (DE N:57, p. 22, 26)

Because of the extensive damage to the vehicle, Officer Davidson was not sure whether the air valves within the brake system were allowing any movement of air. (DE N:57, p. 41)

If there was a loss of pressure, the switch should pop out but in this case, the switch was intact. Officer Davidson admitted that if the switch was not popped out and the system was without air, it implied there was some sort of malfunction in the system. (DE N:57, p. 45-46)

The brakes did lock up after the collision and to move the semi-truck, the brakes on axle 2 had to be released. (DE N:57, p. 17) This indicates that the brakes engaged despite the emergency switch still being in the default position which could be consisted with a malfunction according to the testimony of Officer Davidson.

Sandy Carlson, office manager of Shinn Construction, and romantic partner of Roger Shinn, testified that she arrived on the scene before the paramedics. She observed young men pulling broken parts out of the truck. She approached the driver's side and spoke with claimant. She asked who was with his wife. He replied his sister, Martha. She encouraged him to hold still and asked what happened.

She later heard from someone at the scene that claimant once said he was going to drive his motorcycle into the train. She reported this to Deputy Shaddock, the investigator in charge. At hearing, she said that she did not remember from whom she heard the comment that claimant had thought about taking his life. Later Ryan Bates became the focus of the defendants. When asked about Mr. Bates at hearing, Ms. Carlson was evasive.

> Q. The morning of the accident, you spoke with Deputy Shaddock regarding this rumor you had heard about my client driving a motorcycle into a train.
>
> Right?

A. I don't know if it was that morning or if it was that afternoon, or if it was the next day.

Q. And you said you heard that rumor from somebody standing at the accident site, but you couldn't remember who that was.

Is that right?

A. I don't know who it was.

Q. Was that person, the source of that rumor Mr. Ryan Bates?

A. I did not see Ryan Bates at the accident scene.

Q. Well, eventually, your attorney was sent to go find Mr. Bates as being the originator of this rumor.

Do you disagree with that?

A. Mr. Bates called me about that.

Q. And did he tell you that you were incorrect that he did not start that rumor?

A. He most certainly did not tell me that.

Q. You've seen Mr. Bates's affidavit, that is part of the record here, have you?

A. I have seen it.

Q. And do you disagree with his affidavit?

A. It is 100 percent contradictory to what he told me on the phone in August when he called me.

(Transcript, p. 171, lines 15-25; p. 172, lines 1-23)

Initially, she testified she did not know who started the rumor and then when asked if the rumor started with Ryan Bates she replied she did not see Mr. Bates at the accident scene instead of answering that she did not know. Yet Ryan Bates is one of the witnesses that the defendants were adamant needed to be deposed and the record was held open after the hearing in order for his testimony to be obtained. Further, she admitted to speaking to him on the phone in August.

Mr. Bates provided a sworn statement as part of the late evidence admitted into the record. He stated that he has only spoken to claimant a few times and that claimant had never reported any thoughts of self-harm nor had he ever implied that he was intending to commit or was considering committing acts of self-harm. He further stated: "I also never told Roger Shinn or Sandy Carlson that Mr. Myers told me directly that he planned to 'drive a motorcycle into the side of a train.' or something similar." (JE 0:58)

However, he did hear of comments made by others at the scene of the July 20, 2020, accident speculating that claimant felt down and out and that he was considering driving his motorcycle into a train. He thought these comments were something Mr. Shinn and Ms. Carlson should know and reported that he heard these comments to Michelle Provenzano, Ms. Carlson's sister, assuming that Ms. Provenzano would pass the information on to Mr. Shinn and Ms. Carlson.

In the days following the accident, Mr. Bates spoke with a close friend of claimant who said that at some point in the months before the July 20, 2020, accident claimant made the statement that he was considering driving his motorcycle into a semi-truck because he was feeling down and out. After hearing this comment, the friend became concerned about driving his own semi-truck to his shop because he was afraid he would meet claimant on the road. (JE 0:60)

Defendants were critical claimant failed to take evasive maneuvers such as utilizing the emergency braking systems, driving the semi-truck into the ditch or field, or even jumping out of the moving vehicle. To fail to take these actions is highly suggestive of intent to inflict self-harm argues defendants.

Counsel for defendants questioned claimant as to why he did not engage the Jake Brake. Claimant testified that he believed he would have but he has no memory of what happened immediately preceding the accident. Counsel for defendants also questioned claimant as to why he took no evasive maneuvers to which claimant replied that it was a matter of seconds in which this occurred.

Ms. Carlson is the main proponent of the theory that claimant planned to take his own life. At hearing, she testified that she has driven all sorts of trucks from step decks, vans, belly dumps, end dumps, liquid tanks, and Peterbilt's similar a to claimant's semi-tractor.

She was familiar with claimant's July 20, 2020, route and testified that when claimant leaves his home to get to County Line Road, he drives past her house. She filmed the video in Exhibit D which reflects the route claimant took the date of the accident.

Ms. Carlson testified to personal opinions of how the accident occurred, the importance of the lack of braking, whether claimant was in control of his vehicle at the time of the collision, when he should have applied brakes, how he should have engaged in evasive maneuvers. Ms. Carlson has experience as a truck driver and an office

manager but she is not an accident reconstruction expert and her personal opinions are given low weight.

She did admit that the drum of the brakes can rust if the truck is not used for several months but once the brakes are free from rust, there should not be further issues with them. She also testified that she felt a reasonable truck driver should have checked his brakes if he felt there was a problem and called the shop. Further, she felt that even if the brakes failed and the parking brake did not cause the air pressure to evacuate the system, claimant still could have used the engine brake or Jake Brake to slow his truck. She was critical that claimant did not engage in evasive maneuvers stating, "I would have hit a bridge before I hit a train."

While Ms. Carlson may have done something different does not mean the failure to do so is willful intent to take one's own life.

Just prior to the hearing, defendants proposed a new defense which was that the wrong employer had been sued. It is a convoluted argument based on the theory that there are two entities that employed claimant, both of which are owned by Ben Shinn who did not testify at hearing or via deposition. At no time prior to the hearing did defendants file a motion to indicate that the named employer on the caption was inaccurate.

During cross examination, Ms. Carlson was asked if it was her idea that the actual employer in this case should be Ben Shinn Trucking instead of Shinn Construction. In response, she replied as follows:

> Q. Was it you who came up with the idea that maybe it should have been Roger Shinn Trucking instead of Shinn Construction as the Defendant?
>
> A. It wasn't an idea of anything. It's just a fact that Mr. Myers worked for both Ben Shinn Trucking and Shinn Construction in 2020 and 2019 and 2018 and 2017, and so on.
>
> Q. So was it you that brought up the fact that as of yesterday, that should become an issue as far as this case goes?
>
> A. I don't know what issue you're speaking to.
>
> Q. You weren't involved in the decision to try to bring Ben Shinn Trucking in as another Defendant?
>
> A. What decision are you referring to?
>
> Q. Were you aware that that happened yesterday?
>
> A. I may have been aware that it happened yesterday when it

happened by –

Q. Were you aware that was going to happen prior to yesterday?

A. I don't know that I was aware that it was going to happen until it had happened.

(Tr. p. 169, lines 1-25)

The non-answers are as telling as if she had replied with straightforward admissions.

Ben Shinn Trucking and Shinn Construction are two entities owned by the same people. Ben Shinn started a tanker division to haul for Green Energy. Up until approximately three or four years ago, all of claimant's benefits came from Ben Shinn. Around 2016 or 2017, individuals who worked Shinn Construction were then compensated from the corporate entity of Shinn Construction. In 2016, he received a W2 from Ben Shinn Trucking for $53,193.93. (CE 13:219) In 2017, his W2 was issued by Ben Shinn Trucking in the mount of $49,586.56. (CE 13:220) In 2018, the W2 was issued by Ben Shinn Trucking for $47,114.86. (CE 13:221)

In 2019, claimant was paid $14,873.96 from Ben Shinn Trucking and $28,212.16 from Shinn Construction. (CE 13:223, 222) In 2020, claimant was paid $3,086.38 in 2020 from Ben Shinn Trucking and $31,184.88 from Shinn Construction. (CE 13: 224, 225)

Claimant was a salaried employee with Shinn Construction of approximately $1,200.00 per week beginning April 10, 2020. His health insurance in 2020 was paid through Ben Shinn Trucking.

Claimant testified he was moved from Ben Shinn Trucking to Shinn Construction in approximately 2018 or 2019 with paychecks during those years issued by Shinn Construction. However, tax forms show that in 2019 and 2020, claimant was paid by both Shinn Construction and Ben Shinn Trucking. (CE 13) Ms. Carlson testified claimant was an employee of both entities. Ms. Carlson, herself, is an employee of both companies.

She further admitted that Roger Shinn does not pay special attention or make sure whether he is directing an employee to a Ben Shinn Trucking job or a Shinn Construction job.

In questioning, even the defendants' counsel became confused and said, "All right, and Shinn Construction sometimes, it's basically the same company, it sounds like, would have you go do Shinn Trucking projects." (Tr. p. 117, lines 22-25)

This shell game of employers is not the only evasive maneuver the companies have conducted. Shinn Construction failed to put the money they were taking out of the employee's paychecks and put them into a 401K program as had been previously promised. As a result, Shinn Construction was penalized and the 401K program was transferred to a law firm for administration.

Ms. Carlson testified that claimant did not provide a work release to Shinn Construction and thus was not working for Shinn Construction. However, Roger Shinn shared with Deputy Shaddock that he had spoken with claimant the morning of July 20, 2020, and authorized claimant to do the work previously detailed.

During her testimony, Ms. Carlson hedged her answers and attempted to misdirect in an effort to not answer questions she did not like. When claimant's counsel asked her a straightforward question about whether claimant could be employed by the Shinn trucking companies if he was not able to climb into the cab, she refused to answer directly several times and had to be directed by the undersigned to answer.

Because of Ms. Carlson's overall evasiveness and questionable behavior regarding the identity of the real parties in interest, her credibility is found to be low.

Claimant was issued several citations including failure to maintain control, failure to stop at a railroad crossing, and failure to maintain a seat belt. (DE M:56, p. 7)

Defendants challenged claimant's credibility. They point to the following, among other things, as evidence of his lack of credibility:

1) Reporting to Deputy Shadduck he did not remember what happened but reporting to the EMS crew that his brakes failed

2) Falsely reporting he was restrained

3) A fraud charge in the remote past

At hearing, however, claimant's answers were direct during cross examination. His testimony was consistent at the time of the hearing when compared to previous statements given to the workers compensation investigator. His account of how the incident occurred and his medical health were consistent in the medical records. There was no demeanor cues such as constant shifting, inability to look directly in the camera, looking to his attorney for guidance during questioning, evasiveness, or equivocation during questioning.

Claimant testified that he regularly wore his seat belt and believed that he was wearing one at the time of the collision. I do not find this to be a false reporting. The fraud charge was in the remote past. Relating to Deputy Shadduck he did not remember what happened is not inconsistent with claimant's condition at the time Deputy Shadduck was questioning him. Claimant suffered multiple traumas and while he might not have lost consciousness at the scene, he did following the collision and remained

unconscious for over two weeks. It is not implausible that claimant has suffered some memory loss.

I find that the claimant is a credible witness.

The Mercy Emergency Transport Services notes that claimant reported that his brakes did not work, causing him to collide with train cars moving across the track. (JE 4:58) Claimant was hospitalized from July 20 to August 25. After discharge, he was admitted to Ridgewood Care Center, a nursing rehabilitation facility.

During his hospitalization, he underwent numerous surgeries including laceration repair of a scalp wound, positioning, soft tissue retraction, limb manipulation, fracture reduction, fixation and wound closure of the lower extremities on July 20, 2020, a chest reconstruction with mesh due to multiple rib fractures on July 29, 2020, (JE5:81, 98, 111)

His discharge diagnosis included bilateral pulmonary contusion, close fracture of eight or more ribs on the right side, pneumothorax on the right, close fracture of the nasal bone, close fracture of six ribs on the left, traumatic hemothorax, Bilateral comminuted condylar femur fractures status post open reduction internal fixation, left radial head fracture, and hemorrhagic shock. (JE 5:117; 6:122)

On the intake notes for his admission to Ridgewood for ongoing Skilled Care, his past medical history was enumerated as follows:

PAST MEDICAL HISTORY:

1. Right-sided pneumothorax.
2. Severe bilateral pulmonary contusions, right greater than left.
3. Right severely comminuted ribs 3 – 10 fracture with [TIME: 02:48] chest.
4. Left ribs 3-7 fractures, which were not displaced.
5. Bilateral comminuted condylar femur fractures status post open reduction internal fixation.
6. Left radial head fracture.
7. Hemorrhagic shock.
8. Lactic acidosis.
9. Hypothyroidism.
10. Diabetes mellitus type 2.
11. Chronic hepatitis C.
12. Adjustment disorder with mixed depression and anxiety.
13. Muscular dystrophy.
14. Insomnia.
15. Benign prostatic hyperplasia with lower urinary tract symptoms.
16. Hypertension.
17. History of osteoarthritis status post right total knee replacement.

(JE 6:122) The assessment of his current condition on August 24, 2020, included

bilateral femur fracture status post open reduction internal fixation, multiple rib fractures status post motor vehicle accident, diabetes mellitus type two, currently fair control, constipation, critical illness myopathy, and history of muscular dystrophy. (JE 6:124)

Claimant spent approximately eight weeks at Ridgewood recovering and was discharged on October 23, 2020. (JE 6:140) On September 24, 2020, he had a left shoulder injection due to aggravated arthritis in both shoulders. (JE 6:134) He had had a previous right shoulder injection the week before. (JE 6:134) He was discharged from Ridgewood with the following medications:

DISCHARGE MEDICATIONS:

1. Bariatric walker with 2 wheels secondary to bilateral comminuted femur fractures.
2. Biofreeze as needed.
3. Bupropion extended release 300 mg daily.
4. Gabapentin 200 mg 3 times a day.
5. Metformin 1000 mg extended release daily.
6. Furosemide 20 mg daily.
7. Levothyroxine 137 mcg daily.
8. Lisinopril 20 mg daily.
9. Melatonin 5 mg at bedtime.
10. MiraLax 17 grams daily twice a day for constipation prevention.
11. Oxycodone 5 mg up to 3 times a day as needed for pain.
12. ProAir inhaler as needed.
13. Tamsulosin 0.4 mg at bedtime
14. Tylenol as needed for pain.

(JE 6:141) At that time he was able to walk short distances with the assistance of a walker and pain was adequately controlled with Tylenol and the occasional oxycodone. (JE 6:141)

He was also given a prescription for in home skilled nursing from October 27, 2020, through December 25, 2020. (JE 7:143) Ultimately, he met his goals on December 22, 2020, and was discharged from skilled nurse on the same. (JE 7:152)

On November 11, 2020, he was provided an injection in both shoulders by Gerald Haas, D.O., for bilateral impingement symptoms which was aggravated by the train collision incident. (JE 2:27) On December 2, 2020, claimant returned to Dr. Haas' office and was seen by Chandra Brown, ARNP, for a one-month med check. The claimant described his pain as well controlled and at a 2 out of 10, pain level. (JE 2:29–30)

On February 15, 2021, claimant returned to Dr. Haas' office for a possible injection on his left side due to increased left shoulder pain. (JE 2:32) It was noted that he continued to make improvement and had advanced to walking with a cane short distances within his home. He also used a walker and a powered scooter occasionally both within the home and trips outside the home. The injection was provided. (JE 2:33)

On March 1, 2021, claimant returned to Dr. Haas' office reporting a fall and having right sided rib pain following the fall. (JE 2:34) X-rays did not reveal any acute trauma. (JE 2:34)

On March 3, 2021, he returned to Dr. Haas' office and was seen by Chandra Brown for a med check. Claimant reported that his pain was well-controlled with the medication but was having increased pain on the right side following the fall. Pain was 4 out of 10 on a 10 scale. (JE 2:37) Swelling was noted on the right side. (JE 2:39)

On June 3, 2021, claimant received bilateral shoulder injections from Dr. Haas for the bilateral shoulder pain. (JE 2:43) Claimant returned for a med check on the same date reporting well-controlled pain of 4 on a 10 scale. (JE 2:44)

In the six months preceding the hearing, claimant's progress appears to have stagnated. He has a motorized scooter. His daily routine includes using the scooter next to his bed to move from his bedroom to the kitchen. He makes coffee, lets the dog out, takes his medications, and eats breakfast. He then attempts to walk on his own power.

His ribs, which were crushed in the injury, bulge out. There are a couple places that are still tender. He cannot lean over without pain. He is not able to ride in a vehicle for more than approximately 45 minutes. He testified that while his back did hurt from his previous injury, the train collision intensified the symptoms. He complains of left-sided pain in the low back and pain radiating into the right leg.

He does not believe he could safely operate a semi-tractor in his current status due to the condition of his legs and feet if he could even manage to get into a truck which he does not believe he could do. He installed a handicap ramp outside of his home and inside everything is on one level.

Claimant is taking a battery of medications including gabapentin, indomethacin, oxycodone, orphenadrine, lisinopril among others. He has applied for and been approved for Social Security disability. (CE 9)

Ms. Maddison, his daughter, who has lived next door to claimant since 2018, described him as unsteady on his feet with weak legs and that walking was difficult for him. According to Ms. Madison claimant uses his motorized scooter frequently to maneuver. She has observed him in discomfort during car rides, holding his ribs and clutching his side. He rarely does mowing, shoveling or carrying pellets for his pellet stove.

Michael Church, a former co-worker of about 15 years, testified that he has observed claimant have limited mobility. According to Mr. Church, claimant uses a walker, scooter, and canes. Claimant has visited Mr. Church's home and had to be assisted up onto Mr. Church's deck to traverse one step. Prior to the collision, claimant did not have these agility problems and was fairly functional.

In July 2020, claimant was making the same pay rate and overall earnings than what he did earn at the time of his 2014 back injury. He testified that he was salaried since his back injury which resulted in an increase in earnings.

Claimant is currently not working and does not believe there is a job he can perform. He does not have computer skills or has he worked as a manager or in sales. He has not looked for new employment nor sought any job retraining.

There is almost no mental health expert testimony. When asked about claimant's mental state, Dr. Haas wrote on June 3, 2021, "I have no information about any suicidal ideation in the past and I never had any concerns about this whenever I had seen him in the past." (JE 2:47)

On August 19, 2021, Dr. Haas agreed that claimant was at or near MMI and that further improvement would be minimal and that an FCE would be appropriate (CE 3:68)

He underwent two IMEs, one for the defendants and one for claimant. Claimant testified he felt that the Dr. Stoken evaluation was more thorough than that of Dr. Kimelman. Jacqueline Stoken, D.O., performed strength tests and measured range of motion with a tool which Dr. Kimelman did not do.

At Dr. Stoken's September 7, 2021, examination, claimant complained of pain in the back that ranged from 1 to 6 on a 10 scale with an average of 5. Rest and medications alleviated pain. Walking, standing, lifting, and laying down worsened the pain. (CE 1:16)

Pain in his ribs ranged from 3 to 9 on a 10 scale with an average of 6. Medications and rest alleviated pain while movement, twisting, pressure and coughing worsened pain. (CE 1:16)

He complained of pain in his right shoulder that ranged from 1 to 8 on a 10 scale with an average of 6. Rest and medicine alleviated pain and lifting, use, and lifting above his head worsened the pain. (CE 1:17)

He complained of bilateral leg pain that was lessened with heat, rest and medication but worsened with standing, walking, and lifting. (CE 1:17)

Overall, medications, muscle relaxants, and physical therapy provided moderate amount of relief. (CE 1:17) The pain did not interfere with writing or typing but did interfere mildly with showering and dressing. It also interfered moderately with his ability to lift 10 pounds, do chores around the house, sleep, and travel. (CE 1:17)

At the time of the examination, he was using medical marijuana. (CE 1:17)

Dr. Stoken concluded claimant sustained bilateral upper extremity injuries, low back injuries, and left knee injury. (CE 1:20) As a result of these injuries, Dr. Stoken opines claimant has sustained a total of 15 percent whole body impairment.

A functional capacity examination was completed the same date. (CE 2:55) Claimant gave maximal, consistent effort. (CE 2:56) As a result of the examination, it was determined that claimant's functional ability placed him within the sedentary work category. (CE 2:58) He should avoid all lifting, carrying, pushing/pulling activities, as well as prolonged standing or walking activities. (CE 2:58) He had good grip strength bilaterally, as well as good sitting tolerance. (CE 2:57) He was able to sit without restrictions. (CE 2:63)

Based on the FCE, Dr. Haas agreed that claimant would not be capable of performing any work on a regular basis. (CE 2:69) Dr. Haas opined even if claimant were to find a position within his restrictions, he would miss work on a regular basis due to his injuries. (CE 2:69) This irregular attendance would likely occur more than once a week. (CE 2:69)

On September 20, 2021, claimant underwent an IME with Joshua D. Kimelman, D.O. (DE A:1) In the subsequent report, Dr. Kimelman records that claimant begins his day with pain at 8 on a 10 scale and that the pain is reduced after taking either percocet or oxycodone. (DE A:1) At the examination, claimant's pain in his left shoulder, left arm and bilateral leg pain was 8 on a 10 scale. (DE A:2) Dr. Kimelman observed claimant to walk with a markedly difficult gait using a single cane and wearing ankle and foot orthoses which he has used since 2006 when he was first diagnosed with Charcot-Marie-Tooth. (DE A:4) He had absent knee and ankle reflexes and weakness in all planes of motion of feet and ankles, as well in the quadriceps bilaterally. (DE A:4) He had reduced range of motion in the bilateral knees and left upper extremity but full range of motion of the cervical spine (DE A:4)

His gait disturbance was in the moderate range with a 20 percent impairment of the whole person partially due to Charcot Marie Tooth and in part due to the varus in the bilateral lower extremities. (DE A:4) As a result of the July 20, 2020, incident, he has impairment in the left elbow and right knee and left knee. (DE A:4) Dr. Kimelman assigned 10 percent loss of function for each leg and 20 percent whole body impairment due to his gait. (DE A:4) It appears Dr. Kimelman forgot to assign impairment for the left elbow but did note that claimant had restriction of motion in the left elbow representing 24 degrees loss of supination and 25 degrees loss of flexion, as well as 20-degree loss of left wrist extension. (DE A:4)

Claimant's medical expenses for Mercy, Ridgewood Specialty Care, Dr. Haas, and in home care is $757,099.11. (CE 4:70) The bulk of his expenses are from his 17 days at Mercy Medical Center while he was in a coma. (CE 4:70) Pharmacy charges are $122.99. (CE 6:199)

Dr. Stoken charged $2,000.00 for the exam and $2,400.00 for the report. (CE 1:54)

CONCLUSIONS OF LAW

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 R. App. P. 6.904(3).

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.

The first issue at hand is whether claimant was an employee of the defendant Shinn Construction. Defendants raised a late defense that the real party in interest is Ben Shinn Trucking instead of Shinn Construction. Claimant was headed to the Eddyville shop which was a Ben Shinn Trucking shop. Claimant also spoke with Troy Dejong who worked exclusively for Ben Shinn Trucking. Claimant testified without rebuttal that the Eddyville shop served both Ben Shinn truckers and Shinn Construction truckers. Sandy Carlson is the office manager of Shinn Construction but she testified she had not received any paperwork releasing claimant to return to work.

Complicating matters is that Roger Shinn is the president of both corporate entities. He directed claimant to the Eddyville shop.

Defendants were asked to brief this issue but provided no case law nor legal guidance. It is possible defendants are arguing claimant was serving as a special employee of Ben Shinn Trucking on July 20, 2020, although it is not expressly stated. "[I]n cases involving the question of whether an employee of a general employer became the employee of a special employer, the presumption is that the general employer continues as the sole employer. O'Brien, 72 A.D.2d at 860, 421 N.Y.S.2d at 730; 1B Larson § 48.14, at 8–455." Parson v. Procter & Gamble Mfg. Co., 514 N.W.2d 891, 894 (Iowa 1994).

This legal argument does not appear to be applicable in the current case or, at least, there is not sufficient evidence to prove that Ben Shinn intended to enter into a legal employment contract with the employee on the day of the truck accident that would supersede claimant's employment with Shinn Construction. See Procter & Gamble Mfg. Co., 514 N.W.2d at 894 (noting that intent of the parties controls).

It would also be odd to disregard defendants' previous admissions. In the November 2020, answer defendants admitted they were the employer on the date of the alleged injury. Sandy Carlson and Roger Shinn are the individuals that are in the best position to determine the claimant's employment status both in November 2020 and continuing forward. There was some vague attempts to explain that the defendants were not aware of claimant's conversation with Troy DeJong until the deposition of claimant but even after the deposition, there was no attempt to amend the answer or revise answers to interrogatories.

Rather, it appears that the defendants are engaging in a shell game, as characterized by the claimant, in an attempt to avoid liability. It is disingenuous to present, at the eve of hearing, that the claimant sued the wrong defendant when both companies employed and paid claimant concurrently, when both companies are run by the same person, Roger Shinn, who conveniently did not testify, when the answer and the hearing report contained admissions from defendants that the employer was Shinn Construction. Even Sandy Carlson admitted she was employed by both companies or, at least, paid by both companies. Further, the only testimony that Ben Shinn Trucking was the correct employer came from Sandy Carlson who was previously found to be not credible.

It is found based on the defendants' admissions that they are the real party in interest and the employer of the claimant at the time of the alleged injury.

Defendants seek to preserve their rights under Iowa Code section 85.21. Iowa Code section 85.21 and 85.22 applies to parties to the case. There are only three parties in this case: claimant, defendant Shinn Construction and insurer Technology Insurance Company. Iowa Code sections 85.21 and 85.22 cannot be applied in this case to entities not a party to the suit.

Having determined that claimant was an employee of Shinn Construction at the time of the July 20, 2020, collision and that his injury arose out of and in the course of this employment, the question turns to whether claimant is barred from recovery due to an affirmative defense.

Defendants have pled two affirmative defenses. First, they argue that the claimant did not overcome the presumption that he was intoxicated at the time of the collision and second, they argue that he intentionally intended to harm himself.

The legislature amended Iowa Code section 85.16 in 2017 to create a presumption of intoxication upon a positive test result reflecting, among other things, the presence of depressant. More specifically, the section provides as follows:

> (1) If the employer shows that, at the time of the injury or immediately following the injury, the employee had positive test results reflecting the presence of alcohol, or another narcotic, depressant, stimulant, hallucinogenic, or hypnotic drug which drug either was not prescribed by an authorized medical practitioner or was not used in accordance with the

> prescribed use of the drug, it shall be presumed that the employee was intoxicated at the time of the injury and that intoxication was a substantial factor in causing the injury.
>
> (2) Once the employer has made a showing as provided in subparagraph (1), the burden of proof shall be on the employee to overcome the presumption by establishing that the employee was not intoxicated at the time of the injury, or that intoxication was not a substantial factor in causing the injury.

Iowa Code § 85.16(2)(b) (2017).

Claimant tested positive for cannabis on July 20, 2020, and thus a presumption of intoxication exists. Deputy Shadduck who was on the scene and spoke to claimant while claimant was still pinned inside the cab stated that claimant did not appear to be in an altered state. Claimant testified that he ingested weed-laced gummies but ceased at least a couple days before July 20, 2020. Dr. Stoken opined that the positive results represented remnant result without intoxicating effects. There was no other medical opinion rebutting that of Dr. Stoken.

Defendants point out that the claimant knew that a positive test result would be in violation of Iowa's OWI laws and that it was also a violation of the defendant employer's policies. Claimant was also a regular user of cannabis in the past. (JE 3:50) However, these pieces of evidence only support claimant's admission that he took cannabis in the form of gummies preceding the collision but not that he was intoxicated or impaired at the time of the collision. Instead, greater weight is given to unrebutted medical testimony, as well as the unrebutted testimony of the investigating officer.

Based on the observations of Deputy Shadduck, an accident reconstruction expert with over 17 years of experience on the job, and the medical opinion of Dr. Stoken, it is found that claimant overcame the 85.16(2)(b) presumption of intoxication.

Claimant's claim for workers' compensation benefits is not barred by the defense of intoxication.

Iowa Code also prevents workers' compensation benefit recovery in the event that the employee engaged in willful self-harm.

No compensation under this chapter shall be allowed for an injury caused:

1. By the employee's willful intent to injure the employee's self or to willfully injure another.

Iowa Code.§ 85.16(1).

Claimant maintains that he did not attempt to kill himself by driving his Peterbilt into the train on July 20, 2020. The evidence shows that the day was clear with no visibility issues. The crossing arm of the train was in working order at the time of the

collision. Claimant was in the northbound lane, the correct lane for his path of travel, at the time of the collision which would be difficult to maintain if claimant were not in control of the steering. There were no skid marks to indicate that the brakes had been engaged. Deputy Shadduck, one of the accident investigators, believed there was no attempts to brake.

Claimant did not take any evasive maneuvers such as swerving into a field or jumping out of the moving truck. He was not belted which was not ordinary for claimant according to his own testimony.

One of claimant's close friends purportedly relayed worry that claimant would harm himself. In June 2020, claimant moved property into a revocable trust to remove assets out of the control of his stepsons. He called to find out if he could access his 401K and he set up a living will. Claimant had expressed suicidal ideation in the distant past according to 2017 marital counseling records.

It is possible that there was brake failure. When the caregiver arrived on the morning of July 20, 2020, she observed claimant getting in and out of his truck consistent with claimant's own testimony that he was moving around the truck, trying to loosen his brakes. There was rust on the brake drums that further buttressed claimant's testimony about the condition of his brakes on July 20, 2020. Officer Davidson conceded that the emergency brake button being intact could be suggestive of some sort of brake malfunction.

Claimant testified credibly that he was in a good mood that day and excited to return to work. His daughter confirmed this testimony with observations of her own that claimant was more mobile than he had been in her memory.

Claimant underwent right total knee replacement surgery in May 2020 which does not appear to be behavior of an individual with self-harm ideation. "He is very pleased with the results of his total knee replacement," Dr. Dulaney documented. "Tom is doing great. He will continue activities as tolerated. Any recurrent concerns, he will simply call. He is very comfortable with this plan." (JE 1:23) None of his other doctors preceding July 2020 made notations of suicide or depression. He was actively going through physical therapy to improve his knee condition.

When asked about claimant's mental state, Dr. Haas wrote on June 3, 2021, "I have no information about any suicidal ideation in the past and I never had any concerns about this whenever I had seen him in the past." (JE 2:47)

The greater weight of the evidence does not give rise to a finding that claimant intended to harm himself on July 20, 2020. That he failed to take evasive maneuvers such as braking, by driving into a ditch, a field or an embankment or even jumping out of a semi-truck going 50 or 60 miles an hour is not sufficient evidence to support a finding that claimant intended to harm himself. There are other plausible explanations for claimant not taking evasive maneuvers including panic or lack of foresight.

Even if he did express suicidal ideation preceding the collision, there are other signs that he was actively working to get healthy enough to return to work including undergoing significant surgery and physical therapy.

It is found defendants did not carry their burden to prove by a preponderance of the evidence that claimant engaged in the willful intent to injure himself.

Having decided claimant's pursuit of worker's compensation benefits is not barred by the affirmative defenses of intoxication or intent to injure oneself, the next issue is to what benefits claimant is entitled.

The parties agree that claimant was off work from July 20, 2020, through August 19, 2021. It was during this period of time that claimant was recovering from injuries that arose out of and in the course of his employment. Therefore, claimant is entitled to temporary benefits from July 20, 2020, through August 19, 2021.

Per the hearing report, the parties dispute the nature of claimant's injury and whether it is scheduled member or industrial. Claimant sustained injuries to his chest, ribs, low back, and bilateral lower extremities, and nose. The chest and ribs are part of the torso and those are deemed to be body as a whole or industrial injuries. Iowa Code § 85.34(2)(v)

Thus, claimant has sustained a permanent disability to the whole body and is entitled to an industrial disability award.

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.

Claimant did have extensive pre-existing injuries and diseases such as Charcot-Marie-Tooth which affected his gait and ability to walk, his right knee degenerative disease which necessitated a total knee replacement, his bilateral shoulder issues

which have required almost annual injections. He was assigned to light duty work in 2015 due to a previous work injury and Dr. Kimelman assigned a 20 percent rating due to gait impairment that included claimant's pre-existing disease.

Despite the pre-existing disease and impairments in 2013, claimant returned to work as a truck driver.

Dr. Stoken concluded claimant sustained bilateral upper extremity injuries, low back injuries, and a left knee injury. (CE 1:20) As a result of these injuries, Dr. Stoken opined claimant has sustained a total of 15 percent whole body impairment. A valid FCE placed claimant within the sedentary work category with restrictions of no lifting, carrying, pushing/pulling activities, as well as prolonged standing or walking activities. He had good sitting tolerance. Dr. Haas adopted the FCE restrictions. No doctor has rejected them. Dr. Haas further opined claimant would not be capable of performing any work on a regular basis and that even if claimant were to find a position within his restrictions, he would miss work on a regular basis due to his injuries.

No doctor has told claimant he cannot drive and he does not have any restrictions on his license.

Claimant testified that he cannot pull himself into a semi-tractor so while he may be able to drive distances similar to what he was doing before the injury, his injuries hamper his ability to climb into a semi. This does not preclude him from doing other work as a driver. Claimant has looked for no work, has sought out no job retraining.

He has extensive trucking experience and served as a dispatcher at one time. He has not applied for those types of jobs. It is true that he has limited sedentary work experience, but the lack of motivation to return to work in this case is one of the factors to determine the extent of disability.

On the other side, claimant is an older worker. His injuries were quite serious. He has no computer experience or office experience. While claimant may still be employed by defendant employer in some capacity absent his violation of the drug policy this is evidence of the defendant employer's generous employment policies rather than the labor market available to claimant.

He has difficulty moving within his trailer, using his motorized scooter to traverse the distance from his bed to his kitchen. He is not able to climb into the cab of a semi-tractor. He could drive but he would not be able to lift, carry, push or pull. It is not clear what positions would be available to a person for driving only. Even if he was able to climb into the cab, claimant worries about his ability to brake or clutch consistently. Additionally, his ability to drive a truck is impeded by the medications he is taking that are necessary to control his pain.

In weighing the factors above, while it is unfortunate claimant has not looked for work or investigated job retraining, the greater weight of the evidence supports a finding that he is permanently and totally disabled. Dr. Haas opined without rebuttal that claimant would not be capable of performing any work on a regular basis and that even

if there was a position within claimant's restrictions, claimant would miss work on a regular basis.

Total disability is not a state of absolute helplessness but when an 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).

Defendants seek an apportionment against claimant's industrial disability. Iowa Code section 85.34(7) was revised in 2017 to eliminate the previous rule that permanent total disability awards are not subject to apportionment. See Drake Univ. v. Davis, 769 N.W.2d 176, 184 (Iowa 2009). The revision also eliminated the formula for how the liability for the combined disabilities should be apportioned. Roberts Dairy v. Billick, 861 N.W.2d 814, 820 (Iowa 2015), as amended (June 11, 2015); Warren Properties v. Stewart applies. 864 N.W.2d 307, 319 (Iowa 2015), as corrected (July 1, 2015).

Iowa Code section 85.34(7) says that an employer is not liable for compensating an employee's pre-existing disability that arose out of and in the course of employment from a prior injury with the employer, to the extent that the employee's preexisting disability has already been compensated. Iowa Code section 85.34(7) (2017)

Defendants do not provide a calculation for the apportionment and claimant does not address this issue in his brief. There is no expert testimony differentiating previous injuries from the present. Dr. Kimelman opined claimant's whole body impairment is 20 percent and that some of the impairment is due to the claimant's Charcot-Marie-Tooth condition and some from the claimant's injuries sustained on July 20, 2020, but no percentage breakdown is given.

The burden is on the defendants to prove apportionment and without expert testimony, the undersigned can but guess at how much of the current disability is related to the July 20, 2020, injury and how much is from prior injuries.

He had returned to work and was driving a truck for defendant employer for several years prior to his July 20, 2020, injury. He had been out of work immediately preceding the injury, but from degenerative disease rather than a work-related injury for which he had already been compensated. Based on the foregoing, it is found defendants have not provided sufficient evidence to prove entitlement to an apportionment.

Permanent total disability benefits are payable during the period of the employee's disability. Iowa Code § 85.34(3)(a). As a result, permanent total disability benefits generally commence on the date of injury. See Sandhu v. Nordstrom, Inc., File No. 5046628 (App. January 24, 2019). Thus, the commencement date for claimant's permanent total disability benefits is July 20, 2020. This renders claimant's claim for temporary disability benefits moot. (See Hearing Report, p. 1)

Claimant asserts a claim for penalty benefits pursuant to Iowa Code section 86.13. This issue is not briefed by either party so it is not clear under what theories claimant believes supports his entitlement to penalty benefits.

It is presumed that given that no benefits are paid, the claim for penalty benefits arises from an unreasonable denial. Iowa Code section 86.13 requires the imposition of additional benefits unless the employer shows reasonable cause or excuse for the delay or denial. Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996). It is defendants' burden to prove a reasonable cause or excuse for the delay or denial. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996).

The applicable statutory standard for penalty benefits is codified at Iowa Code section 86.13(4), which provides:

> (b) The workers' compensation commissioner shall award benefits under this subsection if the commissioner finds both of the following facts:
>
> (1) The employee has demonstrated a denial, delay in payment, or termination of benefits.
>
> (2) The employer has failed to prove a reasonable or probable cause or excuse for the denial, delay in payment, or termination of benefits.
>
> (c) In order to be considered a reasonable or probable cause or excuse under paragraph “b”, an excuse shall satisfy all of the following criteria:
>
> (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
>
> (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
>
> (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.

Iowa Code § 86.13(4)(b)-(c).

Delay attributable to the time required to perform a reasonable investigation is not unreasonable. Kiesecker v. Webster City Meats, Inc., 528 N.W.2d 109 (Iowa 1995).

It also is not unreasonable to deny a claim when a good faith issue of law or fact makes the employer's liability fairly debatable. An issue of law is fairly debatable if viable arguments exist in favor of each party. Covia v. Robinson, 507 N.W.2d 411 (Iowa 1993). An issue of fact is fairly debatable if substantial evidence exists which would

support a finding favorable to the employer. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

An employer's bare assertion that a claim is fairly debatable, however, is insufficient to avoid imposition of a penalty. The employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

This case was a challenging one for the undersigned. The issues were heavily fact based and it cannot be said that the denial was unreasonable given that the claimant tested positive for cannabis and there were no signs of braking on the day of the incident. Based on the previous findings of fact, it is found that the claim was fairly debatable and imposition of penalty benefits is not appropriate.

Claimant also seeks medical expenses as set forth in Claimant's Exhibit 4 and 6. While defendants asserted on the hearing report that these expenses were not authorized, defendants lost their authorization defense upon their denial of the claim. See Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193 (Iowa 2010). It appears all of the expenses contained in Claimant's Exhibit 4 and 6 were for treatment of claimant's injuries arising out of the work injury of July 20, 2020. Thus, defendants are responsible for the expenses contained in Claimant's Exhibit 4 and 6.

Defendants argue that the entirety of the amount in Claimant's Exhibit 4 and 6 should not be assessed and only the amount that was paid by the health insurer. In support of this argument, defendants cite Pexa v. Auto Owners Inc. Co., 686 N.W.2d 150, 156 (Iowa 2004) as controlling precedent. Pexa is a personal injury case and not a worker's compensation case. In that case, the Supreme Court stated that the amount charged, standing alone, is not evidence of reasonable and fair value of services rendered. Id. The billed amount is relevant only if that figure was paid or an expert witness has testified to the reasonableness of the charges. Id. The amount charged is not, in the absence of proof of the reasonableness of the billed sum, support recovery of medical expenses. Id. The court also stated that an injured party's recovery for past medical services should be limited to the amount actually paid for medical services and that such a position would be contrary to the long-standing principle that such damages are measured by the reasonable value of medical services and the amount paid is but one form of probative evidence on this issue. Id. Medical charges may be compromised for reasons other than the unreasonableness of the billed amount. Id.

Pexa's holding is that jury decides what is the reasonable and necessary cost of medical care as a jury is not bound by the testimony of an expert but may use their own judgment in such matters. Id.

The Pexa case is persuasive but not authoritative because Iowa Code section 85.27 controls in workers' compensation cases.

The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.

Iowa Code § 85.27. If it is believed that the charges are excessive or unnecessary, the defendants can bring a separate action, requesting a determination of the reasonableness of the charges. Iowa Code § 85.27(3)

In this case, the medical bill from the hospital was sent to a collection agency who pursued a recovery of $57,727.84. (CE 4:71) The letter from the collection agency also indicated that the claim may increase if additional health benefits are paid. (CE 4:71) It would not be appropriate for the claimant to have to pay out of pocket for his medical expenses that arose out of the work injury. To that extent, the defendants are ordered to reimburse the payor of the medical expenses the amount paid. Should there be future disputes about the reasonableness of charges, the parties should avail themselves of the avenues of relief provided by the statute.

Claimant seeks reimbursement for expenses related to his IME with Dr. Stoken under Iowa Code section 85.39. Iowa Code section 85.39, as amended in 2017, provides in relevant part:

> If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

Iowa Code § 85.39 (2017).

In this case, there was no opinion obtained by an employer-retained physician prior to the examination of Dr. Stoken and thus the trigger for Iowa Code section 85.39 examination was not initiated. Claimant is not entitled to a recovery of the IME of Dr. Stoken pursuant to Iowa Code 85.39.

In cases where defendants have denied liability, the commissioner has concluded that medical opinions or reports obtained for the purposes of determining causation, regardless of whether they are obtained from a treating or expert physician, are not the equivalent of an impairment rating for purposes of Iowa Code section 85.39.

See Reh, File No. 5053428 (App. March 2018); Soliz v. Farmland Foods, Inc., File No. 5047856 (App. March 2018).

Agency rule 876 IAC 4.33(6) permits the assessment of the reasonable costs of "obtaining no more than two doctors' or practitioners' reports." The agency has previously determined this administrative rule permits assessment of the cost of FCE expenses and vocational expert reports. Caven v. John Deere Dubuque Works, File Nos. 5023051, 5023052 (App. July 21, 2009); Pastor v. Farmland Foods, File No. 5050551 (Arb. April 2016); Bohr v. Donaldson Company, File No. 5028959 (Arb. November 23, 2010); Muller v. Crouse Transportation, File No. 5026809 (Arb. December 8, 2010). However, the Iowa Supreme Court has held that only the cost of drafting the expert's report is permissible in lieu of testimony. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845-846 (Iowa 2015).

Thus claimant is entitled to recover the cost of the report of Dr. Stoken or $2,400.00. The cost of the filing fee is also appropriate to be assessed.

ORDER

That defendants are to pay unto claimant permanent total disability benefits at a rate of seven hundred seventy-one and 91/100 dollars ($771.91) commencing July 20, 2020 and continuing during the period of permanent total disability.

That defendants shall pay accrued weekly benefits in a lump sum.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants shall pay the past medical bills as detailed above, as well as future medical expenses associated with claimant's work-related injuries.

That defendant shall pay the costs of this matter pursuant to rule 876 IAC 4.33 including the report fee of Dr. Stoken in the amount of two thousand four hundred and no/100 dollars ($2400.00) and the filing fee.

Signed and filed this 29th day of April, 2022.

JENNIFER S. GERRISH-LAMPE
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

John Dougherty (via WCES)

Nicholas Pellegrin (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.