

IN THE IOWA DISTRICT COURT  
IN AND FOR POLK COUNTYREGIONAL CARE HOSPITAL PARTNERS,  
INC., & ZURICH AMERICAN INSURANCE  
COMPANY,*Petitioners,*

v.

ROBERTA MARRS,  
*Respondent.*

Case No.: CVCV062630

ORDER:

*Ruling on Petition for Judicial Review*

On March 11, 2022, this matter came before the Court on Regional Care Hospital Partners, Inc., and Zurich American Insurance Company's (collectively "Regional Care") Petition for Judicial Review. After reviewing the administrative record and the Court file, which included the parties' pleadings, the Court now enters the following Order.

**I. FACTUAL & PROCEDURAL BACKGROUND**

On July 28, 2014, Marrs suffered a work-related injury when she tried to prevent a patient from falling. At the time, Marrs was employed as a nurse at Ottumwa Regional Health Center. Marrs was helping a patient back into their bed when that patient started to fall towards her. Marrs was injured after she assisted the patient in staying upright and back into bed. Following the incident, Marrs went to the emergency room and complained of pain in her back and neck.

In the months that followed, Marrs was diagnosed and treated for thoracic and high-lumbar sprains. Marrs continued to have pain in her upper back and neck. Marrs petitioned for workers' compensation benefits from Regional Care. Iowa Deputy Workers' Compensation Commissioner Stan McElderry ruled on the underlying Arbitration Decision. On June 14, 2017, Deputy McElderry found that Marrs: 1) sustained a work-related injury to the thoracic and cervical portions of her spine; 2) was entitled to a running award of healing benefits from October 22, 2014, at a weekly rate of \$559.49, and future medical benefits and reimbursement for past medical expenses; and 3) was entitled to penalty benefits of \$50,000. Regional Care filed an intra-agency appeal.

On appeal, Iowa Workers' Compensation Commissioner Joseph S. Cortese II entered an Appeal Decision affirming Deputy McElderry's findings, but modified the penalty

assessment. The Commissioner reduced the penalty benefits to \$39,000. Regional Care filed a Petition for Judicial Review in the District Court for Polk County. The District Court affirmed the Commissioner on judicial review. Regional Care appealed. The Iowa Court of Appeals affirmed the decision on February 17, 2021.

On October 22, 2018, Regional Care filed a review-reopening petition seeking a determination of proper commencement for permanency benefits and a determination of the extent of permanent disability Marrs sustained as a result of her work injury. The review-reopening hearing was held on November 18, 2020, before Deputy Workers' Compensation Commissioner Erin Pals.

At the time of the review-reopening hearing, Marrs was 48-years of age and unemployed. She obtained her R.N. with an associate's degree in nursing in 2013. After her work injury, she had undergone conservative treatment for her neck, including medications, physical therapy, and injections. Marrs has not had surgery because she said every surgeon she met with told her surgery would not alleviate the pain in her neck or her headaches. Since the 2017 Arbitration Hearing, Marrs continued to receive conservative treatments, including medications, physical therapy, and injections.

Marrs also saw Dr. John Rayburn. Dr. Rayburn performed three rounds of medial branch block injections or radiofrequency ablations (RFA) with the last one being performed on October 24, 2017. By early December 2017, Marrs reported good relief from RFA on the left side, but was still having pretty severe pain in the right neck musculature. Marrs received bilateral trigger point injections (TPIs), physical therapy, and hydrocodone from Dr. Rayburn from December 2017 to August 2020.

On January 29, 2020, Marrs saw Dr. Jacqueline Stoken for an Independent Medical Examination (IME). Dr. Stoken's impression was of Marrs's status as of her post-work injury on July 28, 2014. At that time, Dr. Stoken diagnosed her with a herniated disk of the cervical spine and thoracic pain and chronic muscle spasms. Dr. Stoken used The Fifth Edition AMA Guides to the Evaluation of Permanent Impairment to place Marrs in the diagnosis related estimate (DRE) cervical category II and assigned 8% of the whole person for her cervical injury. Dr. Stoken placed Marrs in the DRE thoracic category II and assigned 5% impairment of the whole person for her thoracic injury. Using the combined values chart, this amounted to 13% impairment of the whole person.

On January 29, 2020, Marrs submitted to a functional capacity evaluation (FCE) at Advantage Physical Therapy and Rehab. Dr. Stoken opined that Marrs's work restrictions would flow from the recommendations contained in the FCE. Marrs indicated she would be willing to work at her safe maximal abilities throughout the testing. The results of the FCE were that Marrs's functional ability places her within the U.S. Department of Labor's light work category. Specifically, Marrs is to avoid waist-to-overhead lifting work activities on a frequent and constant basis. She should consistently avoid performing elevated work activities or repetitive reaching of the right upper extremity at or above shoulder height, and limit the repetitive work activities to 6-33% of the workday. Marrs was not limited in the number of hours that she could work each day. However, specific recommendations were made for the distribution of certain activities throughout the day, including limiting certain tasks to a half-hour at a time (rarely) or three hours (occasionally). Static work was recommended to be rare, 1 to 5% of an 8-hour workday, but Marrs demonstrated the ability to perform forward bending/sitting frequently and forward bending/standing constantly. No restrictions were placed on rotation sitting or standing. Marrs may only sit rarely, about 1-5% of the day and only stand rarely. She may only walk occasionally, which is 6-33% of the day.

Dr. Todd Harbach sent a memo to Regional Care on February 20, 2020. Dr. Harbach noted Marrs was scheduled for surgery for her continuing neck and radicular arm pain in the summer of 2017. However, Marrs' ongoing medical issues prevented her from having surgery. Dr. Harbach placed Marrs at maximum medical improvement (MMI) on February 28, 2018, because that is the point where she had finished her injections and reached a steady state. Dr. Harbach utilized The Fifth Edition of the AMA Guides. He placed her in the DRE cervical category II and assigned 8% permanent impairment of the whole person. Dr. Harbach also reviewed the FCE recommendations from January 2020. He agreed with the FCE recommendations that placed Marrs in the light duty category. Dr. Harbach also recommended she perform daily home exercises.

At Regional Care's request, Dr. Charles Mooney conducted another IME. He issued a report on February 25, 2020. Dr. Mooney diagnosed Marrs with chronic cervical pain consistent with aggravation of underlying cervical disc disease associated with radicular symptoms and chronic pain syndrome. Dr. Mooney placed Marrs on MMI for the work injury

as of February 13, 2017, which was the date she declined surgical intervention by Dr. Harbach. As it relates to her cervical spine, Dr. Mooney placed Marrs in the DRE cervical category II and assigned 8% permanent impairment of the whole person related to the work injury. Dr. Mooney also confirmed that the FCE appeared to be valid and consistent with Marrs' medical condition, but believed she could be functioning at a higher level if she would undergo the recommended surgery. He stated her permanent restrictions place her in the light duty capacity, which specifically is a maximum rare lift of 20 pounds and a maximum occasional lift of 10 pounds. Lastly, Dr. Mooney opined that Marrs is employable; however, she would be unable to perform elevated work activities that required repeated reaching above her shoulder on the right.

On March 2, 2020, Lara Sellner issued an employability report at the request of Regional Care. Sellner did not speak with or interview Marrs, but, rather, based her vocational opinion on the record provided to her. Sellner concluded that the FCE restrictions placed Marrs in the light work category. Sellner concluded that Marrs has many transferable skills, and she conducted labor market research to identify jobs within the Ottumwa, Iowa, area for Marrs. Sellner identified 16 available positions for Marrs, including customer service or sales representative, monitor technician, registration clerk, client service representative, nurse case manager, scheduling coordinator, coordinator care plan nurse, weekend receptionist, care coach, telephonic specialty medication review nurse, cardiovascular data entry abstractor, clinical reviewer, and customer service care coordinator. Sellner stated in her report that the jobs listed are available within the recommended FCE guidelines, with or without accommodations.

On June 11, 2021, Deputy Pals found: (1) that Marrs failed to prove she is permanently and totally disabled as a result of the stipulated work injury from July 28, 2014, under either the traditional industrial disability analysis or under the odd-lot doctrine; (2) Marrs sustained 80% industrial disability as a result of her work injury; and (3) Marrs's permanent partial disability benefits should commence on February 28, 2018. Marrs appeal.

On October 4, 2021, Iowa Workers' Compensation Commissioner Joseph S. Cortese II entered an Appeal Decision reversing, in part, and modifying, in part, Deputy Pals' findings. The Commissioner reversed the Deputy and found Marrs is permanently and totally disabled under the traditional industrial disability analysis. The Commissioner also modified the

commencement of Marrs's permanent total disability benefits to October 22, 2018, instead of the date of commencement found by the Deputy of February 28, 2018.

Regional Care filed this Petition for Judicial Review on October 12, 2021.

## II. STANDARD OF REVIEW

Final decisions rendered by the Iowa Workers' Compensation Commission are reviewed under Iowa Code Chapter 17A, the Iowa Administrative Procedures Act.<sup>1</sup> "Under the Act, [a court] may only interfere with the commissioner's decision if it is erroneous under one of the grounds enumerated in the statute and a party's substantial rights have been prejudiced."<sup>2</sup> The standard of review depends on the type of error alleged by the Petitioner.<sup>3</sup>

If the alleged error is one of fact, the standard of review is whether the findings are supported by substantial evidence.<sup>4</sup> "[A] reviewing court can only disturb those factual findings if they are 'not supported by substantial evidence in the record before the court when that record is reviewed as a whole.'"<sup>5</sup> Additionally, in workers' compensation cases, factual questions are "delegated by the legislature to the [C]ommissioner."<sup>6</sup> Consequently, the Court does not apply a "scrutinizing analysis" to factual findings of the Commissioner, but only reverses the Commissioner's findings if they are not supported by substantial evidence.<sup>7</sup>

"Evidence is substantial if a reasonable person would find the evidence adequate to reach the same conclusion."<sup>8</sup> The Court is "not to determine whether the evidence supports

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<sup>1</sup> *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 768 (Iowa 2016), *reh'g denied* (May 27, 2016); *see* Iowa Code § 86.26 (2022).

<sup>2</sup> *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006).

<sup>3</sup> *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010).

<sup>4</sup> *Harris*, 778 N.W.2d at 196; *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 557 (Iowa 2010).

<sup>5</sup> *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting Iowa Code § 17A.19(10)(f)).

<sup>6</sup> *Larson Mfg. Co., v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009).

<sup>7</sup> *Mercy Med. Ctr. v. Healy*, 801 N.W.2d 865, 870 (Iowa Ct. App. 2011) (citing *Midwest Ambulance Serv. v. Rudd*, 754 N.W.2d 860, 864, 866 (Iowa 2008)).

<sup>8</sup> *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002) (citing *Ehteshamfar v. UTA Engineered Sys. Div.*, 555 N.W.2d 450, 452 (Iowa 1996)).

a different finding; rather, our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made.”<sup>9</sup>

If the claimed error is in the ultimate conclusion reached, “then the challenge is to the agency’s application of the law to the facts.”<sup>10</sup> In workers’ compensation cases, “[t]he application of the law to the facts is also an enterprise vested in the [C]ommissioner.” As such, this Court “reverse[s] only if the [C]ommissioner’s application was irrational, illogical, or wholly unjustifiable.”<sup>11</sup>

### III. DISCUSSION

Regional Care contends the Commissioner erred in concluding Marrs carried her burden of proof to establish she is permanently and totally disabled under the traditional industrial analysis. Regional Care argues the record lacks substantial evidence that supports Marrs is wholly disabled from performing work for which she is suited. The record demonstrates that Marrs made no effort to secure employment. Regional Care produced an un rebutted vocational report from a vocational counselor and expert that identified 16 available positions for Marrs. Regional Care argues Marrs has transferrable skills, which the Commissioner did not dispute. Additionally, no medical provider has opined that she is completely precluded from returning to work and may work within the restrictions set forth in the FCE.

Under Iowa workers’ compensation law, industrial disability is determined by an evaluation of the employee’s earning capacity.<sup>12</sup> The focus is not on what claimant can or cannot do, but on the ability of claimant to be gainfully employed.<sup>13</sup> The Commissioner may consider a number of factors in determining industrial disability, including functional disability, “age, education, qualifications, experience, and [the claimant’s] inability, because of the injury, to engage in employment for which [s]he is fitted.”<sup>14</sup>

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<sup>9</sup> *Cedar Rapids Community School District v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (internal citations and quotations omitted).

<sup>10</sup> *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006).

<sup>11</sup> *Healy*, 801 N.W.2d at 870 (citing *Larson Mfg.*, 763 N.W.2d at 850).

<sup>12</sup> *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 632 (Iowa 2000).

<sup>13</sup> *Second Injury Fund of Iowa v. Nelson*, 544 N.W.2d 258, 266 (Iowa 1995).

<sup>14</sup> *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 192 (Iowa 1980) (internal quotation marks omitted).

In finding permanent and total disability, the Commissioner stated:

With limitations that allow only rare sitting and standing, which force claimant to lay down for the vast majority of her workday, I find claimant is wholly disabled from performing work that her experience, training, education, intelligence and physical capabilities would otherwise allow her to perform. Thus, I respectfully reverse the deputy commissioner's finding, and instead I find claimant carried her burden of proof to establish she is permanently and totally disabled under the traditional industrial analysis.

Regional Care argues Marrs's work injury does not prevent her from returning to employment. The FCE report places her in the light work category. Furthermore, Regional Care produced Lara Sellner's vocational report that identified 16 available positions for which Marrs would seemingly qualify. Regional Care states this report was un rebutted and the Commissioner erred when he determined that non-expert opinions are sufficient to rebut the vocational report. Regional Care also contends Marrs is to blame for failing to return to work because she has made little to no effort to secure alternate employment and her refusal to undergo surgery. It argues that Marrs's failure to secure alternate employment or undergo surgery is fatal to her claim of permanent total disability.

The Commissioner found that although Marrs's functional ability places her in the light work category from the FCE, the vocational report is rebutted by other facts. However, bodily impairment is only one of the factors that can be used to gauge industrial disability.<sup>15</sup> Marrs testified she spends 90 percent of her days laying down in a recliner or in her bed and must use a traction machine several times a day for up to 30 minutes each time. Her sitting tolerance also is limited by her need to change positions every 15-20 minutes due to increased pain. The Commissioner found, based on Marrs's testimony, it is unclear how she could perform any of the jobs outlined in the vocational report (or any other job) while having to lay down for the vast majority of her day. Regional Care argues Marrs's testimony is unreliable, self-serving, and not corroborated by any medical evidence.

The Commissioner deferred to the Deputy Commissioner, who found Marrs to be credible. The Commissioner's assessment concerning the credibility and weight of witnesses

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<sup>15</sup> *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 495 (Iowa 2003); *Guyton v. Irving Jensen Co.*, 373 N.W.2d 101, 103 (Iowa 1985).



deserves deference.<sup>16</sup> It is the job of the workers' compensation commissioner — not the Court — to weigh the evidence and measure the credibility of witnesses.<sup>17</sup> The Commissioner is free to accept or reject Marrs' testimony about her specific limitations.<sup>18</sup> Although Marrs is not a medical expert, "it is a fundamental requirement that the commissioner consider all evidence, both medical and nonmedical. Lay witness testimony is both relevant and material upon the cause and extent of injury."<sup>19</sup> Expert medical testimony may be "buttressed by supportive lay testimony."<sup>20</sup> Additionally, it is the job of the workers' compensation commissioner – again, not the Court – to accept or reject expert opinions and, if accepted, amount of weight to give those opinions.<sup>21</sup> Therefore, regardless of whether it went un rebutted, when determining permanent total disability, the Commissioner had the authority to accept Marrs' testimony and, thereby, reject Sellner's vocational report, in whole or in part.

As for Marrs not making little to any attempt to secure alternative employment, "such proof [of a job search] is not an absolute prerequisite if the employee introduces other substantial evidence that he has no reasonable prospect of steady employment."<sup>22</sup> The Commissioner found Marrs' testimony to be credible on her limitations, and due to these limitations, any job search would have been futile. As a related issue, Marrs having other skills does not necessarily preclude her from being totally disabled. Total disability is not a state of absolute helplessness.<sup>23</sup> Instead, a permanent and total disability "occurs when the injury wholly disables the employee from performing work that the employee's experience, training, intelligence, and physical capacities would otherwise permit the employee to perform."<sup>24</sup> Functional impairment is but one consideration in determining industrial

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<sup>16</sup> *Dunlavey v. Economy Fire and Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995).

<sup>17</sup> *See Pease*, 807 N.W.2d at 845.

<sup>18</sup> *See Schutjer*, 780 N.W.2d at 558.

<sup>19</sup> *Miller v. Lauridsen Foods, Inc.*, 525 N.W.2d 417, 421 (Iowa 1994).

<sup>20</sup> *Id.* (quoting *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 374 (Iowa 1985)).

<sup>21</sup> *See Pease*, 807 N.W.2d at 845.

<sup>22</sup> *Nelson*, 544 N.W.2d at 267 (citations omitted).

<sup>23</sup> *IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 633

<sup>24</sup> *Id.*



disability.<sup>25</sup> The Commissioner considered these factors along with the FCE and Marrs' testimony when finding Marrs is permanently and totally disabled.

As it relates to the surgery issue, it fails for two reasons. First, Regional Care raised this argument for the first time in briefing for its Petition for Judicial Review. It is well settled that the District Court's scope of review is limited to those questions considered by the administrative agency.<sup>26</sup> Second, even if the Court were to consider the argument, Regional Care failed to provide any legal authority supporting their position.

Although there may be some evidence in the record suggesting Marrs is capable of finding alternate employment, the Commissioner chose to give weight to the evidence in support of permanent total disability. The District Court's task "is not to decide whether the evidence supports a finding contrary to that reached by the agency."<sup>27</sup> Rather, the Court defers, as it should, to the Commissioner's weighing of the evidence and "broadly and liberally apply those findings in order to uphold, rather than defeat, the industrial commissioner's decision."<sup>28</sup> Therefore, the only question is whether substantial evidence supports the findings the agency made.<sup>29</sup> After reviewing the administrative record, and considering the parties' pleadings, the Court concludes there is substantial evidence supporting the Commissioner's finding that is permanently and totally disabled.

### ORDER

IT IS THEREFORE ORDERED, and for all the reasons stated herein, the Commissioner's decision should be and is hereby AFFIRMED.

IT IS FURTHER ORDERED Petitioners' Petition for Judicial Review should be and is hereby DENIED and DISMISSED. Costs to Petitioners.

So Ordered.

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<sup>25</sup> *Diederich v. Tri-City Ry. Co.*, 258 N.W. 899, 902 (Iowa 1935).

<sup>26</sup> *See Soo Line R. Co. v. Iowa Dept. of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994).

<sup>27</sup> *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 219 (Iowa 2004).

<sup>28</sup> *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 649 (Iowa 2000).

<sup>29</sup> *See Mike Brooks, Inc. v. House*, 843 N.W.2d 885, 889 (Iowa 2014).



State of Iowa Courts

**Case Number**  
CVCV062630

**Case Title**  
REGIONAL CARE HOSP PARTNERS ET AL VS ROBERTA  
MARRS  
**Type:** ORDER REGARDING DISMISSAL

So Ordered

A handwritten signature in black ink, appearing to read "David Porter", is written over a horizontal line.

David Porter, District Court Judge,  
Fifth Judicial District of Iowa

Electronically signed on 2022-05-10 08:38:43