

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RAMO COVIC,

Claimant,

vs.

CTI READY MIX, LLC,

Employer,

and

TRAVELERS INDEMNITY CO. OF CT,

Insurance Carrier,
Defendants.

File No. 21700207.01

ARBITRATION DECISION

Head Notes: 1400; 1402.40; 1803;
3000; 3001; 3002

STATEMENT OF THE CASE

The claimant, Ramo Covic, filed a petition for arbitration seeking workers' compensation benefits from employer CTI Ready Mix, LLC ("CTI"), and their insurer, Travelers Indemnity Company of Connecticut. Randall Schueller appeared on behalf of the claimant. Kevin Rutan appeared on behalf of the defendants.

The matter came on for hearing on April 12, 2022, before Deputy Workers' Compensation Commissioner Andrew M. Phillips. Pursuant to an order of the Iowa Workers' Compensation Commissioner related to the COVID-19 pandemic, the hearing occurred electronically. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-16, Claimant's Exhibit 1-5, and Defendants' Exhibits A-G. The exhibits were received into the record without objection.

The claimant testified on his own behalf. Amy Pedersen was appointed the official reporter and custodian of the notes of the proceeding. Karmela Lofthus was sworn in as the interpreter. Also present was employer's representative Brian Gibson. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on April 26, 2022, after briefing by the parties.

STIPULATIONS

Through the hearing report, as reviewed at the commencement of the hearing, the parties stipulated and/or established the following:

1. There was an employer-employee relationship at the time of the alleged injury.
2. That the claimant sustained an injury which arose out of, and in the course of employment on May 18, 2020.
3. That the alleged injury is a cause of temporary disability during a period of recovery.
4. If the injury is found to be a cause of permanent disability, the permanent disability is an industrial disability.
5. That the commencement date for permanent partial disability benefits, if any are awarded, is September 9, 2020.
6. That the claimant was married and entitled to two exemptions at the time of the alleged injury.

Entitlement to temporary disability and/or healing period benefits is no longer in dispute. Neither medical benefits nor credits against any award are in dispute. The defendants waived their affirmative defenses.

The parties are now bound by their stipulations.

ISSUES

The parties submitted the following issues for determination:

1. Whether the alleged injury is a cause of permanent disability.
2. The extent of permanent disability, if any is awarded.
3. The amount of the claimant's gross earnings at the time of the alleged injury.
4. The claimant's weekly compensation rate at the time of the alleged injury.

FINDINGS OF FACT

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

Ramo Covic, the claimant, was 47 years old at the time of the hearing. (Testimony). He currently resides in Urbandale, Iowa, where he has lived for about 10 years. (Testimony). He is married. (Testimony). Mr. Covic moved to the United States in 1997 from Bosnia. (Testimony). He immigrated to the United States with a desire for better opportunities and work, which he did not find in Bosnia due to the civil war. (Testimony).

In Bosnia, Mr. Covic completed schooling through eighth grade. (Testimony). This is contradicted a bit by his interrogatory answer in which he indicated that he graduated from high school in Cazin, Bosnia in 1989. (Claimant's Exhibit 1:1). After that, the civil war broke out, and he did not complete any further schooling. (Testimony). He can speak English, to some extent, but felt more comfortable utilizing an interpreter for the hearing. (Testimony). He can read "some" in English, but relies on his wife for help reading. (Testimony). He cannot write in English. (Testimony).

Upon arriving in the United States, Mr. Covic moved to Waterloo, Iowa. (Testimony). He lived there for two-and-a-half years before moving to Des Moines, Iowa. (Testimony). He then moved to Ottumwa, Iowa, for nine to ten years. (Testimony). Since moving to Iowa, Mr. Covic has worked in a variety of positions between meatpacking and truck driving. (CE 1:4-5).

Mr. Covic began working for CTI in 2019. (Testimony). He drove concrete mixing trucks and trucks delivering concrete to different construction sites. (Testimony). He earned twenty-two and 50/100 dollars (\$22.50) per hour in 2019. (Testimony). He worked up to 50 hours per week, depending on the weather. (Testimony). He testified that, in nicer weather, he would work longer hours. (Testimony).

On May 18, 2020, at about 8:30 p.m., the claimant was washing a concrete truck after making a delivery. (Testimony). He fell on his back, causing an injury. (Testimony). He testified that he had no back issues prior to this date. (Testimony).

On May 19, 2020, the claimant reported to Concentra with complaints stemming from a back injury. (Joint Exhibit 1:1). Mr. Covic noted that he fell while washing at a job site. (JE 1:3). Specifically, Mr. Covic had lower back pain on both sides of his back. (JE 1:3). He rated his pain 7 to 8 out of 10. (JE 1:5). Pain radiated down his legs along with tingling and numbness into his right leg. (JE 1:5). Physical examination revealed focal tenderness to the lumbar area, along with reduced range of motion due to pain. (JE 1:6). The claimant had a normal gait. (JE 1:6). Concentra allowed Mr. Covic to return to work full time with restrictions including, lifting up to 20 pounds occasionally, pushing/pulling up to 20 pounds occasionally, bending occasionally, and rotating his trunk occasionally. (JE 1:4).

Shawn Spooner, M.D., examined Mr. Covic at CIA Urbandale Sports Medicine on May 21, 2020. (JE 2:22-26). Mr. Covic described his injury and complained of pain and stiffness with aching into his buttocks and bilateral thighs. (JE 2:23). His pain was worse on the right than the left, except in the pelvis where it was worse on the left. (JE 2:23). X-rays were performed and were unremarkable. (JE 2:23). Mr. Covic noted no radiation of his back pain. (JE 2:23). Upon physical examination, Dr. Spooner observed some limited range of motion and pain in the lumbar and thoracolumbar spine. (JE 2:25). Dr. Spooner also observed muscle spasms in the left lumbosacral area. (JE 2:25). Dr. Spooner diagnosed the claimant with lumbosacral pain, which he further noted was "[l]ikely bone bruise and soft tissue bruising." (JE 2:26). Dr. Spooner prescribed a short course of prednisone followed by diclofenac. (JE 2:26). Dr. Spooner recommended relative rest and staying off work for 10 days. (JE 2:26).

Mr. Covic had physical therapy on May 28, 2020, at Concentra. (JE 1:8-12). He was progressing as expected in physical therapy, including showing improvement in his ability to perform exercises. (JE 1:8). However, he reported no change to his pain levels, and presented with hypersensitivity. (JE 1:8). The therapist opined that this hypersensitive pain along the lumbar spine into the thoracic spine was abnormal. (JE 1:8). The therapist was concerned regarding the success of rehab due to Mr. Covic's understanding of his pain "or the importance of moving and keeping the rest of his body from tightening up." (JE 1:8).

On May 29, 2020, Mr. Covic returned to Concentra for re-examination based upon his low back injury. (JE 1:11-18). Mr. Covic noted that he had pain in his low back with radiation and tingling down his left leg. (JE 1:13). His symptoms increased with prolonged walking and standing. (JE 1:13). Physical therapy provided no benefit, but prescribed medication did. (JE 1:13). Physical examination revealed focal tenderness in the lumbar area greater on the left than the right. (JE 1:14). Mr. Covic also had reduced range of motion in the lumbar spine due to discomfort. (JE 1:14). The plan for treatment included a lumbar MRI and a referral for physical therapy. (JE 1:11). The plan also noted, "[p]atients [sic] ongoing symptoms do not match with the mechanism of injury very well. Would like to consider doing an FCE but would first like to do an MRI to r/o structural problems in the spine." (JE 1:11). The restrictions listed were the same as those on May 19, 2020, but included an allowance to stand and walk as needed while at work. (JE 1:11).

Mr. Covic also had a physical therapy follow up on May 29, 2020. (JE 1:19-21). This was his fifth visit for physical therapy. (JE 1:19). Mr. Covic reported continued significant pain. (JE 1:19). The therapist found that Mr. Covic achieved 20 percent of his end goals. (JE 1:20). Mr. Covic told the therapist that he had no improvement in his pain since starting therapy. (JE 1:20). Mr. Covic progressed slower than anticipated. (JE 1:20). The therapist opined that it was "very unclear" as to whether the level of pain Mr. Covic was feeling was consistent with what he was reporting. (JE 1:20). The therapist felt that Mr. Covic would benefit from additional imaging and additional therapy. (JE 1:20).

The claimant reported to Alliance Radiology on June 8, 2020, for a lumbar MRI. (JE 3:55). Raviv Ramdial, M.D., interpreted the MRI results. (JE 3:55). He concluded that there was a motion issue that caused issues with the MRI. (JE 3:55). However, he saw no convincing evidence of nerve root impingement or canal stenosis. (JE 3:55). He did note a central annular tear at L5-S1 with no herniated disc, canal stenosis, or foraminal narrowing. (JE 3:55).

Lynn Nelson, M.D., examined Mr. Covic at Des Moines Orthopaedic Surgeons, P.C., on June 18, 2020. (JE 4:56-59). Mr. Covic had left-sided low back pain greater than left buttock and left posterior thigh and calf pain. (JE 4:56). He rated his pain 8 out of 10. (JE 4:56). Lying down and taking medication improved his pain. (JE 4:56). Mr. Covic denied relief from previous physical therapy. (JE 4:56). Dr. Nelson found pain to palpation "midline from L4-S1," as well as in the "bilateral PSIS areas." (JE 4:56). Dr. Nelson reviewed the June 8, 2020, MRI with Mr. Covic and his wife. (JE 4:57). Dr. Nelson indicated that the MRI showed, "trace disk bulges at L3-4 and L4-5," a small

annular tear at L5-S1, and no “HNP” or stenosis of any significance. (JE 4:57). Dr. Nelson’s diagnosis was “[l]ow back greater than left buttock/lower extremity pain.” (JE 4:57). Dr. Nelson noted an extended discussion with Mr. Covic regarding his complaints. (JE 4:57). Mr. Covic complained “bitterly of pain.” (JE 4:57). Dr. Nelson explained to Mr. Covic that the MRI did not show significant impingement, and that he was not a candidate for lumbar spine surgical treatment or injections. (JE 4:57). Dr. Nelson observed that Mr. Covic displayed pain complaints that were “considerably greater than one would anticipate given his radiographic and physical findings.” (JE 4:57). Dr. Nelson recommended a functional capacity evaluation (“FCE”), and noted, “[i]f his FCE is invalid, I am skeptical that he report [s/c] a good response to basically any treatment.” (JE 4:57). Dr. Nelson allowed Mr. Covic to continue to work with a 10-pound lifting restriction, and no repetitive bending or twisting. (JE 4:59).

Mr. Covic had an FCE at ARC Physical Therapy+ on June 30, 2020. (JE 5:61-77). Mr. Covic noted on his pain diagram that he had stabbing pain across the lower back and burning and numbness down his left leg. (JE 5:62). An interpreter was present for the FCE. (JE 5:64). Mr. Covic indicated that his pain was 8 out of 10. (JE 5:68). Mr. Covic displayed a high result for subjective reports of pain and behaviors on the “Inappropriate Symptoms Questionnaire.” (JE 5:69). Mr. Covic also showed high results for subjective reports of pain and behaviors on the Waddell Disability Questionnaire and Oswestry Low Back Inventory. (JE 5:69). Mr. Covic demonstrated an antalgic gait with decreased weight bearing on the left lower extremity. (JE 5:72). Mr. Covic had limited lifting activities due to low back pain. (JE 5:72). The examiner determined that these subjective reports were not credible due to a lack of reproducibility. (JE 5:72). Mr. Covic also demonstrated hypersensitivity to palpation in the lumbar spine. (JE 5:72).

The examiner determined that Mr. Covic’s position as a mixer driver is a “Heavy PDC” job demand based upon The Dictionary of Occupational Titles. (JE 5:64). The examiner opined that Mr. Covic’s overall examination was “invalid” due to inconsistent performance during repeated measures protocols. (JE 5:64). Further, the examiner opined that Mr. Covic failed to give maximum voluntary effort during the FCE. (JE 5:64). Mr. Covic achieved up to about 30 pounds of lifting to waist height. (JE 5:64). The overall results were invalid for a number of listed reasons. (JE 5:64). The examiner observed “an absence of correlation between lifts of unmarked steel bars and the corresponding lifts on the XRTS Lever Arm.” (JE 5:64). Mr. Covic also lifted and carried more weight than was documented as a lift described by the client as a “maximum lifting capacity” when lifting capacities were assessed. (JE 5:64). The examiner also observed the following:

- Breakaway/Cogwheeling was present during the manual strength testing and the lifting evaluation.
- Extreme overt pain behaviors, including grimacing and groaning, were noted during this test.
- The pain questionnaires are high for subjective pain reports and behaviors.

- Benign testing was positive for possible over-reporting of symptoms.
- High pain reports during and/or following FCE are inconsistent with minimal or no demonstrated pain behaviors.
- Waddell Testing: Positive in 4 of 5 categories.

(JE 5:65). Based upon the examiner's observations, Mr. Covic met the handling demands for a medium demand vocation pursuant to the Dictionary of Occupational Titles. (JE 5:64).

On June 30, 2020, Dr. Nelson reviewed the FCE report from ARC Physical Therapy. (JE 4:60). Based upon the invalidity of the FCE due to Mr. Covic's inconsistent performance, Dr. Nelson recommended no further invasive interventions. (JE 4:60). Dr. Nelson declared Mr. Covic to be at maximum medical improvement ("MMI") with regard to the lumbar spine. (JE 4:60). Dr. Nelson recommended evaluation by a physiatrist to determine if Mr. Covic achieved MMI from a "noninvasive" standpoint. (JE 4:60).

On July 15, 2020, Mr. Covic visited with Kurt Smith, D.O., at Iowa Ortho. (JE 6:89-92). Mr. Covic had persistent but fluctuating low back pain that radiated to his left buttock. (JE 6:89). He described the pain as aching, burning, discomforting, and throbbing. (JE 6:89). Mr. Covic told Dr. Smith about his treatment to date and noted his continued pain issues. (JE 6:89). At the time of his appointment, he took tramadol, meloxicam, and cyclobenzaprine. (JE 6:89). Upon physical examination, Dr. Smith observed pain and tenderness in the left sacroiliac joint. (JE 6:91). Dr. Smith noted that Mr. Covic displayed inconsistent effort during motor strength testing. (JE 6:91). Dr. Smith opined that Mr. Covic had not responded to treatment thus far, and that he had documented inconsistencies in physical therapy and the FCE. (JE 6:91-92). Dr. Smith recommended an EMG of the left lower extremity, work restrictions, and a follow-up visit after the EMG. (JE 6:92).

The next day, July 16, 2020, Mr. Covic returned to Dr. Spooner's office with continuing complaints of low back pain. (JE 2:28-31). Dr. Spooner noted that a previous MRI showed an L5-S1 annular tear, but no other objective abnormalities. (JE 2:28). Dr. Spooner observed substantial hypersensitivity to palpation and motion in his left lumbosacral region. (JE 2:28). Dr. Spooner indicated that he previously treated Mr. Covic and found him to have a pain perception or tolerance issue. (JE 2:28). However, Dr. Spooner did not see evidence of malingering in this matter. (JE 2:28). Dr. Spooner diagnosed the claimant with lumbosacral pain. (JE 2:30). Dr. Spooner continued in noting that it was unclear as to whether the annular tear was present previously; however, Dr. Spooner opined that the work injury made the condition materially worse. (JE 2:30). Dr. Spooner recommended that he continue working light duty and taking tramadol as needed. (JE 2:30). He continued by recommending physical therapy and a trial of epidural injections. (JE 2:30-31).

On July 24, 2020, Mr. Covic followed-up with Dr. Smith for his lower back pain. (JE 6:93-95). Mr. Covic noted no change to his symptoms despite an injection from his primary care provider. (JE 6:93). Dr. Smith performed an EMG on Mr. Covic, which

was normal with findings consistent with lumbago. (JE 6:94-95). Dr. Smith discussed with the claimant that his injuries were soft tissue in nature and should respond to physical therapy. (JE 6:95). Dr. Smith wrote a prescription for physical therapy, continued work restrictions “per Patient Status Report,” and to follow up in three weeks. (JE 6:95).

Mr. Covic began physical therapy at ARC Physical Therapy+ on July 31, 2020. (JE 5:78-83). ARC Physical Therapy+ provided an interpreter for Mr. Covic. (JE 5:81). Mr. Covic completed a pain diagram, which showed numbness down his left leg, and dull/aching pain in his left lower back. (JE 5:78). He also had muscular cramping and stabbing pain in his left leg. (JE 5:78). Mr. Covic indicated a personal goal of “pain control.” (JE 5:79). Mr. Covic scored 36 out of 50 on the Oswestry Low Back Pain Disability Questionnaire. (JE 5:80). Mr. Covic rated his pain 7 out of 10. (JE 5:81). The therapist observed that Mr. Covic had poor body mechanics when he performed functional and baseline lifting, as he bent and lifted with his back, rather than squatting with his legs to lift. (JE 5:81). The therapist also observed tenderness to palpation at the L5 spinous process and left transverse process. (JE 5:81). The therapist could not test the range of motion of Mr. Covic’s left lower extremity due to “self reported” increased pain to 10 out of 10 with very light pressure. (JE 5:81). The therapist opined that Mr. Covic displayed objective findings which impaired his capacity to work. (JE 5:81). During therapy, Mr. Covic presented “inconsistent leg symptoms” when he performed supine stretching with a band, and also showed limited ranges of motion before reporting severe low back and left leg pain. (JE 5:83).

On August 10, 2020, Mr. Covic returned to ARC Physical Therapy+ for additional treatment. (JE 5:84). Mr. Covic reported left lower back pain at 6 out of 10. (JE 5:84). He required constant verbal reminding to maintain a neutral lumbar while lifting and carrying. (JE 5:84). The therapist provided Mr. Covic with a home exercise plan. (JE 5:84). The plan was to continue job demand conditioning. (JE 5:84).

Mr. Covic continued his care with Dr. Smith on August 12, 2020, for continued follow-up of his lower back pain. (JE 6:96-98). Mr. Covic indicated that the pain radiated from the lower back to the left calf and left buttock. (JE 6:96). Dr. Smith noted that Mr. Covic was inconsistent in attending physical therapy “per the therapist,” and his symptoms had not changed. (JE 6:96). Dr. Smith diagnosed Mr. Covic with low back pain, myalgia, a strain of the lumbar region, and dietary counseling. (JE 6:98). Dr. Smith noted inconsistencies upon examination, including give-way strength testing of both legs. (JE 6:98). Mr. Covic also demonstrated normal strength when distracted. (JE 6:98). Dr. Smith recommended a trial of pool therapy, and if Mr. Covic was not consistent with attendance, he would place him at MMI. (JE 6:98). Dr. Smith requested that Mr. Covic return two weeks after starting pool therapy. (JE 6:98).

Mr. Covic had another visit for physical therapy at ARC Physical Therapy+ on August 13, 2020. (JE 5:85). He rated his pain 7 out of 10 and indicated that it was in his left buttock and thigh. (JE 5:85). Mr. Covic complained that his pain increased after therapy and required him to take a hot bath to relieve it. (JE 5:85). Mr. Covic lifted 60 pounds from the floor to knuckle “occasionally” without verbal cues or reports of increased left lower extremity pain. (JE 5:85).

Dr. Spooner saw Mr. Covic again on August 13, 2020, for continued low back pain. (JE 2:33-36). A previous PSIS injection provided by Dr. Spooner gave Mr. Covic three to four days of improvement. (JE 2:33). Dr. Spooner indicated that Mr. Covic continued physical therapy. (JE 2:33). Mr. Covic continued to display tenderness to palpation in the left lumbosacral region, along with substantial myofascial spasticity to palpation. (JE 2:35). Dr. Spooner diagnosed Mr. Covic with lumbosacral pain, radicular pain, and muscle spasm of the back. (JE 2:35-36). Dr. Spooner opined that Mr. Covic would continue to slowly recover with time and light duty status, and that he had a history of a propensity for myofascial pain out of proportion. (JE 2:36). Dr. Spooner prescribed meloxicam and cyclobenzaprine. (JE 2:36).

ARC Physical Therapy+ provided another round of physical therapy to Mr. Covic on August 20, 2020. (JE 5:86). Mr. Covic had an interpreter for this visit, and denied any improvement with physical therapy. (JE 5:87). He claimed that he could not perform any aspect of his job as a mixer driver. (JE 5:87). Upon testing, Mr. Covic continued to demonstrate bending his back while lifting rather than squatting with his legs to lift “despite being provided proper instruction and demonstration.” (JE 5:87). He showed improvement in range of motion. (JE 5:87). He could occasionally lift up to 60 pounds from 10 inches to his waist. (JE 5:87). He had an occasional tolerance for bilaterally carrying 60 pounds. (JE 5:88). Since he met all essential job demands, the therapist opined that Mr. Covic would not benefit from further skilled therapy. (JE 5:88). The therapist continued by noting that Mr. Covic’s subjective reports of pain limiting his job demands performance were inconsistent with the objective findings. (JE 5:88). At the conclusion of the visit, he was to hold on land therapy “per Dr. Smith’s orders.” (JE 5:86).

Dr. Smith wrote a letter to an employee of Travelers on August 21, 2020. (JE 6:99). He noted that Mr. Covic should get one last chance to trial pool therapy, and reiterated that if he was inconsistent with attendance, he would be placed at MMI. (JE 6:99). Due to the previous inconsistent effort FCE, Dr. Smith would “likely place him at full duty.” (JE 6:99).

On August 27, 2020, the claimant had aquatic therapy at Rock Valley Physical Therapy. (JE 7:111-112). He commenced care there on August 19, 2020. (JE 7:111). The claimant reported continued back and leg pain. (JE 7:111). The pain was worse at night and disrupted his sleep. (JE 7:111). The therapist noted improved tolerance for pool exercises by the claimant despite continued pain into his left lower extremity. (JE 7:112). The therapist had to provide multiple verbal cues for proper completion of pool therapy exercises. (JE 7:112).

Mr. Covic returned to Dr. Smith’s office on September 9, 2020, due to his lower back pain. (JE 6:100-102). His pain radiated from his lower back to the left calf and left buttock. (JE 6:100). Mr. Covic completed five pool therapy sessions with no changes in symptoms. (JE 6:100). Dr. Smith diagnosed Mr. Covic with myalgia and low back pain. (JE 6:102). Dr. Smith opined that Mr. Covic had subjective complaints of low back pain with radiation into the left lower extremity, which are not supported by objective findings on examination. (JE 6:102). Dr. Smith also opined that Mr. Covic’s progress with treatment had plateaued. (JE 6:102). As such, Dr. Smith placed the claimant at MMI,

discontinued physical therapy as it relates to the May 18, 2020, date of injury, and returned him to work full duty. (JE 6:102).

On September 10, 2020, the claimant continued his visits with Dr. Spooner. (JE 2:37-40). He still had substantial hypersensitivity to palpation and motion in the left lumbosacral region. (JE 2:37). Mr. Covic was performing aquatic therapy. (JE 2:37). Mr. Covic had left lumbosacral pain with "referred pain numbness and tingling into the left posterior lateral thigh." (JE 2:37). Mr. Covic was concerned that his workers' compensation physician released him to work full duty while he felt that he could not perform his job without light duty. (JE 2:37). Dr. Spooner continued to diagnose Mr. Covic with lumbosacral pain, radicular pain, and a muscle spasm in his back. (JE 2:39). Dr. Spooner recommended continued conservative management and light duty. (JE 2:39-40). Dr. Spooner opined that the claimant was not ready to return to work full time or full duty without restrictions. (JE 2:40). Dr. Spooner further noted, "I am going to advocate for continued restrictions," and consider a referral to pain management. (JE 2:40).

Mr. Covic presented to the UnityPoint Methodist West Emergency Department on September 14, 2020, complaining of severe left lower back pain radiating into his ankle and foot. (JE 8:113-120). Brittany Jensen, M.D., examined him. (JE 8:113-120). Mr. Covic told Dr. Jensen that he was in pain all day after being released to full duty by Dr. Smith. (JE 8:114). His pain worsened after climbing up and down a ladder several times. (JE 8:114). Dr. Jensen noted that the claimant appeared uncomfortable. (JE 8:116). Dr. Jensen observed that Mr. Covic exhibited tenderness in the mid-lumbar and left SI joint. (JE 8:116). Dr. Jensen diagnosed Mr. Covic with acute left-sided low back pain with left-sided sciatica. (JE 8:117). She discharged him with a prescription for hydrocodone-acetaminophen. (JE 8:118).

Dr. Smith examined Mr. Covic again on September 17, 2020. (JE 6:103-105). The claimant complained about continued lower back pain after returning to work. (JE 6:103). Mr. Covic displayed "nondermatomal sensation changes in the left lower extremity." (JE 6:104). He also had diffuse tenderness in the lumbar spine. (JE 6:104). Dr. Smith diagnosed Mr. Covic with myalgia, low back pain, and a strain of the lumbar region. (JE 6:105). Dr. Smith reiterated that the objective findings did not support the claimant's subjective symptoms. (JE 6:105). Dr. Smith opined that the claimant's examination remained unchanged. (JE 6:105). He wrote a prescription for a repeat FCE, and told the claimant that if the FCE results continued to be invalid, Dr. Smith would release the claimant to work without restrictions. (JE 6:105).

On September 18, 2020, CTI provided Mr. Covic with a temporary/transitional duty assignment form. (CE 3:8). His assignment was to begin on September 21, 2020. (CE 3:8). The lifting restriction of 50 pounds was included in the description. (CE 3:8). The hours were to be varied, pending demand. (CE 3:8). CTI noted that they were in the process of purchasing light weight chutes that were below Mr. Covic's lifting restrictions, in order to allow Mr. Covic increased accessibility to job hours and locations. (CE 3:8). Mr. Covic refused the temporary/transitional duty. (CE 3:9). Someone wrote that his reason for refusal was, "[t]he work is not suitable; unable to perform due to ongoing symptoms and limitations. See reports of primary care

physician Dr. Spooner attached.” (CE 3:9). Included was a letter from Dr. Spooner indicating that Mr. Covic was unable to return to work at that time, and would be re-evaluated in four weeks. (CE 3:10). There was also a letter provided with a 15 pound, light duty restriction, from Dr. Spooner, dated September 10, 2020. (CE 3:11).

The defendants provided a link to surveillance performed on September 18, 2020, September 19, 2020, and September 20, 2020. (DE G:1). I viewed the surveillance footage, which consists of 11 minutes and 54 seconds of footage. (DE G:1). On September 19, 2020, Mr. Covic is seen walking in a parking lot and getting into a vehicle. (DE G:1). He is later seen walking on a sidewalk and turning to look behind him as he walks. (DE G:1). He displayed what appeared to be a normal gait as he then walked across some grass with a female companion. (DE G:1). He is then seen from the rear, as he continues to walk away from the surveillance camera. (DE G:1). He does not show any gait disturbance. (DE G:1). Before walking out of view of the camera, Mr. Covic appeared to have been walking for about 18 minutes. (DE G:1).

Mr. Covic is then seen on September 20, 2020. (DE G:1). He is walking with a normal gait in a parking lot. (DE G:1). He entered a vehicle, and was later seen at a store with a female companion. (DE G:1). The footage shows the claimant shopping at Wal-Mart. (DE G:1). He is seen walking around the store, and standing with no outward appearing pain issues. (DE G:1). He is later seen fueling his vehicle at a gas station. (DE G:1).

Mr. Covic reported to E3 Work Therapy Services for an FCE on September 25, 2020. (JE 9:121-132). E3 Work Therapy Services utilized the XRTS FCE testing system in performing the FCE. (JE 9:121). An interpreter assisted with translation for the claimant. (JE 9:121). Mr. Covic expressed concern with returning to full duty. (JE 9:126). He complained of pain mostly in his left low back, which also went down his leg. (JE 9:126). He indicated difficulty with everything that is repetitive. (JE 9:126). Walking, sitting, and standing aggravated his pain. (JE 9:126). Pain medication and short walks helped alleviate his symptoms. (JE 9:127). He rated his pain 7 to 8 out of 10 on the day of the exam. (JE 9:127). Mr. Covic estimated that he could only walk for 10 to 15 minutes, stand for 10 to 20 minutes, and sit for 15 to 20 minutes. (JE 9:127). He estimated that he could lift 10 to 15 pounds. (JE 9:127). The examiner opined that the FCE was invalid, due to Mr. Covic “performing inconsistently” during the repeated measures protocol. (JE 9:121). Specifically, the FCE reported that the claimant failed to provide maximum voluntary effort during the FCE. (JE 9:121). Further, the examiner noted, that there was an absence of correlation between lifts of unmarked steel bars and the corresponding lifts on the XRTS lever arm. (JE 9:121). The examiner continued by pointing out that Mr. Covic lifted and carried more weight than he claimed as a “maximum lifting capacity” when he was assessed. (JE 9:121). Additional reasons for invalid categorization were as follows:

- Breakaway/Cogwheeling was present during the manual strength testing and the lifting evaluation.
- Extreme overt pain behaviors, including grimacing and groaning, were noted during this test.

- The pain questionnaires are high for subjective pain reports and behaviors.
- Waddell Testing: Positive in 4 of 5 categories.

(JE 9:122). The examiner observed that Mr. Covic walked with an antalgic gait. (JE 9:124). The examiner further found that Mr. Covic could lift between 24 and 27 pounds to his waist. (JE 9:121). Based upon the Dictionary of Occupational Titles, the claimant met the material handling demands for a medium demand vocation. (JE 9:121).

On October 1, 2020, the claimant continued his visits with Dr. Smith. (JE 6:106-109). Mr. Covic reported no change in his symptoms. (JE 6:106). Dr. Smith noted that Mr. Covic completed multiple courses of land and water physical therapy with no change in symptoms. (JE 6:108). Mr. Covic also completed two separate FCEs, both of which were invalid. (JE 6:108). Again, Dr. Smith noted that the claimant's subjective symptoms were not supported by objective findings. (JE 6:108). Dr. Smith opined that "[f]rom a Physical Medicine & Rehabilitation (PM&R) standpoint, he is at maximal medical improvement." (JE 6:108). Dr. Smith allowed the claimant to return to work full duty due to the invalid FCE, and recommended no further medical treatment due to the claimant reaching MMI. (JE 6:108-109).

Dr. Smith assigned the claimant a zero percent impairment rating as it relates to the injury to the lumbar region as a result of his May 18, 2020, work injury. (JE 6:110). Dr. Smith based his opinion on the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (JE 6:110). Dr. Smith noted that Mr. Covic's examination continued to be inconsistent, and that he had two invalid FCEs. (JE 6:110). Dr. Smith also expressed that he found no evidence of radicular findings, and symptom magnification. (JE 6:110).

On October 6, 2020, at the referral of Dr. Spooner, Mr. Covic saw Andrzej Szczepanek, M.D., at Central States Pain Clinic. (JE 10:133-138). He rated his left lower back, left hip, left buttock, and left lower extremity pain 8 out of 10. (JE 10:134). He had weakness and numbness. (JE 10:134).

Mr. Covic followed-up with Central States Pain Clinic on October 13, 2020, for diagnoses of chronic pain following trauma, and radiculopathy due to lumbosacral intervertebral disc disorder. (JE 10:135-138). Mr. Covic presented for a lumbar epidural steroid injection. (JE 10:136). The procedure was performed, and Mr. Covic tolerated it well. (JE 10:137-138).

On October 26, 2020, Mr. Covic returned to Central States Pain Clinic. (JE 10:139-141). Mr. Covic continued to have back and left leg pain, which radiated down the left lower extremity. (JE 10:140). He rated his pain 7 out of 10. (JE 10:140). He reported about 30 percent relief from the injection. (JE 10:140). Mr. Covic complained of weakness and numbness in the left leg. (JE 10:140).

Mr. Covic sought chiropractic care at DeRocher Chiropractic on November 10, 2020. (JE 11:152). He complained of low back pain, and pain in the "sacral-iliac" region. (JE 11:152). Mr. Covic told the chiropractor that his pain radiated down his left leg to his left foot. (JE 11:152). The chiropractor found severe tenderness to palpation,

severe spasms, and severe hypomobility in the lower back. (JE 11:152). The chiropractor took x-rays which he opined showed degenerative disc disease in the “lumbarsacral [sic]” spine. (JE 11:152).

Mr. Covic returned to DeRocher Chiropractic on November 11, 2020, for continued chiropractic treatment of his lower back pain. (JE 11:153). The claimant continued to exhibit severe levels of pain and muscle spasm. (JE 11:153). The chiropractor noted little change to Mr. Covic’s condition since his last visit despite making note of an “overall positive” response. (JE 11:153).

The claimant continued his care with Central States Pain Clinic on November 12, 2020. (JE 10:142-146). He complained of lower back pain with radiation down the left lower extremity. (JE 10:143). Mr. Covic related that his symptoms were poorly controlled. (JE 10:143). The lumbosacral pain radiates to the left lower extremity. (JE 10:144). Dr. Szczepanek opined that the pain appeared to be predominantly radicular in nature, and located mostly in the S1 dermatomal distribution. (JE 10:144). The L5-S1 injections provided only a modest benefit because of the claimant’s poor cooperation and anxiety. (JE 10:144). Dr. Szczepanek further opined that the claimant appeared to be depressed with a possible nonorganic component pain. (JE 10:144). Mr. Covic agreed to call the clinic when he was ready to undertake additional injections. (JE 10:144). Dr. Szczepanek diagnosed Mr. Covic with radiculopathy co-occurrent and due to lumbosacral intervertebral disc disorder, and chronic pain following trauma. (JE 10:144).

Mr. Covic also had a visit at DeRocher Chiropractic on November 12, 2020. (JE 11:154). During that visit he continued to complain of low back pain, and sacral pain that radiated. (JE 11:154). Mr. Covic told the chiropractor that he had no changes since his last visit, and that he was in severe pain. (JE 11:154). The chiropractor opined that Mr. Covic’s condition was unchanged from his previous visit. (JE 11:154).

On November 16, 2020, the claimant continued his chiropractic care with DeRocher Chiropractic. (JE 11:155). He continued to have severe issues with tenderness and spasms. (JE 11:155). He told the chiropractor that he had a “[v]ery difficult weekend with pain.” (JE 11:155). He had no change in his pain since his last visit. (JE 11:155). The chiropractor recommended continued chiropractic care, and opined that Mr. Covic’s response to date was “overall positive.” (JE 11:155).

The claimant returned to DeRocher Chiropractic on November 17, 2020. (JE 11:156). He continued to complain of severe low back pain, which radiated. (JE 11:156). According to the chiropractor, the claimant’s condition remained unchanged from previous visits; however, the chiropractor continued to opine that the claimant’s response to chiropractic treatment was “overall positive.” (JE 11:156).

On November 19, 2020, Mr. Covic continued his care with DeRocher Chiropractic. (JE 11:157). He continued to complain of severe pain in his lower back. (JE 11:157). The chiropractor opined that the claimant’s condition remained unchanged from his previous visit. (JE 11:157). The chiropractor continued to opine that the claimant’s response to treatment was “overall positive.” (JE 11:157).

The claimant returned to DeRocher Chiropractic on November 23, 2020. (JE 11:158). The claimant noted that he had a “[b]etter weekend,” but “not by much.” (JE 11:158). He continued to experience low back pain in the “sacral-iliac” region. (JE 11:158). His reported pain was 7 to 8 out of 10, and no radiation was noted. (JE 11:158). The chiropractor continued to opine that the claimant’s response to date was “overall positive.” (JE 11:158). The chiropractor continued, “[i]t is my clinical opinion that conservative chiropractic management should be continued.” (JE 11:158).

Mr. Covic returned to Dr. Spooner’s office again on December 2, 2020, for his continued low back complaints. (JE 2:41-46). Mr. Covic indicated that an epidural injection done in October improved his pain by 30 percent. (JE 2:42). Mr. Covic reported minimal improvement since his last visit. (JE 2:42). Dr. Spooner offered a second injection, but Mr. Covic declined due to a fear of needles. (JE 2:42). Mr. Covic showed substantial superficial tenderness to palpation in the left lumbosacral region. (JE 2:44). Dr. Spooner diagnosed the claimant with lumbosacral pain and radicular pain. (JE 2:44). Dr. Spooner opined that Mr. Covic exhausted physical therapy, chiropractic care, and medications. (JE 2:44). Dr. Spooner increased Mr. Covic’s gabapentin dosage, and referred him to an orthopedic doctor for further evaluation. (JE 2:44-45).

On December 17, 2020, CTI provided Mr. Covic with a return to work assignment form. (CE 4:12-13). The form indicates that the claimant was to operate under no restrictions. (CE 4:12). The return to work assignment would be a full-time work duty assignment driving ready mix concrete material from a concrete plant to a customer location. (CE 4:12). The hours and demand would vary depending on the weather and customer. (CE 4:12). The assignment was to begin on December 17, 2020. (CE 4:12). Mr. Covic refused the full-time employment and noted on December 21, 2020, “cannot meet physical demands of this assignment due to current work restrictions of Dr. Spooner (see attached). Employee willing to do light duty work within restrictions.” (CE 4:13).

Benjamin Bjerke, M.D., of Capital Orthopaedics, examined the claimant on December 18, 2020. (JE 12:159-161). Mr. Covic complained of low back pain with numbness, tingling, and weakness in his left leg. (JE 12:159). Dr. Bjerke recounted the medications used by the claimant in an attempt to relieve his pain with no relief. (JE 12:159). Mr. Covic denied relief from his previous injection, therapy, and chiropractic care. (JE 12:159). Dr. Bjerke ordered x-rays of the lumbar spine and pelvis. (JE 12:160). Upon reviewing the x-rays, Dr. Bjerke found no evidence of spondylolisthesis, fracture or instability in the lumbar spine. (JE 12:160). He also found a grossly normal pelvis without limb length discrepancy. (JE 12:160). Dr. Bjerke reviewed the previous MRI, and opined that it was of “extremely limited [quality].” (JE 12:160). Upon physical examination, Dr. Bjerke observed that Mr. Covic had decreased sensation along the left posterior thigh, anteromedial leg, and anterolateral leg. (JE 12:160). Dr. Bjerke opined, “he clearly has radicular symptoms, including numbness, tingling, objective weakness, and a positive straight leg raise. I agree with the previous MRI interpretation and that there is no obvious large disc herniation of or evidence of stenosis.” (JE 12:161). Dr. Bjerke continued to opine that there was edema at L5-S1 on both endplates, which

“may be evidence for fracture or other pathology here.” (JE 12:161). Dr. Bjerke recommended another MRI. (JE 12:161).

Mr. Covic had an MRI at Capital Orthopaedics on December 24, 2020. (JE 13:173-174). Indunil Karunasokora, M.D., interpreted the results of the MRI. (JE 13:174). Dr. Karunasokora opined that the MRI showed stable disc degeneration at L5-S1 with mild disc bulging and a small annular tear. (JE 13:174). The MRI also showed left-sided disc bulging with a small, unchanged annular tear at L4-5 “with possible irritation of left L4 nerve root laterally.” (JE 13:174). Finally, the radiologist opined that the MRI showed stable, gentle, broad-based right lateral/intraforaminal disc herniation at L3-4 with a possible irritation of the exiting right L3 nerve root. (JE 13:174).

The claimant returned to Dr. Bjerke’s office on December 24, 2020. (JE 12:162). Dr. Bjerke reviewed an MRI, which he said showed, mild abnormalities, including asymmetric Modic endplate changes at the left L5-S1 level. (JE 12:170). However, Dr. Bjerke continued by noting that it was an “otherwise unremarkable study.” (JE 12:170). Dr. Bjerke could not elucidate the cause of Mr. Covic’s pain based upon the findings of the MRI. (JE 12:170). Dr. Bjerke continued that Mr. Covic met no surgical criteria. (JE 12:170). Dr. Bjerke issued an order for pain management care. (JE 12:162).

On December 30, 2020, Dr. Spooner re-examined Mr. Covic. (JE 2:47-50). Mr. Covic reported “mild interval improvement” with the use of gabapentin. (JE 2:47). Mr. Covic also reported a willingness to follow-up with pain management. (JE 2:47). Mr. Covic still displayed substantial superficial tenderness to palpation in the left lumbosacral region. (JE 2:49). Dr. Spooner diagnosed him with lumbosacral pain, radicular pain, muscle spasm in the back, and hyperreflexia of the left lower extremity. (JE 2:49). Dr. Spooner noted that Mr. Covic’s exam and history were “consistent with persistent lumbosacral pain with radicular pattern of pain to the left lower extremity.” (JE 2:50). Dr. Spooner opined that Mr. Covic was not malingering, and did not have chronic regional pain syndrome or psychosomatic issues. (JE 2:50). Dr. Spooner asked Mr. Covic to follow-up after his visit with pain management. (JE 2:50).

On June 16, 2021, Mr. Covic was discharged from his employment by Bullseye Des Moines. (CE 5:14). The discharge notice says, “Ramo lied on his job application. After we did a background check we noticed he left out his previous employer. Ramo’s employment is terminated today.” (CE 5:14).

Mr. Covic completed a DOT physical on June 24, 2021. (Defendants’ Exhibit E:6-10). The only section in which Mr. Covic indicated “yes” in the health history section was that he currently drank alcohol. (DE E:7). Mr. Covic made no mention of his back pain or leg pain. (DE E:7). His physical examination was normal across all noted body systems. (DE E:8). The examiner provided Mr. Covic with a two-year qualification for his DOT physical. (DE E:9). Mr. Covic also passed a drug test. (DE E:11).

Dr. Spooner examined Mr. Covic again on February 4, 2021. (JE 2:51-54). Mr. Covic indicated that he visited with pain management, but again declined an injection due to apprehension. (JE 2:52). He was interested in trying tramadol to relieve his pain. (JE 2:52). Upon physical examination, he displayed substantial superficial

tenderness to palpation in the left lumbosacral region. (JE 2:53). Dr. Spooner agreed to begin a trial prescription of tramadol. (JE 2:54).

The claimant had a third FCE on January 20, 2022, at WorkWell/Short Physical Therapy, PLLC. (JE 14:175-183). The examiner opined that Mr. Covic provided consistent effort with all of his testing. (JE 14:175). He also showed reproducible activities throughout lifting and carrying test items. (JE 14:175). At the start of the FCE, Mr. Covic rated his pain 7 out of 10, which increased to 9 out of 10 as he progressed through his evaluation. (JE 14:176). The FCE report indicated that Mr. Covic had "some limitations" with the following: elevated work, forward bent standing, sitting, standing work, walking, kneeling, half-kneeling, reaching, stairs, lifting up to 20 pounds from the floor to 10 inches to the waist, lifting up to 10 pounds from the waist up to the crown, and front carrying up to 20 pounds up to 50 feet. (JE 14:176). He had "significant limitations" with crouching, lifting up to 15 pounds from the floor to the waist, lifting up to 25 pounds from 10 inches from the floor to the waist, lifting up to 20 pounds from the waist to the crown, and front carrying up to 25 pounds up to 50 feet. (JE 14:176). The examiner opined that the FCE results placed Mr. Covic's capabilities in the "light" category, which includes lifting up to 20 pounds on an occasional basis at waist level. (JE 14:176). The examiner recommended that Mr. Covic limit elevated work and/or reaching at shoulder height to an occasional basis due to his decreased strength and endurance in his low back. (JE 14:176). The examiner noted that Mr. Covic ambulated with an altered, antalgic gait, on the left side. (JE 14:176). A further recommendation included allowing Mr. Covic to change positions between sitting, standing, and walking, as needed. (JE 14:177). The examiner continued by recommending that Mr. Covic limit standing and walking combined up to 35 percent of the day. (JE 14:177). Mr. Covic was also counseled to use correct lifting techniques. (JE 14:177).

Sunil Bansal, M.D., conducted an independent medical examination ("IME") of the claimant on January 21, 2022. (JE 15:184-198). Dr. Bansal is board certified in occupational medicine. (JE 15:184). Dr. Bansal began his IME report by reviewing the applicable medical records. (JE 15:184-193). Mr. Covic outlined the events that caused his injury. (JE 15:194). He complained of continued low back pain that radiated down his left leg into his foot. (JE 15:194). He could sit or stand comfortably for 15 to 20 minutes before having to shift positions. (JE 15:194). He complained that he was slow on stairs, and had to use handrails. (JE 15:194). Bending caused him severe pain that shot down his leg. (JE 15:194). Mr. Covic told Dr. Bansal that he worked 10 to 12 hours per day at CTI, where he also had to lift three 50-pound cement chutes to unload his truck. (JE 15:194). He also had to wash the chutes when finished. (JE 15:194).

Upon examination, Dr. Bansal noted that Mr. Covic had tenderness to palpation over the lower back with guarding. (JE 15:195). The claimant had negative Fabre's tests and negative left straight leg raise testing. (JE 15:195). Dr. Bansal used a two-point discriminator and found a loss of sensory discrimination over Mr. Covic's anterior lower leg. (JE 15:195). Mr. Covic displayed no loss of strength in the lower extremity. (JE 15:195).

Dr. Bansal diagnosed Mr. Covic with L3-4, L4-5, and L5-S1 disc bulging, and aggravation of lumbar spondylosis and facet arthropathy. (JE 15:196). He agreed with Dr. Smith that the claimant achieved MMI on September 9, 2020. (JE 15:196). Dr. Bansal opined that Mr. Covic's lower back injuries were an aggravation of his degenerative condition caused by his fall while at work. (JE 15:196). Based upon Table 15-3 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, Dr. Bansal opined that Mr. Covic's impairment met a DRE Lumbar Category II impairment with some Category III impairment. (JE 15:197). This was due to the bulging discs at L3-4, L4-5, and L5-S1, along with left lower extremity radicular pain. (JE 15:197). Based upon his findings, Dr. Bansal assigned Mr. Covic an 8 percent body as a whole impairment rating. (JE 15:197). Dr. Bansal opined further that Mr. Covic may need continued intermittent epidural injections, facet injections and/or radiofrequency ablation. (JE 15:198). Dr. Bansal also proposed permanent restrictions as laid out in the January 20, 2022, FCE. (JE 15:197). These restrictions were directly quoted by Dr. Bansal as follows:

Date of service January 20, 2022. Functional capacity evaluation.

SUMMARY: Mr. Covic demonstrated consistent performance and provided valid effort. Due to the decreased range of motion, strength, and endurance of his low back, it is recommended that his capabilities are in the light category (up to 20 pounds on an occasional basis) of physical demand. It is recommended that he limit elevated work and/or reaching at shoulder height and higher with material and nonmaterial handling activities to an occasional basis. He ambulates with an altered gait, with an antalgic limp on his left lower extremity. He has increased pain in his low back with weightbearing through his left lower extremity, and guarded posture through his trunk. It is recommended that he be able to change positions between sitting, standing, and walking as needed. He should limit standing/walking combined for up to 35% of the day. It is recommended that he use correct lifting techniques and body mechanics when performing lifting activities, keeping loads close to his body, bending through his hip/knees and not his low back, and no bending or twisting.

(JE 15:197).

On February 7, 2022, Mr. Covic reported to Methodist West Hospital, for complaints of low back pain. (JE 16:199-207). He described sharp pain that radiated throughout his left lower extremity. (JE 16:199). He noticed swelling in his left leg, and had shooting pain down his left hip "all the way to his foot." (JE 16:199). Upon examination, the provider found "[t]race edema at ankles." (JE 16:202). No tenderness was noted in the lower back. (JE 16:202). Mr. Covic had sensation and strength intact in the bilateral lower extremities, along with slightly less dorsiflexion and plantarflexion in the left lower extremity. (JE 16:202). The provider observed tenderness at the left SI joint and generally throughout the left paraspinal musculature. (JE 16:204). Preliminary findings were negative for DVT or thrombophlebitis. (JE 16:204). He was provided with a prescription for diclofenac and Norflex. (JE 16:205). When he was discharged, he told the provider that his leg felt better. (JE 16:205).

On February 9, 2022, the claimant returned to Dr. Spooner's office regarding his continued lumbosacral pain. (JE 2:54.1-54.3). Dr. Spooner opined that the radicular pain was "[t]hought to be discogenic radicular provocation." (JE 2:54.1). Over the previous week, Mr. Covic reported progressive pain to his left foot. (JE 2:54.1). Mr. Covic had some pain, warmth, and mild swelling to the dorsum of his left foot. (JE 2:54.1). Dr. Spooner diagnosed Mr. Covic with lumbosacral pain, radicular pain, and synovitis of the left foot. (JE 2:54.2). Dr. Spooner could not rule out gout as a cause of Mr. Covic's left foot pain. (JE 2:54.3). He provided Mr. Covic with a five-day course of prednisone. (JE 2:54.3).

Mr. Covic testified that he agreed with the restrictions promulgated by the January 20, 2022, FCE. (Testimony). He believed that the lifting restrictions were 20 pounds. (Testimony). Dr. Bansal agreed with these lifting restrictions, and provided an eight percent impairment rating. (Testimony).

Prior to starting his subsequent job with Huber Hauling, the claimant underwent a medical examination. (Testimony). He checked a box indicating that he had no neck or back problems. (Testimony). He testified that he completed this online and did not have an interpreter assisting him, so he did not know what he checked with regard to his health conditions. (Testimony).

Mr. Covic testified that when he sits for longer periods of time, his back hurts. (Testimony). He further testified that he walks for 20 to 25 minutes. (Testimony). He indicated that his wife "pretty much" helped him with everything. (Testimony). In his discovery responses, he also claimed that "[m]ost activities of daily living are now difficult to perform. (CE 1:3). He also has difficulty getting up or down, issues with sleeping, and performing any recreational activities. (CE 1:3).

For a short period of time, Mr. Covic worked for Bullseye Trucking. (Testimony). He was fired from Bullseye for failing to disclose that he worked for CTI. (Testimony).

At the time of the hearing, Mr. Covic worked for Huber Hauling. (Testimony). He earned twenty-one and 00/100 dollars (\$21.00) per hour. (Testimony). He works 50 hours per week at Huber Hauling. (Testimony). He hauls sand and dirt to different customer locations, which he unloads automatically. (Testimony). He found this job easier than the job at CTI because it does not involve as much lifting. (Testimony).

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 Rule of Appellate Procedure 6.904(3).

Permanent Disability

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 medical causation is “essentially within the domain of expert testimony.” Cedar Rapids Cmty. Sch. Dist. V. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The commissioner, as the trier of fact, must “weigh the evidence and measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994). Supportive lay testimony may be used to buttress expert testimony, and therefore is also relevant and material to the causation question.

Iowa employers take an employee subject to any active or dormant health problems, and must exercise care to avoid injury to both the weak and infirm and the strong and healthy. Hanson v. Dickinson, 188 Iowa 728, 176 N.W. 823 (1920). While a claimant must show that the injury proximately caused the medical condition sought to be compensable, it is well established that a cause is “proximate” when it is a substantial factor, or even the primary or most substantial cause to be compensable under the Iowa workers’ compensation system. Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

Mr. Covic testified that he had no back issues or pain prior to a work incident on May 18, 2020. On May 18, 2020, Mr. Covic was washing his CTI truck after making a delivery. He slipped and fell on his back. He noted immediate pain, and discussed some radiating pain at that time. He commenced physical therapy, but noted that this was not providing much relief. He then began having radiating pain down his left leg.

He had an MRI which showed a central annular tear at L5-S1; however, the bulk of the MRI was unreadable due to motion issues. Dr. Nelson then saw Mr. Covic. Dr. Nelson indicated that the MRI did not show significant impingement, and opined that Mr. Covic was not a surgical candidate. Dr. Nelson felt that Mr. Covic’s pain complaints were “considerably greater” than expected based upon the objective findings. Dr. Nelson recommended an FCE, and opined that if it was invalid, Mr. Covic would likely not have a positive response to treatment.

The first FCE at ARC Physical Therapy+ on April 30, 2020, was invalid. The examiner found that the claimant had high results for subjective reports of pain. The claimant also displayed an antalgic gait. The examiner opined that the claimant’s subjective reporting of pain was not credible due to a lack of reproducibility. The examiner also found considerable inconsistencies in testing results. These

inconsistencies led to an invalid result. Based upon this, Dr. Nelson placed Mr. Covic at MMI.

Dr. Smith then examined the claimant, and recommended an EMG due to inconsistencies between physical therapy results and the FCE. The EMG was normal. Dr. Smith also found that Mr. Covic had normal strength measurements when distracted during a subsequent examination.

During this time, Dr. Spooner noted that he did not see any evidence that Mr. Covic was malingering. Dr. Spooner also opined that based upon his previous care for Mr. Covic, that Mr. Covic displayed pain perception or tolerance issues.

Dr. Smith prescribed aquatic therapy for a time. Eventually, Mr. Covic was to be released to work full duty. He objected to this. Dr. Spooner also objected to this, and indicated that he would advocate that the claimant continue to treat and be kept on restricted duty. Dr. Spooner also recommended that the claimant proceed to pain management.

On September 17, 2020, Dr. Smith issued a strong opinion that the objective findings did not support Mr. Covic's subjective pain complaints. Dr. Smith ordered another FCE. The FCE was again invalid due to inconsistent performance and a number of other issues. Of note, Mr. Covic told the FCE examiner that he could only walk for 10 to 15 minutes. This is contradicted by surveillance footage, which shows Mr. Covic on several occasions walking normally, and walking for over 18 minutes without an antalgic gait.

Eventually, Mr. Covic had an injection into his lower back. He indicated that the injection did not provide him with much relief.

The pain management provider, Dr. Szczepanek opined that Mr. Covic displayed radicular pain in the S1 dermatomal distribution. This is consistent with the MRI results noted above. Dr. Bjerke also opined that Mr. Covic had radicular symptoms, including numbness, tingling, objective weakness, and a positive straight leg raise.

An MRI done on December 24, 2020, showed stable degenerative disc issues at L5-S1 with mild disc bulging and a small, unchanged annular tear. Dr. Bjerke opined that this was an otherwise unremarkable MRI and that he could not elucidate the cause of the claimant's pain.

Interestingly, the claimant had a DOT physical which was "normal" across the allegedly affected body areas.

Mr. Covic then underwent a third FCE, which provided a litany of restrictions and assessments.

Dr. Bansal then conducted an IME at the request of claimant's counsel. Dr. Bansal opined that the claimant suffered an aggravation of his degenerative condition when he fell. He agreed that the claimant achieved MMI on September 9, 2020. He further noted that the claimant sustained an 8 percent body as a whole permanent disability. Finally, Dr. Bansal adopted the restrictions recommended by the third FCE.

Based upon my review of the record, the preponderance of the evidence shows that the claimant suffered a permanent aggravation of his lower back issues as a result of his fall on May 18, 2020. It should be noted that Dr. Spooner confirms that the claimant has pain tolerance issues. Additionally, Dr. Szczepanek and Dr. Bjerke confirmed the MRI findings showed that the claimant had radicular symptoms in the S1 dermatomal distribution. While the MRI is "otherwise unremarkable" these objective findings confirm the claimant's subjective complaints.

The parties in this matter stipulated that, if the injury was found to be a cause of permanent disability, then the disability is an industrial disability. The claimant has not sustained a disability to a scheduled member. Rather, the claimant sustained a disability to the body as a whole. Since the 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: "[i]t 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 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. 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).

A loss of earning capacity due to voluntary choice or lack of motivation to return to work is not compensable. Malget v. John Deere Waterloo Works, File No. 5048441 (Remand Dec. May 23, 2018); Rus v. Bradley Puhrmann, File No. 5037928 (App. December 16, 2014); Gaffney v. Nordstrom, File No. 5026533 (App. September 1, 2011); Snow v. Chevron Phillips Chemical Co., File No. 5016619 (App. October 25, 2007); Copeland v. Boone's Book and Bible Store, File No. 1059319 (App. November 6, 1997); See also Brown v. Nissen Corp., 89-90 IAWC 56, 62 (App. 1989)(no prima facie showing that claimant is unemployable when claimant did not make an attempt for vocational rehabilitation).

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. Iowa Code section 85.34.

Before beginning my discussion regarding Mr. Covic's industrial disability, I would like to take a moment to discuss credibility issues in this matter. Mr. Covic consistently displayed an antalgic gait upon examination by providers. Surveillance footage showed him walking normally with no gait issues. He also displayed normal strength in his leg when distracted by Dr. Smith. Also, Mr. Covic testified to having an eighth grade education, but also provided responses to discovery indicating that he graduated high

school. Mr. Covic also indicated difficulties understanding English, but had to be reminded in his deposition that he needed to let the interpreter finish her interpretation before he responded to the questions. Mr. Covic also indicated that he has issues with certain household tasks, including shopping; however, surveillance footage calls that into question. All of these, taken together, weigh heavily on my industrial disability analysis below.

Mr. Covic was 47 years old at the time of the hearing. He either has an eighth grade education, or a high school education. He has worked primarily in meat packing and/or trucking since arriving in the United States of America. He is obviously motivated to return to work, as he now has a job with Huber Hauling. He indicated that this new job is easier than his old job with CTI because he unloads trucks automatically. He earns one and 50/100 dollar (\$1.50) per hour less now than he did before. He complains of pain in his lower back causing him to have issues performing activities of daily living. He has work restrictions as presented by an FCE; however, he also has two failed FCEs due to inconsistent effort. I find that the final FCE restrictions are not convincing considering his credibility issues and previous invalid FCE results. Dr. Bansal is the only provider to opine on permanent disability and provided the claimant with an 8 percent whole person impairment.

Based upon the foregoing, and the factors considered in an industrial disability analysis, I find that the claimant sustained a nine (9) percent industrial disability. This represents 45 weeks. ($.09 \times 500 \text{ weeks} = 45 \text{ weeks}$).

Gross Earnings and Weekly Rate

The parties have a dispute regarding the claimant's gross weekly earnings, and thus the corresponding weekly workers' compensation rate. Iowa Code section 85.36 states "[t]he basis of compensation shall be the weekly earnings of the injured employee at the time of the injury." Weekly earnings are defined as the gross salary, wages, or earnings of an employee had the employee worked the customary hours for the full pay period in which the employee was injured as the employer regularly required for work of employment. Id. The subsections of Iowa Code section 85.36 set forth methods for computing weekly earnings depending upon the type of earnings and employment.

If an employee is paid on a daily, or hourly basis, or based upon output, weekly earnings are computed by dividing by thirteen (13) the earnings over the thirteen (13) week period immediately preceding the injury. However, any week that does not fairly reflect the employee's customary earnings shall be replaced by the closest previous week that is a fair representation of the employee's customary earnings. Iowa Code section 85.36(6). The calculation shall include shift differential pay, but not overtime or premium pay in the calendar weeks immediately preceding the injury. Id. If the employee was absent during the time period subject to calculation for personal reasons, the weekly earnings are the amount the employee would have earned had the employee worked when work was available to other employees in a similar occupation for the employer. Id.

Mr. Covic argues that his weekly gross earnings were one thousand thirty-seven and 78/100 dollars (\$1,037.78) per week. This equates to six hundred seventy-three

and 45/100 dollars (\$673.45) according to the claimant's contention. In their posthearing brief, the defendants argue that the correct weekly gross earnings are seven hundred twenty-four and 00/100 dollars (\$724.00) per week, which equates to a weekly compensation rate of four hundred eighty-five and 98/100 dollars (\$485.98).

The claimant testified that his schedule was largely dependent on demand and the weather. If the weather was more conducive, he would work longer hours. Conversely, if the weather was poor, he would work less. The claimant points to Jacobson Transport Co. v. Harris to support their contention that weeks in which the weather was poor, and the claimant worked less, should be excluded. 778 N.W.2d 192 (Iowa 2010). In that case, the claimant, an over-the-road truck driver, was paid by the mile. Id. at 194. He was not guaranteed a minimum amount of work each week, and so his mileage varied based upon "traffic, speed limits, road construction, and weather." Id. In citing to a previous decision, the court noted, "[w]hy a particular week may not reflect the employee's customary hours is important only insofar as it might be relevant to whether the *hours* worked in that week are in fact customary. . ." Id. at 198 (citing Griffin Pipe Products Co. v. Guarino, 663 N.W.2d 862, 866 (Iowa 2003)). The court continued, "[t]he reason for the variance in earnings is not determinative of whether a week's earnings should be replaced because they are not customary." Id. at 198.

The question is which weeks reflect customary hours worked by the claimant. Claimant's Exhibit 2 has payroll records from October 3, 2019, to June 4, 2020. The claimant's hours shown in Claimant's Exhibit 2 were as follows:

Check Date	Hours Worked
October 3, 2019	21.09
October 10, 2019	46.80
October 17, 2019	47.46
October 24, 2019	60.62
October 31, 2019	56.91
November 7, 2019	58.50
November 14, 2019	61.30
November 21, 2019	18.31
November 27, 2019	51.93
December 5, 2019	27.63
December 12, 2019	36.89
December 19, 2019	23.94
December 26, 2019	26.54
January 2, 2020	21.76
January 9, 2020	5.93
January 16, 2020	21.45
January 30, 2020	9.96
February 6, 2020	20.68
February 13, 2020	3.62
February 20, 2020	5.34
February 27, 2020	14.39

March 5, 2020	28.23
March 12, 2020	36.75
March 19, 2020	31.03
March 26, 2020	10.01
April 2, 2020	23.35
April 9, 2020	46.85
April 16, 2020	35.58
April 23, 2020	18.24
April 30, 2020	60.82
May 7, 2020	53.46
May 14, 2020	38.77
May 21, 2020	47.09
May 28, 2020	33.17
June 4, 2020	21.50

(CE 2:6-7). The claimant argues that the following weeks should be excluded: February 27, 2020, March 5, 2020, March 19, 2020, March 26, 2020, April 2, 2020, and April 23, 2020. The defendants argue that no weeks from February 20, 2020, through May 14, 2020, should be excluded.

In reviewing the evidence, I find that the following weeks represent customary hours as worked by the claimant: March 5, 2020, March 12, 2020, March 19, 2020, April 9, 2020, April 16, 2020, April 30, 2020, May 7, 2020, and May 14, 2020. It is important to note that weeks which do not fairly represent customary earnings are to be replaced by the closest previous week with earnings that fairly represent the customary earnings. See Iowa Code section 85.36(6). This requires looking back beyond March 5, 2020. Since I found eight weeks that fairly represent customary earnings, I must find five additional weeks in order to have 13 weeks representing customary earnings. I would add in the following weeks: October 31, 2019, November 7, 2019, November 14, 2019, November 27, 2019, and December 12, 2019, to complete the thirteen-week analysis.

Based upon the foregoing, the claimant's gross earnings are one thousand one hundred twenty-eight and 30/100 dollars (\$1,128.30) per week ($\$14,667.91 / 13 = \$1,128.30$). The parties stipulated that the claimant was married and entitled to two exemptions at the time of the alleged injury. Based upon the rates in effect on May 18, 2020, the claimant's compensation rate would be seven hundred twenty-six and 58/100 dollars (\$726.58) per week.

ORDER

THEREFORE, IT IS ORDERED:

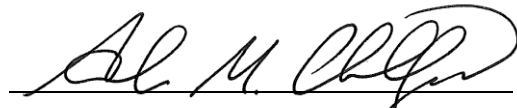
That the claimant's gross weekly earnings were one thousand one hundred twenty-eight and 30/100 dollars (\$1,128.30), which equates to a weekly compensation rate of seven hundred twenty-six and 58/100 dollars (\$726.58) per week.

That the defendants shall pay the claimant forty-five (45) weeks of permanent partial disability benefits at the ordered rate of seven hundred twenty-six and 58/100 dollars (\$726.58) per week commencing on the stipulated date of September 9, 2020.

That the defendant shall pay accrued weekly benefits in a lump sum together with interest. All interest on past due weekly compensation benefits 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 Gamble v. AG Leader Technology, File No. 5054686 (App. Apr. 24, 2018).

That the defendant shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 Iowa Administrative Code 3.1(2) and 876 Iowa Administrative Code 11.7.

Signed and filed this 9th day of June, 2022.



ANDREW M. PHILLIPS
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Randall Schueller (via WCES)

Kevin Rutan (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.