

## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

CHARLES SEARS,

Claimant,

vs.

CONCRETE TECHNOLOGIES, INC.,

Employer,

and

FEDERATED INSURANCE COMPANY,

Insurance Carrier,  
Defendants.

File No. 20011489.01

ARBITRATION DECISION

Head Note Nos.: 1800, 1803

**STATEMENT OF THE CASE**

The claimant, Charles Sears, filed a petition for arbitration seeking workers' compensation benefits from Concrete Technologies, Inc., ("CTI") and its insurer Federated Insurance Company. Michael Norris appeared on behalf of the claimant. Michael Kuehner appeared on behalf of the defendants.

The matter came for hearing on November 18, 2021, 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 via CourtCall. The hearing proceeded without significant difficulty.

The record in this case consists of Joint Exhibits 1-5, Claimant's Exhibits 1-4, and Defendants' Exhibits A-G. The claimant testified on his own behalf. Emily Maiers was appointed the official reporter and custodian of the notes of the proceeding. The evidentiary record closed at the end of the hearing, and the matter was fully submitted on January 7, 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. The claimant sustained an injury arising out of, and in the course of, employment, on September 14, 2020.

3. That the alleged injury is a cause of temporary disability during a period of recovery.
4. That, if the injury is a cause of permanent disability, the disability is an industrial disability.
5. That the commencement date for permanent partial disability benefits, if any are awarded is March 15, 2021.
6. That the claimant was single and entitled to one exemption, and has a weekly rate of compensation of eight hundred seventy two and 59/100 dollars (\$872.59).
7. That prior to the hearing, the claimant was paid five weeks of compensation at the rate of eight hundred seventy two and 59/100 dollars (\$872.59).
8. That the defendants would pay the claimant's filing fee, costs of the hearing, and an invoice in the exhibits.

Entitlement to temporary disability and/or healing period benefits is no longer in dispute. Medical benefits are also no longer 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 partial disability, should any be awarded.

### **FINDINGS OF FACT**

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

Charles Sears, the claimant, was 41 years old at the time of the hearing. (Testimony). He resides in Windsor Heights, Iowa, with his brother. (Testimony). He has lived in the Des Moines, Iowa, area for his entire adult life. (Testimony). He has one minor child. (Testimony).

Mr. Sears graduated from Barry Goldwater High School in Mesa, Arizona, in 1999. (Testimony). He did not attend college or pursue any additional education after graduation. (Testimony). He began his working career by working in landscaping. (Testimony). He laid sod, built walls, and transported rocks, for about five years. (Testimony). He then worked intermittently in construction on concrete driveways, and ceiling tile demolition. (Testimony).

Mr. Sears then moved to central Iowa. (Testimony). He worked for Kirk Welden performing underground cable boring for six to seven years. (Testimony). Finally, Mr. Sears worked for CTI. (Testimony). He moved to CTI because he wanted to have more of a chance for upward mobility and advancement. (Testimony). When he started work at CTI, he earned nineteen and 50/100 dollars (\$19.50) per hour. (Testimony). At the time of the incident, he earned twenty five and 00/100 dollars (\$25.00) per hour. (Testimony). His work at CTI was seasonal. (Testimony). He would be laid off during the winter, claim unemployment, and then CTI would call him back in the spring. (Testimony).

On September 14, 2020, the claimant was working for CTI in the Waukee, Iowa, area. (Testimony). He was unloading concrete for a wall. (Testimony). He finished unloading concrete, cleaned his truck, and climbed the ladder. (Testimony). The hose caught his foot, and he fell off the ladder from a height of about 8 to 10 feet. (Testimony). He did not lose consciousness, but was dazed and confused subsequent to the fall. (Testimony). A coworker rendered aid. (Testimony). His supervisor eventually called him. (Testimony). He described the situation to his supervisor, and told him that his lower back was sore. (Testimony).

Mr. Sears testified that he wanted to see a medical provider, but CTI sent him home to rest, instead. (Testimony). Three days after the injury, he sought out his own care for continued pain in his middle and lower back. (Testimony). Adam Andrews, D.O., examined Mr. Sears on September 17, 2020. (Joint Exhibit 1:1-4). Mr. Sears reported his fall, and complained of sharp pain in his left lumbar area. (JE 1:1). Dr. Andrews ordered and reviewed x-rays of the thoracic, lumbar, and sacral regions, which he indicated were normal. (JE 1:2). Dr. Andrews diagnosed Mr. Sears with midline thoracic back pain, and left-sided low back pain. (JE 1:2). Dr. Andrews prescribed Naproxen and a muscle relaxer. (JE 1:2).

Eventually, Mr. Sears spoke to the owner of CTI, and was sent to Concentra on October 9, 2020. (Testimony; JE 4:1-4; Defendant's Exhibit D:1-4). Nicholas Warnken, DPT, provided physical therapy for "spondylosis w/out [sic] myelopathy or radiculopathy." (JE 4:1; DE D:1). Mr. Sears reported feeling sore upon his arrival. (JE 4:1; DE D:1). He also told the therapist that he had difficulty getting out of bed. (JE 4:1; DE D:1). Mr. Sears rated his pain 6 out of 10 in the thoracic spine. (JE 4:1; DE D:1). His pain worsened in the morning, and at times included shooting and tingling "superior to the left iliac crest." (JE 4:1; DE D:1). Mr. Warnken opined that the claimant was recovering as expected, and that he showed improved range of motion and better control of his movement. (JE 4:3; DE D:1).

On December 9, 2020, Mr. Sears reported to Iowa Ortho. (JE 2:1-3; DE A:1-3). Thomas Klein, D.O., performed a medial branch block injection at L3-4, L4-5, and L5-S1. (JE 2:1; DE A:1-3). Dr. Klein diagnosed Mr. Sears with spondylosis of the lumbosacral region and lumbar spondylosis. (JE 2:2; DE A:1-3). Dr. Klein provided no new restrictions for the claimant. (JE 2:3; DE A:1-3). Mr. Sears testified that these injections provided him with relief for "a week or two." (Testimony).

Mr. Sears returned to Iowa Ortho on December 10, 2020. (JE 2:4-6; DE A:4-7). Brett Rosenthal, M.D., examined him. (JE 2:4-6; DE A:4-7). Mr. Sears reported mild-moderate daily symptoms to his lower back. (JE 2:4; DE A:4). He had injections the

day prior, which provided temporary relief; however, his low back pain continued. (JE 2:4; DE A:4). Mr. Sears reported to Dr. Rosenthal that he wanted to address his work restrictions. (JE 2:4; DE A:4). Dr. Rosenthal diagnosed Mr. Sears with low back pain, multilevel lumbar spondylosis, and a history of opioid abuse with methadone usage. (JE 2:5; DE A:5). Dr. Rosenthal observed that Mr. Sears had a benign neurologic examination with “no red flag signs.” (JE 2:6; DE A:6). Mr. Sears was uncomfortable advancing his precautions due to his pain, and Dr. Rosenthal recommended that Mr. Sears continue his work restrictions as provided. (JE 2:6-7; DE A:6-7). Dr. Rosenthal told Mr. Sears that he should begin work conditioning after a planned medial branch block and radiofrequency ablation. (JE 2:6; DE A:6-7).

On December 15, 2020, and December 17, 2020, providers declined to change Mr. Sears’ restrictions. (JE 2:8-9; DE A:8-9). Mr. Sears reported to Mercy River Hills Surgery Center on December 17, 2020. (JE 3:1-2; DE B:1-2). Dr. Klein performed radiofrequency ablation to the right L3-4, L4-5, and L5-S1. (JE 3:1; DE B:1). He also provided a right L2, L3, and L4, medial branch block. (JE 3:1; DE B:1). Dr. Klein noted diagnoses of lumbar and lumbosacral spondylosis without radiculopathy. (JE 3:1; DE B:1). Mr. Sears opined that he received a week to several weeks of relief from the injections and ablations. (Testimony).

I observed video surveillance evidence presented by the defendants as Exhibit E. Mr. Sears testified that the individual shown in the surveillance video is him. (Testimony). The first video was taken on December 16, 2020. (DE E:1). Mr. Sears is seen parking his truck at a Walgreen’s, prior to entering the store. (DE E:1). He exited the store, and walked with no gait issues. (DE E:1). He also had no issues twisting to look back while backing out of a parking spot. (DE E:1). He is later seen assisting an older man into a residence. (DE E:1). He then entered a pickup truck and drove away. (DE E:1).

On December 18, 2020, Dr. Rosenthal issued a referral to a work conditioning program. (JE 2:10).

CTI presented another round of surveillance performed on December 21, 2020. (DE E:1). Mr. Sears ran several errands, and walked into a Dollar General with no apparent gait issues. (DE E:1). He pushed a cart filled with bags, and loaded his vehicle. (DE E:1). He returned to a residence and removed items from his vehicle. (DE E:1). He opened the tailgate of his pickup truck, and removed a large, heavy appearing box. (DE E:1). He placed the box on the ground, entered the residence, and closed the tailgate. (DE E:1). He then lifted the large box from the ground, and carried it into the residence. (DE E:1). He did not appear to have any difficulty lifting the box, nor did he appear to be in any pain while doing so.

CTI performed additional surveillance on December 22, 2020. (DE E:1). This is perhaps the most consequential surveillance footage provided in evidence. The video commences with the claimant removing what appears to be an 8-foot to 10-foot ladder out of the back of his pickup truck. (DE E:1). He picked up the ladder and slung it over his shoulder. (DE E:1). He then took the ladder into a residence. (DE E:1).

Later, the claimant is seen carrying what appears to be a queen sized mattress out of the residence. (DE E:1). He opened the back of his pickup truck, and moved

what appears to be heavy tubes of sand located in the bed of the truck. (DE E:1). He then loaded the mattress into the bed of the truck. (DE E:1). He climbed into the bed of the pickup truck with no issues or discomfort. (DE E:1).

The claimant is next seen at a used car dealership. (DE E:1). He opened a dumpster enclosure, unloaded the queen sized mattress, and deposited it in the dumpster. (DE E:1). He displayed no apparent issues while unloading the mattress. (DE E:1). He then left the used car dealership. (DE E:1).

Mr. Sears testified that he still had discomfort while doing this, but that it occurred "later." (Testimony). He also noted that these actions were "no more than I was doing in physical therapy." (Testimony).

Mr. Sears proceeded to Hy-Vee where he shopped. (DE E:1). He was seen bending over to get items off lower shelves. (DE E:1). He left the store, slipped, and his cart fell. (DE E:1). He picked up his grocery cart to about waist level and threw it several feet in what appeared to be a fit of frustration. (DE E:1). He picked up his groceries and loaded his vehicle. (DE E:1).

The claimant is next observed on December 23, 2020. (DE E:1). He walked out of CTI, entered his vehicle, and went to a business. (DE E:1). He placed his hand on his lower back at one time, but there was no obvious indication of pain. (DE E:1).

Mr. Sears returned to Mercy River Hills Surgery Center on January 4, 2021. (JE 3:3-4; DE B:3-4). Dr. Klein performed a left L2, L3, and L4 medial branch block. (JE 3:3; DE B:3). He also performed a radiofrequency ablation at the left L3-4, L4-5, and L5-S1 facets. (JE 3:3; DE B:3). Dr. Klein reiterated diagnoses of lumbar and lumbosacral spondylosis without radiculopathy. (JE 3:3; DE B:3).

On January 5, 2021, CTI surveilled the claimant again, but there was nothing of note to discuss. (DE E:2).

CTI surveilled the claimant again on January 6, 2021. (DE E:2). He took some items from a business, and brought them to a vehicle. (DE E:2). As he returned to the business, the claimant placed his hand on his lower back and stretched a bit before entering the business. (DE E:2). He exited the business again and upon approaching the door for re-entry, he again placed his hand on his lower back. (DE E:2). Mr. Sears opined that doctors told him that his restrictions at this time were to stop activity if he felt pain in his back. (Testimony).

On January 25, 2021, Mr. Sears reported for his fifth session of physical therapy with Athletico Physical Therapy. (JE 5:1-2; DE C:1-2). He complained of continued soreness, with more pain in the upper back. (JE 5:1; DE C:1). He told the therapist that "the shots help," but that his pain continued in a less intense way. (JE 5:1; DE C:1). The therapist provided Mr. Sears with work conditioning. (JE 5:1; DE C:1). Mr. Sears was observed leaning on the rails of a treadmill while performing that exercise. (JE 5:1; DE C:1). The therapist planned to progress therapy as Mr. Sears was able to tolerate it until the claimant was able to return to full duty work pursuant to a doctor's recommendation. (JE 5:1-2; DE C:1-2).

Mr. Sears returned to Athletico Physical Therapy on January 26, 2021, for continued work conditioning. (JE 5:3-4; DE C:3-4). Mr. Sears reported that his legs were increasingly sore, and that he noticed more pain in his upper back. (JE 5:3; DE C:3). The therapist again observed Mr. Sears leaning forward on the rails of the treadmill and walking at a very slow pace during his therapy session. (JE 5:3; DE C:3).

Mr. Sears had another session of work conditioning at Athletico Physical Therapy on January 27, 2021. (JE 5:5-6; DE C:5-6). He complained of increased pain in his back, which he rated 5 out of 10. (JE 5:5; DE C:5). He also expressed concern as to having “so much pain.” (JE 5:5; DE C:5). Mr. Sears told the therapist that he had difficulty walking on the treadmill, so an alternate exercise was provided. (JE 5:5; DE C:5). Mr. Sears completed “all of the work circuit” with modifications to certain lower body strengthening exercises. (JE 5:5; DE C:5).

Janelle Bailey, PT, MPT, of Athletico Physical Therapy provided a “Work Conditioning Functional Status Report” to Dr. Rosenthal on January 28, 2021. (JE 5:7-11; DE C:7-11). Mr. Sears attended seven appointments as of the time of the report. (JE 5:7; DE C:7). He met 44.44 percent of his reported job demands as a ready mix and material truck driver. (JE 5:7; DE C:7). Since Mr. Sears had not yet demonstrated the ability to meet all of the reported job demands, the therapist recommended that he continue daily work conditioning for four weeks, along with working one half day of work. (JE 5:7; DE C:7). As of the writing of the report, Mr. Sears demonstrated that he could only work in the medium physical demand level, while the job description provided by CTI indicated that the job demand level was “heavy.” (JE 5:7; DE C:7).

Dr. Rosenthal authored a missive to defendants’ attorney dated January 29, 2021. (DE F:1). Dr. Rosenthal reviewed surveillance footage provided as Defendants’ Exhibit E. (DE F:1). Dr. Rosenthal recounts observing Mr. Sears performing “heavy lifting, twisting, and bending.” (DE F:1). Dr. Rosenthal further observed that Mr. Sears had no indication of pain throughout the surveillance videos. (DE F:1). Based upon the information, Dr. Rosenthal stated, “I do not believe Mr. Sears requires any work restrictions, nor does he require any limitation to the hours of work he is able to perform per day.” (DE F:1).

On February 1, 2021, Mr. Sears returned to Athletico Physical Therapy for continued work conditioning. (JE 5:12-13; DE C:12-13). He told the therapist that he felt better, especially with rest over the weekend; however, he still had pain in his upper back. (JE 5:12; DE C:12). Mr. Sears was able to progress his work conditioning during this appointment. (JE 5:12; DE C:12).

Dr. Klein issued a letter to CTI’s counsel dated February 1, 2021. (DE G:1). Dr. Klein reviewed the surveillance footage as provided by CTI’s counsel. (DE G:1). Based upon his review of the videos, Dr. Klein noted that he saw no significant abnormalities, nor did he believe that the claimant required significant further treatment. (DE G:1). Dr. Klein noted that he would examine Mr. Sears on February 2, 2021, and would further evaluate if Mr. Sears needed further treatment. (DE G:1).

Dr. Klein, examined Mr. Sears on February 2, 2021, for his continued complaints of lower back pain. (JE 2:13-16; DE A:13-16). Mr. Sears indicated that his pain was a persistent burning and aching, and rated it 4 out of 10. (JE 2:13). Walking relieved his

symptoms. (JE 2:13; DE A:13). However, his back pain improved since the recent radiofrequency ablation. (JE 2:13; DE A:13). He noted that trigger point injections helped for a short time, but that his pain returned. (JE 2:13; DE A:13). Dr. Klein recommended that Mr. Sears continue his work conditioning program, and use over-the-counter Aspercreme several times per day. (JE 2:14; DE A:14). Dr. Klein also provided refills of Lidoderm patches, meloxicam, and baclofen. (JE 2:14; DE A:14). Dr. Klein opined that the claimant achieved maximum medical improvement ("MMI"), and that the claimant should follow up on an as needed basis. (JE 2:14; DE A:14). Dr. Klein provided no new restrictions. (JE 2:16; DE A:16).

Mr. Sears continued work conditioning at Athletico Physical Therapy on February 3, 2021. (JE 5:14; DE C:14). He complained of soreness, and told the therapist that Dr. Klein was "done seeing him." (JE 5:14; DE C:14). The therapist observed the claimant slouching while using a Nustep. (JE 5:14; DE C:14). The therapist instructed the claimant on proper core strength exercises for his home exercise plan. (JE 5:14; DE C:14).

Pursuant to a doctor's recommendations, Athletico Physical Therapy discharged the claimant from work conditioning on February 5, 2021. (JE 5:15; DE C:15). Mr. Sears reported that his back was still sore, "but the doctor told him that it was muscles [sic]." (JE 5:15; DE C:15). The therapist reviewed a home exercise plan with Mr. Sears, and Mr. Sears completed his exercises without difficulty. (JE 5:15; DE C:15). He was also able to increase his lifting amount to 35 pounds. (JE 5:15; DE C:15).

Dr. Rosenthal issued a letter to the defendants' attorney dated February 16, 2021. (DE A:17). He opined that the claimant achieved MMI, and sustained no permanent injury. (DE A:17). Based upon this opinion, Dr. Rosenthal provided a permanent impairment rating of zero percent based upon the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (DE A:17).

Mr. Sears testified during the hearing that his personal physician provided a letter to CTI indicating that he could engage in all of his normal work activities and duties at CTI. (Testimony; CE 4). This letter was allegedly provided to CTI on March 14, 2021. (Testimony). However, Mr. Sears noted that he was never offered return employment by CTI after this letter was provided. (Testimony). The letter in question indicates that Mr. Sears was engaged in medication assisted treatment for opioid use disorder. (CE 4). The letter further states that the claimant was stable, and that his current medications "should not prevent the patient from performing all of his work activities." (CE 4).

Sunil Bansal, M.D., a provider who is board certified in occupational medicine, conducted an independent medical evaluation ("IME") of the claimant on March 23, 2021. (Claimant's Exhibit 1:1-8). Dr. Bansal reviewed the claimant's medical records and history. (CE 1:1-4). It does not appear that Dr. Bansal reviewed the surveillance footage obtained on behalf of the defendants. Mr. Sears provided Dr. Bansal with a recounting of the incident and his symptoms immediately after his fall. (CE 1:4-5). Mr. Sears told Dr. Bansal that he continued to have severe pain in the evenings, and when he stood to wash dishes. (CE 1:5). He also occasionally had pain radiating down his left leg, pain with bending, and pain with driving for long periods of time. (CE 1:5). Upon physical examination, there was a loss of sensory discrimination over the right

lower extremity. (CE 1:6). Dr. Bansal also observed decreased range of motion in the spine. (CE 1:6). Dr. Bansal diagnosed Mr. Sears with lumbar facet disease. (CE 1:7). Dr. Bansal opined that the lumbar facet disease was caused by the impact from the fall from the cement truck which resulted in the synovial facet joints to fill with fluid and distend. (CE 1:7). This resulted in pain from stretching of the joint capsule. (CE 1:7).

Dr. Bansal opined that Mr. Sears achieved MMI on February 2, 2021. (CE 1:7). Dr. Bansal referred to Table 15-3 from the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and placed Mr. Sears into a DRE Lumbar Category II. (CE 1:8). Due to Mr. Sears' radicular pain, loss of range of motion, and guarding, Dr. Bansal provided Mr. Sears with a 5 percent permanent impairment of the body as a whole. (CE 1:8). Dr. Bansal provided permanent restrictions to include no frequent bending or twisting, and no lifting greater than 30 pounds. (CE 1:8). Dr. Bansal concluded by opining that Mr. Sears could benefit from additional, intermittent, radiofrequency ablation. (CE 1:8).

Dr. Bansal is the only physician who provided the claimant with any work restrictions, as Dr. Rosenthal provided no restrictions, opined that the claimant had no permanent injury, and provided a zero percent impairment rating. (Testimony).

Mr. Sears testified that he was told he could come back to work light duty. (Testimony). However, Mr. Sears is a methadone user. (Testimony). He used methadone while employed at CTI. (Testimony). He testified that he was unaware of CTI's policy that its employees not use methadone. (Testimony). He testified that his supervisor and dispatcher knew that he used methadone. (Testimony).

Mr. Sears had his last session of physical therapy on February 5, 2021, as his doctor recommended ceasing physical therapy. (Testimony). He continued to have neck and back pain after that time. (Testimony). He has had no medical care since February 5, 2021. (Testimony).

Mr. Sears testified that he continues to have numbness in the lower back to the left leg, along with a sharp, throbbing pain. (Testimony). He described his pain as a "shock" from his mid back to his lower back. (Testimony). His pain persists on a daily basis, but the level depends on how much he moves around during the day. (Testimony). If he performs more strenuous activity, his pain increases and sometimes lasts overnight. (Testimony).

Mr. Sears testified that he could probably work in landscaping with some restrictions to avoid heavy lifting. (Testimony). He also testified that he could do construction work, but he would be limited by how much he could lift. (Testimony). He also could not repetitively bend or lift. (Testimony). He testified that he could no longer perform the cable laying job, as it required a lot of heavy lifting and digging holes. (Testimony).

He has not attempted to find alternate employment since February of 2021. (Testimony). He collected unemployment for a time, but that has since run out. (Testimony). He lives with this brother at this time, and his brother helps him out monetarily and with costs of living. (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 R. App. P. 6.904(3).

### Permanent Injury

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).

Based upon my review of the record, the claimant suffered a permanent impairment as a result of his fall on September 14, 2020, while working for CTI. The defendants argue that the surveillance videos are effectively a “silver bullet” when taken in conjunction with the opinions of Drs. Rosenthal and Klein. The problem with this argument is that, as the claimant points out, the surveillance videos were taken in time periods that were shortly after the claimant received injections and/or radiofrequency ablation to his back. He consistently testified that the injections and radiofrequency ablation treatments provided him with between one and several weeks of relief from his pain. For example, on January 25, 2021, the claimant mentioned to his therapist that “the shots help” control his pain.

Moreover, the letters from Drs. Rosenthal and Klein make no mention of recent appointments or examinations of the claimant in conjunction with the surveillance video that appears to be the basis for their opinions. Dr. Klein indicated in his letter that he wanted to see the claimant one more time, despite the opinions in his letter. In the subsequent appointment, Dr. Klein recommends continued work hardening even though he opined that the claimant achieved MMI.

Dr. Bansal, after examining the claimant, opined that the fall on September 14, 2020, caused the permanent impairment to the claimant. This conclusion is also apparent when reviewing the claimant's medical records and listening to his testimony. Since I conclude that the fall on September 14, 2020, is a cause of permanent impairment, I then must determine the extent of permanent impairment.

The parties in this matter stipulated that, if the injury was found to be a cause of permanent disability, that 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 R. Co., 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.S.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 May 23, 2018); Rus v. Bradley Puhmann, 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 85.34.

The claimant was 41 years old at the time of the hearing. His highest level of education is graduation from high school in Arizona. Subsequent to high school, Mr. Sears worked in landscaping, construction, laying driveways, performing underground

boring work, and then at the defendant as a cement truck driver. These jobs had some degree of physical demand that many would consider to be moderate to heavy. Mr. Sears injured his lower back after falling 8 to 10 feet from a cement truck. He suffered from either lumbar and lumbosacral spondylosis or lumbar facet disease.

Dr. Bansal assigned the claimant a 5 percent body as a whole impairment rating. No other doctor provided an impairment rating. Dr. Bansal also provided permanent restrictions of no frequent bending or twisting, and no lifting greater than 30 pounds. It appears that his job with CTI required lifting above these levels based upon the records from Athletico Physical Therapy. The employer did not offer to bring Mr. Sears back to work after their physicians declared him at MMI with no work restrictions. They claimed that this was due to his methadone usage and certain Department of Transportation restrictions. These are not discussed much in the record, and no testimony was provided by CTI on this issue. Mr. Sears provided a letter from his physician indicating the medication would not affect his ability to work. Mr. Sears also testified that CTI was aware of his methadone usage. Mr. Sears further testified that CTI would dismiss employees in the winter, and then rehire them in the spring. It is unclear as to the reason that Mr. Sears was not brought back to employment with CTI; however, his methadone usage is a plausible reason. Finally, I would note my concern with Mr. Sears' motivation to return to work. He has not sought, or applied for, any job since February of 2021. This was given considerable weight in my determination below.

Based upon all of the factors considered in an industrial disability analysis, I find that the claimant sustained a 20 percent industrial disability. This represents 100 weeks. (.20 x 500 weeks = 100 weeks).

### **ORDER**

THEREFORE, IT IS ORDERED:

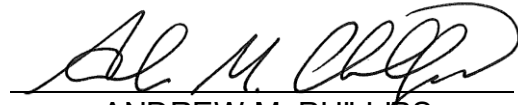
That the defendants are to pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the rate of eight hundred twenty seven and 59/100 dollars (\$827.59) per week from the agreed upon commencement date of March 15, 2021.

That the defendants are entitled to a credit for five weeks of permanent disability benefits at eight hundred twenty seven and 59/100 dollars (\$827.59) per week.

Defendants shall pay accrued weekly benefits in a lump sum together with interest on past due weekly compensation benefits 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 defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 14<sup>th</sup> day of February, 2022.

  
ANDREW M. PHILLIPS  
DEPUTY WORKERS'  
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Michael Norris (via WCES)

Michael Kuehner (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.