BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

DALE TILL, Claimant, vs. WINDSTAR LINES, INC., Employer, and NATIONAL INTERSTATE INS. CO., Insurance Carrier, Defendants.	File No. 5067027 ARBITRATION DECISION Head Note Nos.: 1108.50, 1402.20, 1402.40, 1802, 1803, 2502, 2907, 3001, 4000.2

STATEMENT OF THE CASE

Dale Till, claimant, filed a petition in arbitration seeking workers' compensation benefits from Windstar Lines, Inc., employer and National Interstate Insurance Company, insurance carrier as defendants. Hearing was held on March 24, 2020. This case was scheduled to be an in-person hearing occurring in Des Moines, Iowa. However, due to the outbreak of a pandemic in Iowa, the Iowa Workers' Compensation Commissioner ordered all hearings to occur via video means, using CourtCall. Accordingly, this case proceeded to a live video hearing via CourtCall with claimant appearing remotely from his attorney's office, defense counsel appearing remotely, and the court reporter also appearing remotely. The hearing proceeded without significant difficulties.

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.

Claimant, Dale Till, was the only witnesses to testify live at trial. The evidentiary record also includes joint exhibits JE1-JE4, claimant's exhibits 1-8, and defendant's exhibits A-E. The evidentiary record closed at the conclusion of the arbitration hearing.

The parties submitted post-hearing briefs on May 1, 2020, at which time the case was fully submitted to the undersigned.

ISSUES

The parties submitted the following issues for resolution:

1. Whether claimant sustained an injury, which arose out of and in the course of employment on June 16, 2018.
2. Whether claimant sustained permanent disability as a result of the alleged June 16, 2018, work injury. If so, the nature and extent of permanent disability claimant sustained.
3. Whether claimant is entitled to temporary disability benefits from June 16, 2018 to September 25, 2019.
4. The appropriate commencement date for any permanency benefits.
5. The appropriate rate of weekly workers' compensation benefits.
6. Whether defendants are responsible for past medical expenses under Iowa Code section 85.27.
7. Whether claimant is entitled to be reimbursed pursuant to Iowa Code section 85.39 for the IME.
8. Whether penalty benefits are appropriate.
9. Assessment of costs.

FINDINGS OF FACT

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

Claimant, Dale Till, alleges he sustained an injury to his low back and left hip as the result of his employment with Windstar Lines, Inc. ("Windstar"). He has alleged an injury date of June 16, 2018. Defendants deny claimant sustained an injury or that he is entitled to any workers' compensation benefits.

Mr. Till was hired by Windstar on March 20, 2016 as a part-time charter bus driver. (Cl. Ex. 3, p. 23) Mr. Till typically drove students, student athletes, and adults. For example, he drove college athletes to conference games, or adults to places like Nashville, Tennessee where they stayed for several days. Prior to each bus trip, Mr. Till was required to perform a safety inspection of the bus. Additionally, he was required to inspect the engine compartment. For each bus trip the driver was responsible for loading and unloading the suitcases from the luggage compartment in the bottom of the bus. The luggage ranged in weight from 20 to in excess of 100 pounds. On an average trip, each passenger would have at least one bag. The buses had a capacity of 56 passengers. Often times, Mr. Till would have to get on his knees in order to load and unload the luggage. (Tr. pp. 27-30; Cl. Ex. 2, pp. 18-19)

Mr. Till received his job assignments from Windstar via telephone. Windstar would contact Mr. Till via telephone to offer him of a particular job or trip opportunity. The dispatcher, Jody, would call the driver and ask him if he was interested in taking a trip from point A to point B on a certain date, and provide other information. Part-time

drivers then had the option to accept the trip or decline the trip. If the driver accepted the trip, then three to four days later Windstar would send a detailed itinerary to the driver via email. Prior to June 16, 2018, Mr. Till does not remember a time when the initial contact regarding a trip was made in any manner other than via telephone. Generally, the only communications that were sent via e-mail were notifications of events such as a Christmas party or the death of a driver's family member. (Testimony)

Around the same time that Mr. Till started working as part-time driver for Windstar, he also started driving a bus part-time for Dubuque Community Schools. Mr. Till drove a bus occasionally for the Dubuque Community School District from March 30, 2016 through the Spring of 2019. He drove a bus that was adapted for students with disabilities. The bus had a built-in lift for wheelchairs. His bus also usually had an attendant on board to help the students with any needs. On average, he drove four hours per week. Mr. Till testified that this was not an intensively physical job. He did not have any physical problems with that job. In 2016, Mr. Till did not drive a bus for the school during the summertime because school was out for the year. (Tr. p. 17, 23-24, 75)

Prior to working for Windstar, Mr. Till did not have any problems with his hips or back. Once he began working for Windstar, he noticed that he gradually began having some soreness in his left hip. However, he was not sure if it was from driving too long or from lifting luggage. He also noticed some issues with his low back. (Testimony)

Mr. Till did have some conservative medical treatment prior to the injury in question. On November 29, 2017, Mr. Till went to Grand River Medical Group where he saw Melissa K. Casey, P.A. Mr. Till presented with left hip pain that he has had since summertime. He reported daily pain that involved his left lateral hip and sometimes his left buttocks. He did not have lower back pain. Additionally, he had no numbness, tingling, or weakness in either leg. Over-the-counter Aleve did not seem to help much with his symptoms. An x-ray of his left hip was taken. He was to increase his Aleve to two tablets per day. The assessment was left hip pain. (JE1, p. 1)

Mr. Till returned to Grand River Medical Group on December 12, 2017 where he saw Stephen Pierotti, M.D. The doctor noted left hip pain that had been present for six months. The pain was not constant, but intermittent with ambulation, twisting, and turning. He did not have pain at rest. He had been taking two Aleve per day which helped with the pain, but causing stomach problems. Dr. Pierotti felt that his symptoms were consistent with severe arthrosis, but Mr. Till did not have severe pain. He recommended meloxicam and if that did not work, then a trial of Celebrex or perhaps injections.

Mr. Till was seen at Grand River Medical Group on January 29, 2018. He went there to switch care and for his welcome to Medicare physical. The notes state that he had a history of left hip pain with arthrosis and was taking meloxicam as needed. The doctor's assessment included primary osteoarthritis of the left hip. (JE1, pp. 6-7)

On March 20, 2018, Mr. Till underwent a medical examination for his Commercial Driver Certification. He denied back or joint problems. His examination was negative for any conditions other than obesity and use of a CPAP. (JE2, pp. 10-12)

This brings us to the injury in question. On June 16, 2018, Mr. Till picked up a company car around 8:00 a.m., at the Dubuque Windstar terminal. He drove to the Belvidere Oasis on I-90, which is approximately 25 miles west of Chicago. He went there to relieve a driver who was on a second leg from New York City. Mr. Till then drove the group to their end destination in Muscoda, Wisconsin. While Mr. Till was driving the bus he could tell that it was very heavily loaded. There were a lot of passengers and a lot of heavy luggage. The overhead compartments were full of paraphernalia and souvenirs. A couple of times on the trip, the bus bottomed out and that caused his seat to hit the floor and he felt shock. Mr. Till believes his seat bottomed out three times. He drove to his destination and unloaded the luggage. He then left the depot around 2:00 p.m. He was about 15-20 miles south of the depot when he received a call from his supervisor that a passenger had left personal items on the bus. The bus was so full that one of the chaperones had placed some items in the driver's storage compartment. Unfortunately, the chaperone forgot to get those items out of the compartment. Mr. Till had to turn around and return the items before he could complete his trip. (Tr. pp. 35-41)

When he returned home on Saturday, he did not have any pain in his lower back or left hip that was anything above normal. The next day was Father's Day, he remembers having some discomfort around 4:00 p.m., during a grill out. This would have been approximately 24 hours after he had unloaded the bus. He was experiencing discomfort in his lower back and wanted to lay down. He did not do anything unusual on that Sunday. He describes the pain he had as dull. The pain intensified. When he woke up on Monday, he had tremendous pain in his lower back. He laid on the couch all day Monday and hoped his back pain would subside. Yogi Cox from Windstar called Mr. Till to see if he could drive to Washington D.C. Mr. Till told him he could not because he was hurting too bad. By the morning of Tuesday, June 19th, the pain was "vicious." He had to crawl to the bathroom when he first woke up. Mr. Till sought treatment at the emergency room at Mercy Hospital in Dubuque. (Tr. pp. 41-44)

On June 19, 2018, Mr. Till went to emergency care at Mercy Medical Center in Dubuque. He presented with back pain which began three days ago after lifting some luggage. He reported left lumbar sacral pain that radiated into his left buttock. Mr. Till described the pain as moderate and burning and exacerbated by movement. The diagnosis was low back pain. He was treated conservatively. Mr. Till was also limited from any heavy lifting. He was instructed to follow-up with his primary care physician. (JE3)

Mr. Till said he waited in hell for a week, thinking that the pain medications would work. However, when they did not he went to the emergency department at UnityPoint on June 25, 2018. He reported left-sided low back pain with radiation into the left

buttock for the past week. He was having difficulty sleeping due to his pain and he was having occasional numbness into his left thigh. He reported that he had driven over numerous bumps on a bus, which compressed his spine. The examination revealed paraspinal muscle tenderness and impairment of motion due to pain. The straight leg tests were positive on the left. MRI of the lumbar spine revealed an L4-L5 lateral disc protrusion occupying the lateral recess. Epidural steroid injections and therapy were recommended. He was prescribed Oxycodone. He was to schedule an appointment as soon as possible with an orthopaedic surgeon. (JE4, pp. 18-24; Tr. p. 46)

On June 27, 2018, Timothy J. Miller, M.D., gave Mr. Till a lumbar epidural steroid injection at the L4-5 level on the left. (JE4, pp. 25-27)

Several weeks after his June 16, 2018 trip, Mr. Till experienced increased left hip pain. At times, in certain positions, his hip would buckle. He had not experienced this prior to June 16, 2018. (Tr. p. 50, 61)

A July 9, 2018 x-ray of the lumbosacral spine was performed. The x-ray demonstrated multilevel degenerative changes and significant instability on the flexion and extension views. Dr. Parvin recommended additional injections. (JE4, p. 27; Def. Ed. D, p. 26)

Mr. Till returned to Dr. Miller on July 12, 2018 with pain in his left leg. Dr. Miller performed a trans foraminal epidural steroid injection. (JE4, pp. 28-29)

Mr. Till returned to Dr. Pierotti on July 17, 2018. Mr. Till reported that he saw Dr. Parvin for pain radiating from his back to his buttocks, down the leg and below the knee to the anterolateral leg with numbness. He had been to a pain clinic on two occasions for injections at two different levels. His last injection was five days ago, this provided minimal relief. His pain was worse with sitting for long periods of time and sleeping also bothered him at times. Dr. Pierotti felt that most of his symptoms were due to radiculopathy with pain below the knee and numbness. He also had osteoarthritis of a severe degree on x-rays, but it does not cause him any pain. The notes indicate that he was having significant pain control problems. He was taking oxycodone and getting injections. Dr. Pierotti recommended that Mr. Till talk to the Pain Clinic about his pain and possibly see Dr. Parvin again. Dr. Pierotti did not think that Mr. Till had enough pain in the hip to consider having a replacement. (JE1, p. 3)

Mr. Till returned to Finley Hospital on July 30, 2018. His back symptoms had improved. He was instructed to stop taking opiates and begin taking Tylenol. If his pain did not continue to decrease, then surgery might be an option. (JE4, pp. 32-33; Tr. p. 48)

At the end of August, one of the owners of Windstar called Mr. Till to see how he was feeling. Mr. Till told him that he did not know when he would be able to return to work, but he would call Windstar when he was able to go back to work. Approximately two weeks later, Mr. Till went to Windstar and met with supervisor Brenda and the

assistant supervisor, Yogi Cox. Mr. Till told them that he still was not certain when he could come back to work and asked if they wanted his key and company card back. Mr. Till was told to keep the key and the card. Mr. Till intended to return to work when he was able. (Tr. pp. 51-53)

Mr. Till returned to see Dr. Pierotti again on December 5, 2018 for follow-up of his left hip arthritis. He reported pain in his anterior thigh and groin with ambulation. He was tired of the pain and wanted to discuss a total hip arthroplasty. Dr. Pierotti felt that the majority of his pain was from his arthritic hip. The plan was to proceed with a hip replacement. (JE1, pp. 3-4)

Dr. Pierotti performed the left total hip arthroplasty on January 14, 2019. Mr. Till was discharged from Finley Hospital on January 17, 2019. By February 13, 2019, he was not really having any hip pain and he was very pleased. (JE1, p. 4; JE4, pp. 35-37) Mr. Till saw Dr. Pierotti again on March 13, 2019. At that point, he was two months out from his hip replacement surgery. Mr. Till reported no pain in his hip and he was getting around easily and taking no medication for his pain. He was very happy with the procedure. He was to return in one year for x-rays. (JE1, p. 4)

At the request of the defendants, Erin J. Kennedy, M.D., reviewed Mr. Till's records and issued a report on September 13, 2018. Dr. Kennedy noted that the records she reviewed were dated from June 19, 2018 through July 8, 2018. Dr. Kennedy noted that Mr. Till had reported the mechanism of injury in different ways. He reported pain with lifting luggage, pain from ACL compression with going over bumps while driving. She noted that the mechanism of injury was not clear and she believed this certainly brought causation into question. (Def. Ex. D, pp. 25-27)

Dr. Kennedy saw Mr. Till on September 24, 2018. Mr. Till reported that he was not certain what caused his low back and radiating left leg symptoms. He felt it was a combination of factors including the seat that was without appropriate shock absorption, bending to lift heavy suitcases, and sitting long hours while driving. He described lifting up to 50 pounds, though some luggage weighed more. He also reported that the seat seemed flat and his back ached when he last drove which was a day or two prior to his pain change. His pain worsened and radiated from his low back to his left buttock and posterior thigh. He could not identify a point in time at work when he had a sudden zinger or change of symptoms. It was at least 36 hours after the time when he last drove the bus that he had worsening pain. Dr. Kennedy felt that Mr. Till's presentation was most consistent with left L5 radiculopathy based on description of his tingling middle 3 digits and L4 radiculopathy based on his response to ESI at that level. She could not opine that his condition was work-related. Dr. Kennedy felt that if an occupational exposure had caused irritation of these nerve roots, it would likely happen at the moment in time in which the nerve roots were impinged, not days after. She believed it more likely that he developed symptoms as the natural course of his degenerative condition. Dr. Kennedy did not offer any opinions with regard to Mr. Till's left hip. Dr. Kennedy restricted Mr. Till from work as she felt he could not safely drive

passengers in his current condition. (Def. Ex. D, pp. 29-30) I find that as of September 24, 2018, Mr. Till was restricted from his job as a bus driver.

At the request of his attorney, Mr. Till saw Farid Manshadi, M.D., for an IME on September 25, 2019. In addition to examining Mr. Till, Dr. Manshadi also reviewed his medical records. Mr. Till reported that he gradually developed pain in his left hip over the course of his employment at Windstar. Mr. Till felt the primary aggravating factors were long periods of driving and busses with poor suspension in the driver's seat. On June 16, 2018, Mr. Till drove a Windstar bus with very poor suspension which caused significant bouncing. At the end of the trip, he had to lift out multiple suitcases weighing around 100 pounds each. He had to bend and twist in order to move the luggage. When he woke up the following day, he had had severe pain in his low back. He used a heating pad, but that did not resolve his pain. By the next day he had to crawl to go from his bedroom to the bathroom. After his back injury, his left hip pain also gradually began to worsen. (Cl. Ex. 1, p. 1-5)

At the time of his examination with Dr. Manshadi, Mr. Till reported that he felt improvement from the injections and the left hip surgery. However, he still experienced some ongoing back and left hip pain. He had difficulty with long drives, heavy lifting, and shoveling. Dr. Manshadi stated:

> I believe he sustained a low back injury which resulted in L4-L5 far lateral disc protrusion with left lower extremity radiculopathy, as well as left-sided hip pain. Please note that he probably has had some hip arthritis which was not really symptomatic. However, with his work activities while working for Windstar, this became significantly aggravated to become symptomatic, and eventually requiring him to have total left hip arthroplasty with Dr. Pierotti. Mr. Till reports that he does bus driving for the school only maybe twice a month now. However, his job at Windstar was fairly physical, especially when he tried to pull out the heavy suitcases from the suitcase compartment, and that required him, in fact, many times to crawl into the compartment underneath of the bus to retrieve the heavy suitcases. This job required a lot of twisting and bending. As such, my diagnosis remains left-sided low back pain with L4-L5 disc disease on the left side, status post injections with improvement of low back pain symptoms; and left-sided hip arthritis, status post left total hip arthroplasty.

(Cl. Ex. 1, p. 4)

Dr. Manshadi stated that Mr. Till had reached MMI for his low back and left hip. Pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, he placed Mr. Till in the DRE lumbar Category II and assigned five percent whole person impairment. With regard to the total hip arthroplasty, Dr. Manshadi assigned 15 percent whole person impairment. He placed the following permanent restrictions on Mr. Till: avoid any activity which requires repetitious bending or stooping or twisting at

his waist. He was also to avoid squatting and lifting more than 20 pounds. Mr. Till also needed to be allowed to sit, stand, and walk on an as needed basis. (Cl. Ex. 1, p. 4)

At the time of the arbitration hearing, Mr. Till continued to experience pain in his low back. His pain is aggravated by lifting or pushing. Since his hip surgery, his hip is much better; however, he continues to have dull hip pain that comes and goes. He manages his symptoms with Tylenol and ibuprofen. Mr. Till does not believe he could perform his prior job at Windstar. He cannot drive more than 90 minutes at a time. He also does not think he could load and unload the luggage. (Tr. p. 58)

Mr. Till did not have any problems with his low back or left hip prior to working for Windstar. He was able to perform all the functions of his job with Windstar from March of 2016 until he completed his June 16, 2018 trip. Mr. Till credibly testified about the difficulties he experienced during this trip, including a problematic seat and a very heavily loaded bus with poor suspension. The first time he sought treatment after the June 16, 2018 trip was on June 19. Since that time, Mr. Till has consistently reported that his pain began while working for Windstar. With regard to Mr. Till's low back, I find the opinions of Dr. Manshadi to be more persuasive than those of Dr. Kennedy. I do not find Dr. Kennedy's rationale to be persuasive. Because Mr. Till reported that there was more than one aspect of his job with Windstar that caused his pain, Dr. Kennedy felt that causation was in question. I find the opinions of Dr. Manshadi to be well-reasoned and to carry greater weight than those of Dr. Kennedy. Thus, I find Mr. Till has carried his burden to demonstrate that his low back pain is related to his work at Windstar. I further find that Mr. Till sustained 5 percent permanent functional impairment to the body as a whole as the result of his back injury.

We now turn to Mr. Till's left hip. Dr. Manshadi is the only physician to offer a causation opinion regarding Mr. Till's left hip. Dr. Manshadi causally connects Mr. Till's left hip, including the need for surgery, to the June 16, 2018 work injury. Dr. Manshadi's opinion is unrebutted. I find Mr. Till has carried his burden to show that his left hip problems are related to the June 16, 2018 work injury. I further find that Mr. Till sustained 15 percent permanent functional impairment to the body as a whole as the result of his hip injury.

As noted above, I found the opinions of Dr. Manshadi to be more persuasive than those of Dr. Kennedy. Based on the opinions of Dr. Manshadi and the testimony of Mr. Till, I find that Mr. Till has permanent restrictions as set forth by Dr. Manshadi. Those include: avoid any activity which requires repetitious bending or stooping or twisting at his waist. He is to avoid squatting and also avoid lifting no more than 20 pounds. He should also continue with common total hip arthroplasty precautions. He needs to be allowed to sit, stand and walk on an as needed basis. (Cl. Ex. 1, p. 4) I find Mr. Till could not perform his job as a bus driver at Windstar or as a bus driver with the Dubuque Community School District with these restrictions. (Cl. Ex. 2, pp. 18-20)

Mr. Till is no longer employed with Windstar. After Mr. Till received his second injection, he received a call from Jody, the dispatcher. She asked Mr. Till if he was interested in a job. He told her about the bus with the seat that was not working properly and his back injury. Mr. Till advised Jody, he could not accept the job due to his back injury. He did not know when he would be capable of driving again, but he would call her when he was able to come back to work. He believes this call likely took place in late July. Mr. Till did not hear from Windstar again until the end of August when he received a phone call from one of the owners who wanted to see how Mr. Till was doing. Mr. Till said he still was not ready to return to work, but he would call him when he thought he was able to drive for Windstar again. Mr. Till offered to return his company credit card and key, but he was told that was not necessary. It was Mr. Till's intention to return to work for Windstar at some point and work until he was seventy-one years old. (Tr. pp. 51-52)

On September 25, 2018, Yogi Cox, the Dubuque Operations Manager for Windstar sent an email to Mr. Till. The subject line of the email states: "Employment Status." The body of the email states:

> It may make sense for us to remove you from our list now. It costs us money to keep you on our drug screen list, ADP, TSS, etc. If you want to resign, that makes you eligible for rehire should the time come and your back is better and your availability is good. Would you like to go this route? Let me know, thanks!

(Def. Ex. B, p. 16)

Mr. Cox sent a follow-up email to Mr. Till on October 3, 2018. Once again the subject line read "RE: Employment Status." (Def. Ex. B, p. 16) The body of the email stated: "I didn't hear back from you from the below email [09/25/18 email]. Can you please let me know what your plan is moving forward by Friday. Thank you!" (Def. Ex. B, p. 16) Mr. Till saw the emails, but he did not open them because he was doing something else and thought he would go back and read the emails later. He also testified that he did not expect to receive notice of a possible job assignment via email because they had always come via telephone. The Employee Termination form dated of October 19, 2018, states that Mr. Till abandoned his job. Mr. Till testified that he did not read the emails before he was terminated on October 19, 2018. Up until the point that he received the termination notice, Mr. Till thought he was an employee in good standing. (Def. Ex. B, pp. 14-16; Tr. pp. 55-57)

As of September 24, 2018, defendants' own doctor, Dr. Kennedy restricted Mr. Till from performing his job as a bus driver. The employer sent Mr. Till the emails about his employment status on September 25 and October 3, 2018, after he was restricted from work by their own doctor. Although Mr. Till failed to timely open emails about his employment status, his failure is not material due to Dr. Kennedy's restrictions. I find that the defendants did not offer to return Mr. Till to work, because at the time of those emails, he was restricted from performing the job that was offered. I find defendant did

not offer work for which Mr. Till would receive the same or greater wages that he received at the time of the injury.

Mr. Till retired from John Deere in December of 2013. He worked part-time as a fork truck driver for Swiss Colony Brands during the holiday season from October 2015 until March of 2016. In March of 2016, he began working part-time for Dubuque Community Schools and Windstar Lines as a bus driver. He wanted to return to work so he could help with his daughters' education costs. Mr. Till testified that prior to his injury, he planned to continue working his part-time jobs until age seventy-one. (Tr. p. 53)

At the time of the injury Mr. Till was working two part-time jobs. Although he cannot return to his prior jobs, no medical provider has opined that he cannot work. I find Mr. Till's restrictions preclude him from a significant number of jobs. However, I find that the preponderance of the evidence does not show that he is permanently and totally disability. I find Mr. Till has demonstrated that he has a work history with varied skills that would enable him to pursue alternate employment if he were so motivated. Mr. Till has experience using computers, telephones, and working with dealerships to answer technical questions. He also has mechanical expertise. Mr. Till has testified that he has not looked for employment since his injury. He decided that given his pain it was probably time for him to retire. At the time of the injury he was 65 years old. At the time of the hearing he was 67 years old. He had intended to work until the age of 71.

I find that Mr. Till has sustained a significant loss of future earning capacity as a result of the work injury. Unfortunately, he has now been out of the labor market for well over a year and he has significant restrictions. He has lost access to a significant portion of his pre-injury employment opportunities. However, it is possible that he could expand his employment opportunities with a willingness to work.

Considering Mr. Till's age, proximity to retirement, educational background, employment history, ability to retrain, limited motivation to seek employment, length of healing period, permanent impairment, and permanent restrictions, and the other industrial disability factors set forth by the Iowa Supreme Court, I find that he has sustained a 30 percent loss of future earning capacity as a result of his work injury with the defendant employer.

There is a dispute surrounding the appropriate weekly workers' compensation rate for Mr. Till. At the time of the injury, Mr. Till was 65 years old. At the time of the hearing, he was living with his ex-wife and his adopted daughter, Betsy who was 21 years old. At the time of the injury Betsy was not living with Mr. Till, but he did claim her on this tax returns. I find that for the purposes of calculation of his weekly workers' compensation rate, Mr. Till is entitled to three exemptions. (Tr. p. 11)

Mr. Till testified that the average weekly wage of $541.77 seemed like a reasonable representation of his earnings. He estimated that he was paid roughly $13.50 per hour. He thought forty-five hours per week seemed like a reasonable

average, but there were some weeks he worked a lot more hours and some weeks when he worked a lot less hours. Mr. Till testified that his hours varied, but he worked at least as much as the average part-time driver, but certainly not as much as a full-time Windstar driver. At the Dubuque terminal he estimated there were probably eight full-time drivers and twenty-five part-time drivers. Full-time drivers received benefits, but part-time drivers did not. If Windstar had a trip that part-time drivers had declined, a full-time driver was then required to take that trip. A full-time driver at Windstar could easily work sixty hours per week. (Tr. pp. 33-34) The employment paperwork for Mr. Till clearly states that he was a part-time employee. (Def. Ex. B, pp. 3-7, 14) I find that Mr. Till worked less than the less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality. I further find that Mr. Till was a part-time employee at Windstar. I find that the defendants' calculation of Mr. Till's gross weekly wages is correct. I find that his gross weekly wages are $406.15. Mr. Till was single and entitled to three exemptions.

Claimant is seeking payment of past medical expenses as set forth in claimant's exhibit 6. The expenses set forth on claimant's exhibit 6, p. 32 all predate the work injury. There is no evidence in the record to show that these expenses were incurred as the result of the work injury. These expenses are not the responsibility of the defendants.

A review of the records and testimony supports claimant's claim for payment of the past medical expenses as set forth in claimant's exhibit 6, pages 33-43. I find that these expenses were reasonably and necessary to treat the work injury of June 16, 2018. I further find that the defendants are responsible for these expenses.

Claimant is seeking reimbursement for the IME that Dr. Manshadi performed on September 25, 2019. One year prior to this, defendants obtained an opinion from Dr. Kennedy. Dr. Kennedy opined that Mr. Till's back problems were not related to his work. She did not address the issue of impairment.

Under Iowa law, an employee can only obtain reimbursement for an independent medical evaluation under Iowa Code section 85.39 if the strict requirements of the statute are met. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 844 (Iowa 2015). Iowa Code section 85.39(2) provides:

> 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.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained

physician has previously evaluated “permanent disability” and the employee believes that the initial evaluation is too low.

Dr. Manshadi offered the only medical opinion on permanent impairment. As such, claimant cannot establish that a physician retained by the employer rendered a permanent impairment rating before Dr. Manshadi's evaluation. Claimant cannot satisfy the statutory prerequisites to qualify for an independent medical evaluation pursuant to Iowa Code section 85.39. Claimant's request for award of Dr. Manshadi's independent medical evaluation fees pursuant to Iowa Code section 85.39 is denied.

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. 6.14(6)(e).

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

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

Based on the above findings of fact, I conclude that Mr. Till sustained permanent injury to his body as a whole. The Iowa legislature enacted significant changes to the Iowa workers’ compensation laws, which took effect in July 2017. One of the changes was to Iowa Code section 85.34(2)(v) which now states:

> In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs “a” through “u” hereof, the compensation shall be paid during the number of weeks in relation to five

> hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury. If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity. Notwithstanding section 85.26, subsection 2, if an employee who is eligible for compensation under this paragraph returns to work with the same employer and is compensated based only upon the employee's functional impairment resulting from the injury as provided in this paragraph and is terminated from employment by that employer, the award or agreement for settlement for benefits under this chapter shall be reviewed upon commencement of reopening proceedings by the employee for a determination of any reduction in the employee's earning capacity caused by the employee's permanent partial disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Ry. Co. of Iowa, 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).

According to Iowa Code section 85.34(2)(v), Mr. Till’s compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity caused by the disability bears in relation to the earning capacity that the employee possessed when the injury occurred. A determination of the reduction in the employee's earning capacity caused by the disability shall take into account the permanent partial disability of the employee and the number of years in the future it was reasonably anticipated that the employee would work at the time of the injury.

In the present case, I conclude that Mr. Till was not offered work for which he would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury. Mr. Till was offered work as a bus driver. However, at that time, the defendants' own doctor restricted him from performing his job. Thus, I conclude that Mr. Till shall not be compensated based only upon his functional impairment resulting from the injury. Rather, he shall be compensated in relation to his earning capacity. Having considered all of these factors, I conclude Mr. Till sustained 30 loss of earning capacity. As such Mr. Till is entitled to 150 weeks of permanent partial disability benefits.

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. I conclude that Mr. Till's healing period ended on September 25, 2019 when he was placed at Maximum Medical Improvement (MMI). Thus, the commencement date for his permanent partial disability benefits is September 25, 2019. Defendant shall pay Mr. Till 150 weeks of permanent partial disability benefits commencing on September 25, 2019.

Mr. Till is seeking healing period benefits from June 16, 2018 to September 25, 2019. Mr. Till testified that he felt that he could not perform his job during this time. Defendants dispute his entitlement to these benefits. Claimant argues that he has not worked at Windstar since the date of injury on June 16, 2018 and that the record is void of any meaningful employment since that time.

During his treatment Mr. Till was, at times, on opiates and likely would not have been able to drive a bus. However, his treating physicians did not restrict him from driving. It was not until defendants obtained the opinion of Dr. Kennedy that Mr. Till was formally restricted from driving. I find that Mr. Till was disabled from bus driving beginning on September 24, 2018. I conclude Mr. Till is entitled to healing period benefits from September 24, 2018, until he reached MMI on September 25, 2019.

We now turn to the issue of the appropriate weekly workers' compensation rate. Claimant alleges he is entitled to three exemptions and defendants argue he is only entitled to two. Defendants dispute his entitlement to claim his adopted daughter as an exemption. Based on the above findings of fact, I conclude that Mr. Till is entitled to three exemptions.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The Code states that the basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings is defined as the gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment. The different subsections of 85.36 set forth methods of computing weekly earnings depending on the type of earnings and employment.

The parties dispute which subsection of Iowa Code 85.36 should be used to calculation Mr. Till's rate. Based on the above findings of fact, I conclude that Mr. Till worked less than the less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality. I further conclude that Mr. Till was a part-time employee at Windstar. Thus, I conclude that Iowa Code section 85.36(9) is the appropriate code section in this case. Iowa Code section 85.36(9) states:

> If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

I conclude that the appropriate gross weekly earnings are as set forth in defendants' exhibit A**.** His average weekly wages were $406.15. He is single and entitled to 3 exemptions. Thus, his weekly workers' compensation rate is two hundred eighty-one and 44/100 dollars ($281.44).

Claimant is seeking payment of past medical expenses. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Based on the above findings of fact, I conclude that defendants are responsible for the medical expenses set forth in claimant's exhibit 6, pages 33 through 43.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Based on the above findings of fact, I conclude claimant failed to prove entitlement to reimbursement for the IME pursuant to Iowa Code section 85.39.

Claimant is seeking penalty benefits. In Christensen v. Snap-on Tools Corp., 554 N.W.2d 254 (Iowa 1996), and Robbennolt v. Snap-on Tools Corp., 555 N.W.2d 229 (Iowa 1996), the supreme court said:

Based on the plain language of section 86.13, we hold an employee is entitled to penalty benefits if there has been a delay in payment unless the employer proves a reasonable cause or excuse. A reasonable cause or excuse exists if either (1) the delay was necessary for the insurer to investigate the claim or (2) the employer had a reasonable basis to contest the employee's entitlement to benefits. A "reasonable basis" for denial of the claim exists if the claim is "fairly debatable."

Christensen, 554 N.W.2d at 260.

The supreme court has stated:

(1) If the employer has a reason for the delay and conveys that reason to the employee contemporaneously with the beginning of the delay, no penalty will be imposed if the reason is of such character that a reasonable fact-finder could conclude that it is a "reasonable or probable cause or excuse" under Iowa Code section 86.13. In that case, we will defer to the decision of the commissioner. See Christensen, 554 N.W.2d at 260 (substantial evidence found to support commissioner's finding of legitimate reason for delay pending receipt of medical report); Robbennolt, 555 N.W.2d at 236.

(2) If no reason is given for the delay or if the "reason" is not one that a reasonable fact-finder could accept, we will hold that no such cause or excuse exists and remand to the commissioner for the sole purpose of assessing penalties under section 86.13. See Christensen, 554 N.W.2d at 261.

(3) Reasonable causes or excuses include (a) a delay for the employer to investigate the claim, Christensen, 554 N.W.2d at 260; Kiesecker v. Webster City Meats, Inc., 528 N.W.2d at 109, 111 (Iowa 1995); or (b) the employer had a reasonable basis to contest the claim—the "fairly debatable" basis for delay. See Christensen, 554 N.W.2d at 260 (holding two-month delay to obtain employer's own medical report reasonable under the circumstances).

(4) For the purpose of applying section 86.13, the benefits that are underpaid as well as late-paid benefits are subject to penalties, unless the employer establishes reasonable and probable cause or excuse. Robbennolt, 555 N.W.2d at 237 (underpayment resulting from application of wrong wage base; in absence of excuse, commissioner required to apply penalty).

> If we were to construe [section 86.13] to permit the avoidance of penalty if any amount of compensation benefits are paid, the purpose of the penalty statute would be

> frustrated. For these reasons, we conclude section 86.13 is applicable when payment of compensation is not timely . . . or when the full amount of compensation is not paid.
>
> Id.
>
> (5) For purposes of determining whether there has been a delay, payments are "made" when (a) the check addressed to a claimant is mailed (Robbennolt, 555 N.W.2d at 236; Kiesecker, 528 N.W.2d at 112), or (b) the check is delivered personally to the claimant by the employer or its workers' compensation insurer. Robbennolt, 555 N.W.2d at 235.
>
> (6) In determining the amount of penalty, the commissioner is to consider factors such as the length of the delay, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Robbennolt, 555 N.W.2d at 238.
>
> (7) An employer's bare assertion that a claim is "fairly debatable" does not make it so. A fair reading of Christensen and Robbennolt, makes it clear that the employer must assert facts upon which the commissioner could reasonably find that the claim was "fairly debatable." See Christensen, 554 N.W.2d at 260.

Meyers v. Holiday Express Corp., 557 N.W.2d 502 (Iowa 1996).

When an employee's claim for benefits is fairly debatable based on a good faith dispute over the employee's factual or legal entitlement to benefits, an award of penalty benefits is not appropriate under the statute. Whether the issue was fairly debatable turns on whether there was a disputed factual dispute that, if resolved in favor of the employer, would have supported the employer's denial of compensability. Gilbert v. USF Holland, Inc., 637 N.W.2d 194 (Iowa 2001).

Claimant argues penalty benefits are appropriate because defendants have not paid any indemnity benefits. Mr. Till testified that defendants were aware of his worker's compensation injury no later than June 18, 2018. (Tr. p. 45) Dr. Kennedy who was hired by the defendants stated that an injury report was completed by defendants no later than July 19, 2018. Defendants did not obtain a causation opinion until September 24, 2018. I find that this was not necessarily an unreasonable delay because defendants are entitled to time to investigate a claim. However, the record is void of what investigation, if any, defendants were completing during this timeframe. Additionally, I find that defendants' actions were unreasonable with regard to claimant's left hip claim. Defendants never obtained a causation opinion with regard to claimant's left hip.

Even if defendants had conducted and documented a reasonable investigation into Mr. Till's workers' compensation claim, defendants failed to contemporaneously convey their reason for the denial to Mr. Till. The record is void of any communication from defendants setting forth the basis for the denial. I find claimant carried his burden of proof to show that defendants denied benefits. I further find that defendants have failed to prove they conducted a reasonable investigation into Mr. Till's hip claim. I further find that defendants failed to contemporaneously convey their basis for the denial to Mr. Till. Thus, I conclude penalty benefits are appropriate in this case.

Once claimant establishes a delay in payment of benefits, it is defendants' burden to establish that they possessed a reasonable basis, or excuse, for the delay in payment of benefits. Iowa Code section 86.13(4)(b)(2). I conclude that defendants did not offer a reasonable excuse for the denial of the hip claim. Similarly, I conclude that defendants did not contemporaneously convey their bases for denial of benefits to claimant. Iowa Code section 86.13(4)(c)(3). Defendants bore the burden to establish a reasonable basis, or excuse, and to prove the contemporaneous conveyance of those bases to the claimant. Defendants failed to carry their burden of proof on the penalty issues, and a penalty award is appropriate. Iowa Code section 86.13.

The purpose of Iowa Code section 86.13 is both punishment for unreasonable conduct but also deterrence for future cases. Id. at 237. In this regard, the Commission is given discretion to determine the amount of the penalty imposed with a maximum penalty of 50 percent of the amount of the delayed, or denied, benefits. Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 261 (Iowa 1996).

In exercising its discretion, the agency must consider factors such as the length of the delays, the number of delays, the information available to the employer regarding the employee's injury and wages, and the employer's past record of penalties. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996). In this instance, defendants did obtain Dr. Kennedy's opinion regarding his back and that established a reasonable basis for their denial of the back claim. However, defendants failed to obtain an expert opinion regarding his left hip. A penalty sufficient to alert the insurance carrier to this problem and deter similar future conduct is warranted.

Having considered the relevant factors and the purposes of the penalty statute, I conclude that a section 86.13 penalty in the amount of $7,500.00 is appropriate to punish the employer for its denial in payment of benefits and failure to contemporaneously convey its basis for denial.

Finally, claimant is seeking an assessment of costs pursuant to Iowa Code section 86.40. Costs are to be assessed at the discretion of the Commissioner or the hearing deputy. I find that claimant was generally successful in his claim. Therefore, an assessment of costs is appropriate. Claimant is seeking an assessment of costs in the amount of $85.75 for deposition transcription of his deposition. I find that is an appropriate cost under 876 IAC 4.33(1). Claimant is also seeking service charges in the amount of $6.67. I find that this is an appropriate cost under 876 IAC 4.33 (3). The

filing fee in the amount of $100.00 dollars. I find that this is an appropriate cost under 876 IAC 4.33(7).

Claimant is also seeking the examination of Dr. Manshadi in the amount of $350,00 and the report fee in the amount of $1,600.00. 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 Iowa Supreme Court has interpreted this administrative rule. The Court held:

> [A] physician's written report of an examination and evaluation under section 85.39 would be a reimbursable expense under section 85.39, just as an unreimbursed written report of an examination and evaluation, like deposition testimony and witness fees, could be taxed as hearing costs by the commissioner. Yet, a physician's report becomes a cost incurred in a hearing because it is used as evidence in lieu of the doctor's testimony. The underlying medical expenses associated with the examination do not become costs of a report needed for a hearing, just as they do not become costs of the testimony or deposition.

Young, 867 N.W.2d at 846.

I conclude that claimant had prevailed and that assessment of costs in some amount was reasonable. Pursuant to the Iowa Supreme Court's holding in Young, claimant may not receive the cost of Dr. Manshadi's evaluation as a cost. However, Dr. Manshadi's charges for drafting a report are a permissible cost. Id. I conclude that the cost of Dr. Manshadi's report, $1,600.00, should be taxed against defendants as a cost pursuant to Iowa Code section 86.40 and 876 IAC 4.33(6).

ORDER

THEREFORE, IT IS ORDERED:

All weekly benefits shall be paid at the weekly rate of two hundred eighty-one and 44/100 dollars ($281.44).

Defendants shall pay healing period benefits from September 24, 2018 through September 24, 2019.

Defendants shall pay thirty (30) weeks of permanent partial disability benefits commencing on September 25, 2019.

Defendants shall be entitled to credit for all weekly benefits paid to date.

Defendants shall pay accrued weekly benefits in a lump sum together with interest at the rate of ten percent for all weekly benefits payable and not paid when due which accrued before July 1, 2017, and all interest on past due weekly compensation benefits accruing on or after July 1, 2017, shall be payable at an annual rate equal to

the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Deciga Sanchez v. Tyson Fresh Meats, Inc., File No. 5052008 (App. Apr. 23, 2018) (Ruling on Defendants' Motion to Enlarge, Reconsider or Amend Appeal Decision re: Interest Rate Issue).

Defendants shall be responsible for past medical expenses as set forth above.

Defendants shall pay penalty benefits in the amount of seven thousand five hundred and 00/100 dollars ($7,500.00).

Defendants shall reimburse claimant costs as set forth above.

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

Signed and filed this _10th__ day of July, 2020.

ERIN Q. PALS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Gary Nelson (via WCES)

Casey Steadman (via WCES)

Kalli Gloudemans (via WCES)

Abigail Wenninghoff (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.