

THE IOWA DISTRICT COURT FOR POLK COUNTY

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**APRIL ARLENE CLARK,**

**Petitioner,**

**vs.**

**WINNEBAGO INDUSTRIES,**

**Respondent.**

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**Case No. CVCV058801**

**RULING ON JUDICIAL REVIEW**

This matter came before the Court on February 7, 2020, for a hearing on a petition for judicial review. Petitioner, April Arlene Clark, was represented by Mark Soldat. Attorney Lindsey Mills represented Respondent, Winnebago Industries.

**I. FACTUAL AND PROCEDURAL HISTORY**

**A. Statement of the Case**

This is a proceeding for judicial review of the final action of the Iowa Workers' Compensation Commissioner with respect to the Appeal Decision of July 31, 2019. Petitioner April Arlene Clark ("Clark") sustained an injury to her right wrist on July 8, 2016, while working for employer Winnebago Industries, Inc. ("Winnebago").<sup>1</sup> Respondent Winnebago filed a cross-appeal for judicial review on August 30, 2019, seeking modifications to the agency Appeal Decision as well.

The July 31, 2019 Appeal Decision affirmed Deputy Heather Palmer's Arbitration decision, who found the following as it applies to the case before the Court: 1) Clark had sustained a 10% permanent disability of her right upper extremity as a result of the stipulated workplace

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<sup>1</sup> Ex. A, p. 8

injury; 2) Clark's classification for calculation is married with three kids and the correct workers' compensation rate is \$372.30 per week; 3) Clark is not entitled to penalty benefits for Winnebago's non-payment of permanent partial disability benefits; and 4) Clark is entitled to alternate medical care in the form of an evaluation with a specialist in triangular fibrocartilage complex ("TFCC") tears at the Mayo Clinic per Dr. Bansal's recommendation.<sup>2</sup>

**B. Statement of Facts**

Clark resides in Lake Mills, Iowa and was 39 years old at the time of hearing. Clark was engaged to Jeremy Wilson, but was allegedly still legally married to Joshua Clark. Clark alleged that she was trying to divorce Mr. Clark but he had refused to cooperate and she could not afford legal fees for a divorce.<sup>3</sup> Clark filled out a Form W-4 when she first started working at Winnebago and marked 'single' for tax purposes.<sup>4</sup> Clark testified at hearing that she could not locate a copy of her marriage certificate.<sup>5</sup>

On July 8, 2016, Clark sustained an injury to her right wrist in the course of her employment with Winnebago.<sup>6</sup> Clark alleges that the injury occurred when she was building a Line 2 load center and was using a handheld screwdriver.<sup>7</sup> That same day she went to Dr. Bryon Carlson at Mercy complaining of a 'shooting pain' that had traveled up the right arm from her wrist and an initial feeling of numbness and tingling.<sup>8</sup> Clark was diagnosed with a strain of the right forearm and received ibuprofen and work restrictions.<sup>9</sup> Clark was told to ice her arm three times a day and to come back to Dr. Carlson in one week for recheck.<sup>10</sup>

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<sup>2</sup> See. Arb. Dec.

<sup>3</sup> Hr. Tr. pp, 67-69.

<sup>4</sup> Ex. C, p. 9.

<sup>5</sup> Hr. Tr. p. 68.

<sup>6</sup> Ex. A, p. 8.

<sup>7</sup> *Id.*; Hr. Tr. p 31.

<sup>8</sup> Ex. JE2, p. 10.

<sup>9</sup> Ex. JE2, p. 12.

<sup>10</sup> *Id.*

Clark worked under her restrictions on Monday, July 11, 2016.<sup>11</sup> On July 15, 2016, Clark went back to Dr. Carlson and reported that her symptoms were the same and she was still in pain.<sup>12</sup> Dr. Carlson increased Clark's restrictions to no use of her right upper extremity and told her to continue the medications, the icing, and to return in ten days for follow-up appointment.<sup>13</sup>

On July 25, 2016, Clark came back for her follow-up appointment with Dr. Carlson, reporting that she had not gotten much better.<sup>14</sup> Dr. Carlson restricted Clark to not use her right upper extremity and placed a five-pound weight limit at work until her follow up two weeks later.<sup>15</sup>

Clark followed up with Dr. Carlson and again reported no substantial improvement at her August 8, 2016 appointment.<sup>16</sup> Dr. Carlson released Clark to return to work wearing a wrist splint with a 20-pound weight restriction.<sup>17</sup>

On August 9, 2016, Clark was seen by James McGuire, PA-C, for recheck of her right wrist sprain.<sup>18</sup> PA McGuire noted that Clark had tried various light duty jobs, but continued to have difficulty finding one that she could tolerate.<sup>19</sup> Clark stated that she still periodically had some tingling down her right arm and into her fingers and had trouble gripping things.<sup>20</sup> PA McGuire switched Clark to a flexible wrist splint and gave her a Medrol Dosepak treatment, as well as instructed her to have warm soaks and do at-home range-of-motion exercises.<sup>21</sup> PA McGuire

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<sup>11</sup> Hr. Tr. 33.

<sup>12</sup> Ex. JE2, p. 14.

<sup>13</sup> Ex. JE2, p. 16.

<sup>14</sup> Ex. JE2, p. 19.

<sup>15</sup> Ex. JE2, p. 21; 23.

<sup>16</sup> Ex. JE2, p. 24.

<sup>17</sup> Ex. JE2, pp. 26-27; 24.

<sup>18</sup> Ex. JE2, p. 28.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

wrote a note limiting Clark to no lifting over 5 pounds and no use of power tools with her right hand until they had a follow-up appointment.<sup>22</sup>

On August 23, 2016, Clark went back to see PA McGuire for recheck of her right wrist pain.<sup>23</sup> Clark said that any kind of tight gripping with her right hand made her pain worse.<sup>24</sup> PA McGuire told Clark to keep using her splint and doing her exercises and recommended that she see an orthopedic for consultation due to her lack of improvement.<sup>25</sup>

Clark went back to Dr. Carlson on August 30, 2016, for follow-up examination of her right wrist.<sup>26</sup> Clark said she felt the same as she had previously and that she had not seen any significant improvement.<sup>27</sup> Dr. Carlson prescribed that Clark continue use of the splint, abide by the weight restrictions, and follow up with orthopedics in 10 days.<sup>28</sup>

On September 22, 2016, upon PA McGuire's referral, Clark saw Dr. Timothy Gibbons, M.D., for orthopedic care.<sup>29</sup> Clark and Dr. Gibbons reviewed x-ray imaging of her right wrist and discussed the pros and cons of different treatment methods.<sup>30</sup> Dr. Gibbons then treated Clark with an injection of Depo-Medrol in the dorsal ulnar approach.<sup>31</sup> Dr. Gibbons discussed causation with Clark, indicating that the x-ray implied previous old trauma, though Clark could not remember any prior injury to her right wrist.<sup>32</sup> Dr. Gibbons told Clark to continue using her brace and take ibuprofen, and come back for a follow-up in six weeks.<sup>33</sup> Dr. Gibbons also returned Clark to an

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<sup>22</sup> *Id.*

<sup>23</sup> Ex. JE2, p. 30.

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

<sup>25</sup> *Id.*

<sup>26</sup> Ex. JE2, p. 32.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Ex. JE3, p. 38.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

8/40-hour work week with the restriction of only occasional lifting of 11-20 pounds and nothing over 21 pounds.<sup>34</sup>

On November 8, 2016, Clark returned to Dr. Gibbons for her follow-up appointment.<sup>35</sup> Clark stated that even with light duty work activities her pain was still a 6 out of 10.<sup>36</sup> Dr. Gibbons recommended an MRI of Clark's right wrist with a follow-up appointment to go over the results.<sup>37</sup>

Clark underwent the MRI of her right wrist, on November 14, 2016.<sup>38</sup> The MRI showed "a tiny triangular fibrocartilage perforation" and chronic un-united ulnar styloid fracture with likely stress-related edema.<sup>39</sup>

On November 17, 2016, Clark followed up with Dr. Gibbons.<sup>40</sup> Dr. Gibbons reviewed the MRI and determined that it showed an old ulnar styloid avulsion in the TFCC lesion, which appeared to be old and remote.<sup>41</sup> Dr. Gibbons stated that he was unable to find anything significant that would explain Clark's wrist pain, and that he had nothing else to offer her for treatment.<sup>42</sup> Dr. Gibbons declared Clark at maximum medical improvement ("MMI") and discharged her from care with restrictions.<sup>43</sup> He gave Clark work restrictions based on her capabilities and tolerance and, in his opinion, the wrist pain was not related to the reported work injury, but rather to a personal medical condition.<sup>44</sup>

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<sup>34</sup> Ex. JE3, p 40.

<sup>35</sup> Ex. JE3, p. 44.

<sup>36</sup> *Id.*

<sup>37</sup> Ex. JE3, p. 45.

<sup>38</sup> Ex. JE2, pp. 34-37.

<sup>39</sup> Ex. JE2, p. 34.

<sup>40</sup> Ex. JE3, p. 48.

<sup>41</sup> Ex. JE3, p. 49.

<sup>42</sup> Ex. JE3, p. 50.

<sup>43</sup> *Id.*

<sup>44</sup> Ex. JE3, pp. 50, 53.

On July 27, 2017, upon Winnebago's request, Clark underwent an IME with Dr. Joshua Kimelman.<sup>45</sup> Dr. Kimelman diagnosed Clark with chronic wrist pain of an unknown etiology.<sup>46</sup> He opined that Clark's right wrist pain and need for care were related to the July 8, 2016 work injury.<sup>47</sup> Dr. Kimelman did not assign any degree of permanent impairment.<sup>48</sup> Dr. Kimelman opined that Clark was at MMI and did not recommend any additional medical care in regards to the work injury.<sup>49</sup>

On August 4, 2017, Clark was seen by Dr. Sunil Bansal and underwent an Independent Medical Examination ("IME") at the request of her attorney.<sup>50</sup> Dr. Bansal opined that on July 8, 2016, Clark sustained a triangular fibrocartilage complex tear.<sup>51</sup> Dr. Bansal assigned 10% permanent impairment of the right upper extremity, as well as a 10-pound lifting restriction.<sup>52</sup> Dr. Bansal also recommended additional treatment including a consultation with a specialist in triangular fibrocartilage complex tears at a tertiary health care center such as Mayo Clinic.<sup>53</sup>

### **C. Procedural History**

On January 13, 2017, Clark filed a petition with the Iowa Workers' Compensation Commissioner seeking workers' compensation benefits from Winnebago, a self-insured company, for an injury to her right upper extremity sustained at work on July 8, 2016.<sup>54</sup>

A hearing was held on September 17, 2017, before the honorable Deputy Workers' Compensation Commissioner Heather L. Palmer, and was deemed fully submitted on October 9,

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<sup>45</sup> Ex. B.

<sup>46</sup> Ex. B, p. 4.

<sup>47</sup> *Id.*

<sup>48</sup> Ex. B, p. 5.

<sup>49</sup> Ex. B, pp. 4-5.

<sup>50</sup> Ex. I.

<sup>51</sup> Ex. I, p. 12.

<sup>52</sup> Ex. I, p. 13.

<sup>53</sup> *Id.*

<sup>54</sup> See Petition

2017. The issues submitted for hearing were as follows: 1) whether the injury alleged was a cause of permanent disability; 2) if so, the nature and extent of disability; 3) the proper rate of compensation; 4) whether Clark was entitled to alternate medical care; 5) whether Clark was entitled to interest; 6) whether Clark was entitled to penalty benefits under Iowa Code 86.13, and if so, how much; and 7) specific taxation of costs. Deputy Palmer filed an Arbitration Decision On December 21, 2017.<sup>55</sup>

In her decision, Deputy Palmer awarded Clark 10% permanent impairment of the right upper extremity, which equaled 25 weeks of benefits beginning on July 19, 2016 at Clark's asserted rate of \$372.30, alternate medical care with a specialist at Mayo Clinic, and select costs. Deputy Fitch concluded that a penalty award was not appropriate in this case.<sup>56</sup>

On January 10, 2018, Clark filed a rehearing application urging for the issues of penalty and interest to be reconsidered.<sup>57</sup> Winnebago responded, arguing that Clark's failure to address all of her arguments in her post-hearing brief should not give rise to an additional opportunity to do so now. Clark's Application for Rehearing was denied.

Winnebago timely filed a Notice of Appeal of the adverse findings of Deputy Palmer's Arbitration Decision to the Iowa Workers' Compensation Commissioner on January 25, 2018. Clark filed a cross-appeal on January 26, 2018.<sup>58</sup> Winnebago raised the following issues for appeal: 1) whether the alleged injury is a cause of permanent disability, and, if so, the extent of permanent disability; 2) whether Clark is entitled to alternate medical care; and 3) the proper workers' compensation rate. On cross-appeal, Clark sought to have a finding that her work injury resulted in a greater amount of industrial disability (15%) and that she was entitled to penalty and interest.

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<sup>55</sup> See Arb. Dec.

<sup>56</sup> Arb. Dec. pg. 11

<sup>57</sup> See Injured Workers' Rehearing Application

<sup>58</sup> See Injured Workers' Notice of Appeal and Amendment to Injured Workers' Notice of Appeal

Winnebago argued that Clark could not bring these arguments as to interest on appeal, because she did not address these issues in her post-hearing brief. The Iowa Workers' Compensation Commissioner, Joseph S. Cortese, II, entered an appeal decision in which he adopted the analysis, findings, and conclusions of Deputy Palmer and affirmed the arbitration decision in its entirety, on July 31, 2019.<sup>59</sup>

Clark filed a Petition for Judicial Review on November 26, 2019. Winnebago timely filed a cross-appeal on December 26, 2019. Clark raised the following arguments in her appeal: 1) whether the Commissioner erred in only finding 10% permanent disability and whether the Commissioner erred by disregarding material evidence and failing to explain why the evidence supported this conclusion; and 2) whether the Commissioner erred in denying penalty benefits based upon Winnebago's reasonable cause or excuse for denial of benefits.

Winnebago identified the following additional issues in their cross-appeal: 1) whether the Commissioner erred in finding that Clark sustained any degree of permanent disability as a result of the stipulated work injury; 2) whether the Commissioner erred in determining the proper workers' compensation rate; and 3) whether the Commissioner erred in finding that Clark is entitled to alternate medical care with a specialist at Mayo Clinic.

A hearing was held on these matters on February 7, 2020.

## II. STANDARD OF REVIEW

The Iowa Administrative Procedure Act, Chapter 17A of the Iowa Code, governs judicial review of administrative agency decisions. The court shall reverse, modify, or grant other appropriate relief from final agency action if it determines the substantial rights of Petitioner have

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<sup>59</sup> See Appeal Decision



been prejudiced by any of the means set forth in Iowa Code section 17A.19(10)(a)-(n). Review of agency action is at law, not de novo, and is limited to the record made before the agency.<sup>60</sup> Additional evidence or issues not considered by the agency cannot be considered by the court.<sup>61</sup> The court may not substitute its judgment for that of the agency.<sup>62</sup> The court may not usurp the agency's function of making factual findings.<sup>63</sup>

The court shall reverse, modify, or grant other appropriate relief from agency action if the agency action was based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole.<sup>64</sup> “Record viewed as a whole” means that the adequacy of the evidence in the record before the court to support a particular finding of fact, must be judged in light of all the relevant evidence in the record cited by any party that detracts from the findings, as well as all of the relevant evidence in the record cited by any party that supports it.<sup>65</sup> This includes any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact.<sup>66</sup>

The evidence need not amount to a preponderance in order to be substantial evidence, but a mere scintilla will not suffice.<sup>67</sup> Substantial evidence means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be

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<sup>60</sup> *Taylor v. Iowa Dept. of Job Serv.*, 362 N.W.2d 534, 537 (Iowa 1985).

<sup>61</sup> IOWA CODE section 17A.19(7)(2001); *Meads v. Iowa Dept. of Social Serv.* 366 N.W.2d 555, 559 (Iowa 1985).

<sup>62</sup> *Mercy Health Center v. State Health Facilities Council*, 360 N.W.2d 808, 809 (Iowa 1985).

<sup>63</sup> *McSpadden v. Big Ben Coal Co.*, 388 N.W.2d 181, 186 (Iowa 1980).

<sup>64</sup> IOWA CODE section 17A.19(10)(f).

<sup>65</sup> IOWA CODE section 17A.19(10)(f)(3).

<sup>66</sup> *Id.*

<sup>67</sup> *Elliot v. Iowa Dept. of Transp.*, 377 N.W.2d 250, 256 (Iowa 1985).

serious and of great importance.<sup>68</sup> The fact that two inconsistent conclusions can be drawn from the evidence does not mean that one of those conclusions is unsupported by substantial evidence.<sup>69</sup> The relevant inquiry is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made.<sup>70</sup>

The commissioner has a duty to state the evidence relied upon and detail the reasons for any conclusions.<sup>71</sup> This requirement is satisfied if the reviewing court is able to determine with reasonable certainty the factual basis on which the administrative officer acted.<sup>72</sup> It is understood that an administrative agency “cannot in its decision set out verbatim all testimony in a case.”<sup>73</sup> “Nor, when the agency specifically refers to some of the evidence, should the losing party be able, ipso facto, to urge successfully that the agency did not weigh all the other evidence.”<sup>74</sup> An agency decision is final if supported by substantial evidence.<sup>75</sup>

The court shall also reverse, modify, or grant other appropriate relief from agency action if such action was based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.<sup>76</sup> The court shall not give deference to the view of the agency with respect to particular matters that have not been vested by a provision of law in the discretion of the agency.<sup>77</sup> However, appropriate

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<sup>68</sup> IOWA CODE section 17A.19(10)(f)(1)(2001).

<sup>69</sup> *Moore v. Iowa Dept. of Transp.*, 473 N.W.2d 230, 232 (Iowa 1991).

<sup>70</sup> *Id.*

<sup>71</sup> *Pitzer v. Rowley Interstate*, 507 N.W.2d 389, 392 (Iowa 1993) (citing *Catalfo v. Firestone Tire & Rubber Co.*, 213 N.W.2d 506, 510 (Iowa 1973)).

<sup>72</sup> *Id.* at 393.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Robbenolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 234 (Iowa 1996).

<sup>76</sup> IOWA CODE section 17A.19(10)(c).

<sup>77</sup> IOWA CODE section 17A.19(11)(b).

deference is given when the contrary is true.<sup>78</sup> The agency's findings are binding on appeal unless a contrary result is compelled as a matter of law.<sup>79</sup>

Additionally, a reviewing court must also reverse, modify, or grant other appropriate relief when the agency's decision is “[b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency.”<sup>80</sup> “In order to determine an employee's right to benefits, which is the agency's responsibility, the agency, out of necessity, must apply the law to the facts.”<sup>81</sup> Because the agency has been entrusted with the responsibility of applying the law to the facts, the “agency's application of the law to the facts can only be reversed if we determine such an application was ‘irrational, illogical, or wholly unjustifiable.’”<sup>82</sup>

### III. LEGAL CONCLUSION

#### A. Whether the Commissioner erred in finding of 10% permanent disability.

Both Clark and Winnebago take issue with Deputy Palmer’s finding of 10% permanent disability.

Winnebago argues that there is not substantial evidence to support Deputy Palmer’s finding of 10% permanent impairment. Specifically, Winnebago points to the fact that Deputy Palmer found the opinion of Dr. Kimelman to be the most persuasive, but also found Dr. Bansal’s impairment rating unrebutted.<sup>83</sup> Winnebago argues that Mr. Bansal’s impairment rating was rebutted by Dr. Kimelman. Dr. Kimelman did not assign any degree of permanent impairment in

<sup>78</sup> IOWA CODE section 17A.19(11)(c).

<sup>79</sup> *Ward v. Iowa Dept. of Transp.*, 304 N.W.2d 236, 238 (Iowa 1981).

<sup>80</sup> IOWA CODE section 17A.19(10)(m).

<sup>81</sup> *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004).

<sup>82</sup> *Id.* (citing IOWA CODE section 17A.19(10)(m)).

<sup>83</sup> Arb. Dec. p. 9.

regards to Clark's work injury.<sup>84</sup> Winnebago argues that a zero percent impairment rating clearly rebuts the opinion of Dr. Bansal that Clark sustained 10% permanent impairment. However, Dr. Kimelman never expressly made a zero percent impairment rating. Instead, he stated that "[as] regards to permanent impairment, that is difficult to say. . ." <sup>85</sup> He then went on to state that Clark had full range of motion but does exhibit signs of atrophy, but still never answered directly the question of percentage of permanent impairment.<sup>86</sup>

Deputy Palmer used multiple facts to determine her ultimate finding of 10% permanent impairment. The deputy noted that only Doctors Gibbons, Kimelman, and Bansal gave any opinions as to whether Clark's work injury was a proximate cause of permanent functional disability.<sup>87</sup> Both Dr. Kimelman and Dr. Bansal found that the work injury was the proximate cause of the permanent functional disability, but Dr. Gibbons did not.<sup>88</sup> Immediately after noting this, Deputy Palmer stated that she found Dr. Kimelman most persuasive, but, again, that Dr. Bansal's opinion as to percentage of impairment was unrebutted.<sup>89</sup> Logic follows then, that Deputy Palmer found that Dr. Kimelman's finding as to proximate cause was most persuasive while Dr. Bansal's finding of 10% permanent impairment was undisputed because Dr. Kimelman never gave a percentage of impairment.<sup>90</sup>

The question in this instance is not whether the evidence might support a different finding, but whether the evidence supports the findings actually made.<sup>91</sup> Viewing the record as a whole, there is substantial evidence to back up Deputy Palmer's finding of facts as to the nature and extent

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<sup>84</sup> Ex. B, p. 5.

<sup>85</sup> Ex. B, p. 5.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Moore v. Iowa Dept. of Transp.*, 473 N.W.2d 230, 232 (Iowa 1991).

of Clark's 10% permanent disability as required by Iowa Code section 17(A).19(10). There is no evidence to support the position that the deputy's findings were irrational or illogical.

Clark, on the other hand, takes issue with Deputy's finding of 10% impairment not because of the evidence standards under Iowa Code section 17A.19(10), but rather the judicial review grounds found in Iowa Code section 17A.16(1) and 17A.19(10)(d)(j).

Clark first notes that the commissioner has adopted the A.M.A. *Guides* for deciding extent of loss or percentage of permanent partial disabilities.<sup>92</sup> The *Guides* provide that "an impairment may be manifested objectively, for example by a fracture, and/or subjectively through fatigue or pain."<sup>93</sup>

The Deputy's arbitration decision summarizes opinions based on objective evidence given by Doctors Gibbons, Kimelman, and Bansal, but disregarded the material functions of subjective symptoms without any reason as to the disregard as required by Iowa law.<sup>94</sup>

Clark points out that the permanent impairment rating of 10% is based on her objectively measured loss of grip strength due to her work injury.<sup>95</sup> However, the loss of pain-free function is a separate permanent impairment, not, as Winnebago contends, an addition to a loss of grip strength being arbitrarily added on top of the already 10% impairment. Just because a loss of pain-free function is a subjective symptom instead of an objective one does not mean it can be ignored, as it is one of the most common reasons for disability.<sup>96</sup>

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<sup>92</sup> Rule 876-2.4, I.A.C.

<sup>93</sup> A.M.A. *Guides*, section 1.2a, p.3.

<sup>94</sup> Arb. Dec.; See 17A.16(1).

<sup>95</sup> Ex I, p 13.

<sup>96</sup> See A.M.A. *Guides* section 18.8 p. 586.

Winnebago argues that Clark has a history of chronic pain syndrome, and chronic degenerative disc disease, and major depressive disorder, anxiety, and fibromyalgia prior to the injury that could be the cause of the pain.<sup>97</sup> However, there was no showing of this specific wrist pain happening before the accident. Additionally, that does not change the fact that Deputy Palmer still did not address the loss of pain-free function for Clark's wrist for any reason, whether it be prior medical history or specifically because of the workplace injury.

The deputy has a duty to "include an explanation of why the relevant evidence in the record supports each material finding of fact. . ." <sup>98</sup> The deputy in this case did not consider any subjective evidence as to Clark's pain and only summarized objective evidence of Doctors Bansal, Gibbons, and Kimelman. This error is to be remanded to the agency for a re-determination of permanent impairment percentage based on subjective evidence of Clark's possible loss of pain-free function of her wrist.

**B. Whether the Commissioner erred in Denying Penalty Benefits**

Clark argued at hearing that she was entitled to an award of penalty assessed against Winnebago. Clark contends she should be awarded penalties for underpaid benefits due to the dispute over her marital status, and based upon Winnebago's nonpayment of permanency benefits after she was placed at MMI.

First, Winnebago states that because Clark did not provide evidence as to her married status, such as a marriage certificate, and evidence to the contrary, such as Clark filling her taxes as 'single', Winnebago calculated her rate based on her status as single instead of married.

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<sup>97</sup> Winnebago Brief 12/26/19, p. 15.

<sup>98</sup> IOWA CODE section 17A.16(1).

As to the Winnebago's nonpayment of permanency benefits, they argue that they did not pay these benefits because of Dr. Gibbons placing Clark at MMI. On November 17, 2016, Dr. Gibbons placed Clark at MMI and opined that Clark had not sustained any permanent impairment as a result of the work injury.<sup>99</sup> Iowa Code section 85.34(1) states that a healing period ends once there is medical indication that significant improvement from the injury is no longer anticipated, put differently: when MMI is reached. Therefore, Winnebago has reason to think that Clark's healing period had ended when Dr. Gibbons put her at MMI on November 17, 2016. Dr. Gibbons opined that she had not sustained any permanent degree of impairment in relation to the work injury, and thus no permanency benefits were paid. At the time there were not any contrary opinions in the record with regard to permanency and thus Winnebago reasonably relied on Dr. Gibbons' opinions.

Under Iowa Code section 86.13(4)(c) an employer must have an "actual basis" that is relied on to deny, delay, or terminate benefits and must convey the basis of the determinations to the employee. An employer can establish a "reasonable cause or excuse" if the employer had a reasonable basis to contest the employee's entitlement to benefits.<sup>100</sup> "A 'reasonable basis' for denial of the claim exists if the claim is "fairly debatable."<sup>101</sup>

Looking at the record as a whole, there is substantial evidence as to whether Winnebago had a reasonable basis for their delay in payment of benefits. Deputy Palmer found that the issue of whether Clark was married at the time of the work injury was fairly debatable, and therefore, no penalty benefits should be awarded to Clark based upon the incorrect rate.<sup>102</sup> She also held that

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<sup>99</sup> Ex. JE3, p. 51.

<sup>100</sup> *Christensen v. Snap-On Tools Corp.*, 554 N.W.2d 254, 260 (Iowa 1996).

<sup>101</sup> *Burton v. Hilltop Care Ctr.* 813 NW2d 250, 267 (Iowa 2012) (citations omitted).

<sup>102</sup> Arb. Dec., p. 13.

Clark's claim as to Dr. Gibbons putting her at MMI was fairly debatable as well, and therefore, she was not entitled to benefits.

Clark points to the changes in the penalty statute in 2009 and the three-prong test now required.<sup>103</sup> However, there is evidence in the record that the prongs were met. First, the excuse was preceded by a reasonable investigation, as documents were gathered and consulted when trying to determine Clark's marital status and permanent disability. There is evidence that the findings in the investigation were the 'actual basis' Winnebago relied upon when deciding to pay benefits at their calculated rate and not issue permanency benefits, and the basis for those actions were shared with Clark.

This Court, looking at the record as a whole, finds that there is substantial evidence in the proceedings to support the deputy's findings that Clark is not owed penalty benefits.

**C. Whether the Commissioner erred in determining the proper workers' compensation rate.**

At the time of hearing, the parties had stipulated to the fact that Clark's average weekly wage was \$546.34 and that she is entitled to three exemptions. The parties disagree as to whether Clark was married when the work injury took place. Clark believes her weekly rate should be

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<sup>103</sup> Under IOWA CODE section 86.13(4)c: "In order to be considered a reasonable or probable cause or excuse under paragraph "b", an excuse shall satisfy all of the following criteria:

- (1) The excuse was preceded by a reasonable investigation and evaluation by the employer or insurance carrier into whether benefits were owed to the employee.
- (2) The results of the reasonable investigation and evaluation were the actual basis upon which the employer or insurance carrier contemporaneously relied to deny, delay payment of, or terminate benefits.
- (3) The employer or insurance carrier contemporaneously conveyed the basis for the denial, delay in payment, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits.



\$372.30, as she claims she was married at the time of the incident. However, Winnebago contends that Clark's weekly rate should be \$363.86 based on her status as single.

Winnebago points to the fact that Clark, when she first began working at the company, filled out a W-4 where she noted that she was single.<sup>104</sup> Clark also did not mark down any exemptions on the form even though she could have taken three, stating that she wanted the highest amount of tax withheld that she could.<sup>105</sup> Winnebago also notes that Clark allegedly told her doctor, Arvin Vocal, M.D., that she was recently divorced, although Clark denies this.<sup>106</sup> Winnebago also notes that Clark could not produce her marriage certificate.<sup>107</sup>

Clark states that she is married and testified to this fact. Clark stated that she is married to Joshua Clark, but had asked him for a divorce in January of 2014 and officially left him in September of 2014. However, Mr. Clark refused to sign the divorce papers he was given and Clark could not afford the cost of a lawyer and the cost of divorce.<sup>108</sup> Clark also mentioned that she had set up an appointment with Legal Aid to try to get help getting a divorce.<sup>109</sup> Clark did admit that she could not locate her marriage certificate and that she believes Mr. Clark has it.<sup>110</sup> Clark's current fiancé also testified to the fact that Clark is currently married, to his knowledge, and that she is seeking a divorce.<sup>111</sup>

Determining if Clark was married at the time of the injury is an issue of credibility. When assessing a witness' credibility, the trier of fact "may consider whether the testimony is reasonable

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<sup>104</sup> Ex C, pg 9.

<sup>105</sup> Hr. Tr. 69.

<sup>106</sup> Arb. Dec. p. 1.

<sup>107</sup> Hr. Tr. p. 68.

<sup>108</sup> Hr. Tr. pp 58-61, 67-69.

<sup>109</sup> Hr. Tr. p. 67.

<sup>110</sup> Hr. Tr. p. 68.

<sup>111</sup> *Id.*

and consistent with other evidence, whether a witness has made inconsistent statements, the witness' appearance, conduct, memory, and knowledge of the facts, and the witness' interest in the [matter]."<sup>112</sup>

The Commissioner noted that the evidence as to whether Clark was actually married was thin on both sides.<sup>113</sup> However, she found Clark's testimony that she was married at the time of the work injury credible. Based on the Commissioner's observations during hearings, and after considering all the evidence presented, she concluded that Clark was married at the time of the workplace injury.<sup>114</sup>

Giving the appropriate deference, this Court finds substantial evidence supports the Commissioner's findings. Clark testified that she was married, as did her current fiancé. Winnebago did not have any witnesses testify to the marriage issue. The Commissioner found Clark's testimony as to her marriage credible. There is, therefore, substantial evidence to support the factual findings of the Commission. Evidence is not insubstantial simply because different conclusions could be drawn from the evidence. Viewing the record as a whole, the Court concludes that substantial evidence supports the findings.

**D. Whether the Commissioner erred in finding that Clark is entitled to alternate medical care with a specialist at Mayo Clinic**

In their cross-appeal, Winnebago contends that the Commissioner erred in determining that Clark is entitled to a referral for an evaluation by a specialist in triangular fibrocartilage complex tears at the Mayo Clinic.

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<sup>112</sup> State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990).

<sup>113</sup> Arb. Dec., p. 13.

<sup>114</sup> *Id.* at pg 9-10.

The alternate care that was granted was recommended by Dr. Bansal.<sup>115</sup> However, Dr. Bansal was the only doctor who opined that the TFCC tear was related to Clark's workplace injury. Winnebago points to the fact that Deputy Palmer stated in her opinion that she found Dr. Kimelman most persuasive in this case. Winnebago states that this statement does not match the finding that Clark should have an evaluation at the Mayo Clinic when, again, Dr. Bansal is the only physician that found the TFCC tear was related to the work injury.

When performing his IME, Dr. Bansal found that Clark's forceful "torqueing from tightening screws would lead to loaded ulnar deviation, making it highly pathognomonic for a triangular fibrocartilage complex tear."<sup>116</sup> Dr. Bansal opined that given Clark's immediate wrist pain and lack of pre-existing wrist pain, that this was suggestive of an acute aggravation or tear of a previous tear making it clinically relevant.<sup>117</sup> Given this information, Dr. Bansal recommended Clark have a consultation with a TFCC tear specialist at a tertiary center such as the Mayo Clinic.<sup>118</sup>

Clark was also seen for an IME by Dr. Kimelman.<sup>119</sup> Although Dr. Kimelman did not recommend a consultation at the Mayo Clinic, he did review the M.R.I and agreed with the interpretation of there being a small TFCC tear.<sup>120</sup>

Deputy Palmer did find Dr. Kimelman's opinions most persuasive.<sup>121</sup> However, that does not mean that her decision was not supported by the quality and quantity of evidence that would be said to be sufficient "by a neutral, detached, and reasonable person to establish the fact at issue . . ."<sup>122</sup> Both Dr. Kimelman and Dr. Bansal saw a small TFCC tear in the MRI and Dr. Bansal

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<sup>115</sup> Ex. I, p. 13.

<sup>116</sup> Ex. I, p. 13.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Ex. B, pp. 1-3.

<sup>120</sup> Ex. B, pp. 1-3.

<sup>121</sup> Arb Dec., pg. 9.

<sup>122</sup> IOWA CODE section 17A.19(10(f)(1)).

opined it was from the work injury. Dr. Bansal recommended an avenue of care that had not been tried yet by Clark. From review of the record, there is substantial evidence that supports the agency's finding that Clark is entitled to a referral for an evaluation by a specialist in TFCC tears at the Mayo Clinic.

**Conclusion**

There is substantial evidence to show Clark had sustained a 10% permanent disability of her right upper extremity as a result of the stipulated workplace injury, but the agency must determine her percentage of disability based on pain-free function, which was not answered originally. The Commission did not err in finding Clark's classification for calculation is married with three kids and the correct workers' compensation rate is \$372.30 per week. The Commission also did not err when it found that Clark is not entitled to penalty benefits for Winnebago's non-payment of permanent partial disability benefits. Nor did it err when finding Clark is entitled to alternate medical care in the form of an evaluation with a specialist in TFCC tears at the Mayo Clinic per Dr. Bansal's recommendation.

**ORDER**

**IT IS THEREFORE THE ORDER OF THIS COURT** that Judicial Review is **DENIED** in part and **REMANDED** in part.



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number**      **Case Title**  
CVCV058801      APRIL CLARK VS WINNEBAGO INDUSTRIES INC

So Ordered

A handwritten signature in black ink, appearing to read "Paul D. Scott". The signature is written in a cursive style with a long horizontal line extending to the right.

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Paul D. Scott, District Court Judge,  
Fifth Judicial District of Iowa