BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

APRIL ARLENE CLARK,		
Claimant,		File No. 5063138
vs.		ARBITRATION
WINNEBAGO INDUSTRIES, INC.,		DECISION
Employer,		
Self-Insured,		Headnotes: 1402.40, 1803, 2501, 2701, 3003
Defendant.		

Claimant April Clark filed a petition in arbitration on January 31, 2017, alleging she sustained an injury to her right upper extremity and shoulder while working for the defendant, Winnebago Industries, Inc. ("Winnebago"), on July 8, 2016. Winnebago filed an answer on February 21, 2017, admitting Clark sustained a work injury.

An arbitration hearing was held on September 18, 2017, at the Division of Workers' Compensation, in Des Moines, Iowa. Attorney Mark Soldat represented Clark. Clark appeared and testified. Jeremy Wilson, Clark's boyfriend, also appeared and testified on her behalf. Attorney Lindsey Mills represented Winnebago. Joint Exhibits ("JE") 1 through 5, Exhibits 1 and 2, and Exhibits A through E were admitted into the record. The record was held open through October 9, 2017, for the receipt of post-hearing briefs. The briefs were received and the record was closed.

Before the hearing the parties prepared a hearing report listing stipulations and issues to be decided. Winnebago waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Clark and Winnebago at the time of the alleged injury.

2. Clark sustained an injury on or about July 8, 2016, which arose out of and in the course of her employment with Winnebago.

3. The alleged injury is a cause of temporary disability during a period of recovery.

4. If Winnebago is liable for the alleged injury, Winnebago agrees Clark was off work and she is entitled to temporary partial disability benefits from July 18, 2016, August 8, 2016 through August 9, 2016, September 23, 2016 through October 8, 2016,

and from November 20, 2016 through November 26, 2016, and healing period benefits from July 19, 2016 through August 7, 2016, and August 10, 2016 through September 22, 2016.

5. Clark's disability is a scheduled member disability to her arm.

6. The commencement date for permanent partial disability benefits, if any are awarded, is July 19, 2016.

7. At the time of the alleged injury Clark's gross earnings were $546.34 per week.

8. Prior to the hearing Clark was paid the benefits set forth on pages four and five of the hearing report.

9. Winnebago is not entitled to a credit under Iowa Code section 85.38(2) for payment of sick pay/disability income or for payment of medical/hospitalization expenses.

10. Winnebago agreed to pay the $2,458.00 cost of the independent medical examination and report and associated medical mileage totaling $158.36.

11. Winnebago agreed to pay the $8.40 cost of a prescription and medical mileage totaling $244.08.

12. The costs attached to the hearing report have been paid.

ISSUES

1. Is the alleged injury a cause of permanent disability?

2. If the alleged injury is a cause of permanent disability, what is the extent of disability?

3. What is the rate?

4. Is Clark entitled to alternate medical care?

5. If the alleged injury is a cause of permanent disability, is Clark entitled to interest?

6. Should Clark be awarded penalty benefits?

7. Should costs be awarded to Clark?

FINDINGS OF FACT

Clark applied for a job with Winnebago in December 2015. (Ex. C, p. 6) Winnebago hired Clark to work in wire prep at its Lake Mills facility in January 2016. (Ex. C, p. 9; Tr., pp. 27-28) At the time of her hiring, Clark completed a W-4 form noting she was single. (Ex. C, p. 9) The form provided, "[n]ote: If married, but legally separated, or spouse is a nonresident alien, check the 'Single' box." (Ex. C, p. 9) Clark relayed she marked zero exemptions, even though she could have taken three because she wanted the most tax withheld. (Tr., p. 69) Clark testified she left her husband in September 2014, and asked for a divorce in January 2014, but he refused. (Tr., p. 68) Clark reported she had looked for her marriage certificate, but she could not find it. (Tr., p. 68)

Clark built wire boards during her first month with Winnebago. (Tr., p. 28) Clark was then assigned to build load centers, installing breakers, fuses, connected wires, pushing tubed wires, and making connections between the wires for recreation vehicles. (Tr., p. 28)

Clark has a preexisting history of cervical and lumbar spine problems, and chronic pain and received treatment with Arvin Vocal, M.D., with the Mayo Clinic from 2012 through 2015. (JE 1) During a follow-up appointment on May 10, 2015, Dr. Vocal documented Clark "is asking this provider for opinion whether she can go back to work. She was recently divorced from her husband and she would like to return to work, not only for financial reasons, but mainly to improve her emotional status. She believes that working will keep her stress away." (JE 1, p. 8) Dr. Vocal opined Clark could return to the workforce with a lifting restriction of twenty pounds. (JE 1, p. 9) Clark denied that she received a twenty pound lifting restriction from Dr. Vocal and testified "he knew I was not divorced; nor did I ever state to him that I was." (Tr., p. 61)

On July 8, 2016, Clark was using a hand-held screwdriver while building a line 2 load center, which is the largest load center employees build at the Winnebago Lake Mills facility. (Tr., pp. 30-31) Clark testified many employees complained they could not tighten the metal brackets on a row of breakers with tiny screws because Winnebago had not provided the correct screwdriver for the tiny screws. (Tr., p. 30) Clark reported:

> I had to brace down with the weight of my left arm to hold the load center down as I turned — put pressure on to turn to tighten it enough. And on my last turn is when I had like a sharp pain in my wrist that shot all the way up into my shoulder blade. . . . It made my pinky finger and my ring finger go numb and tingly. . . . I doubled over in pain. My face turned red. I started to cry.

(Tr., pp. 31-32) Clark reported her work injury to Winnebago. (Tr., p. 32)

Later that day Clark attended an appointment with Byron Carlson, M.D., a family practitioner with MC MFC Forest City. Dr. Carlson documented Clark was

> [u]sing a screwdriver to screw down breakers and was pushing down and twisting and felt shooting pain up right arm from wrist. The patient has pain in the right hand which is described as aching with radiation to the right shoulder. The injury is aggravated by movement and turning head.

(JE 2, p. 10) Clark reported she had experienced numbness and tingling, which had resolved, but she had decreased mobility. (JE 2, p. 10) Dr. Carlson assessed Clark with a strain of the right forearm, and ordered Clark to ice her upper extremity three times per day, and to take ibuprofen. (JE 2, p. 12)

On July 15, 2016, Clark returned to Dr. Carlson, reporting the pain was no longer shooting up her arm into her shoulder, and she was experiencing tingling in the fifth finger of her right hand. (JE 2, p. 14) Dr. Carlson excused Clark from work for ten days and imposed a restriction of no use of the right upper extremity through July 25, 2016. (JE 2, pp. 16, 18, 37b)

Clark returned to work on July 18, 2016, and relayed the weight of a cordless drill she was using pulled down her wrist. (Tr., pp. 40-41) Clark reported the work was too painful and Winnebago sent her back to Dr. Carlson. (Tr., pp. 40-41)

Clark attended an appointment with Dr. Carlson on July 25, 2016. Dr. Carlson noted the aching in her arm had improved, but she "still has minor aches to her wrist and forearm." (JE 2, p. 19) Dr. Carlson imposed restrictions of no use of the right upper extremity for one week, followed by a five pound lifting restriction with no use of vibratory or power tools. (JE 2, pp. 21, 23)

On August 8, 2016, Clark returned to Dr. Carlson, reporting her wrist and arm were feeling better, but complaining of aching when using her right upper extremity. (JE 2, p. 24) Dr. Carlson imposed restrictions of lifting twenty pounds occasionally, carrying objects weighing ten pounds frequently, and noted she could wear a right wrist splint at work. (JE 2, pp. 27, 37c)

The next day Clark attended an appointment with James McGuire, PA-C with Mercy Family Clinic – Forest City, Winnebago Industries Worker Compensation. (JE 2, p. 28) McGuire listed an impression of a right wrist sprain with median nerve paresthesias, and noted Clark had performed various light-duty jobs, but she was having difficulty finding one she could tolerate without aggravating her wrist pain. (JE 2, p. 28) McGuire fitted Clark with a right wrist splint, ordered her to perform warm soaks and range of motion exercises, prescribed a Medrol Dosepak, recommended Clark limit right wrist gripping, and imposed a lifting restriction of five pounds, with no use of power or vibratory tools with the right hand. (JE 2, pp. 28-29) McGuire continued Clark's restrictions, and recommended she continue using a splint and perform warm soaks

and exercises. (JE 2, pp. 30-33) McGuire noted Clark had not shown much improvement and recommended an orthopedic consultation. (JE 2, p. 30)

On September 22, 2016, Clark attended an appointment with Timothy Gibbons, M.D., an orthopedic surgeon with the Mason City Clinic, complaining of right wrist pain. (JE 3, p. 38) Dr. Gibbons examined Clark, ordered and reviewed Clark's x-rays, provided a Depo-Medrol injection, and ordered Clark to continue using her brace and ibuprofen. (JE 3, pp. 38, 42) Dr. Clark listed an impression for the x-ray of "[n]ormal wrist with evidence of prior trauma, consistent with a distal radius impaction fracture and ulnar styloid fracture, well healed and remodeled." (JE 3, p. 42) With respect to causation, Dr. Gibbons opined "I think the x-ray implies that she has previous old trauma though she cannot recall when this occurred. I think this is a temporary agitation of a pre-existing condition as it stands today." (JE 3, p. 38) Dr. Gibbons imposed restrictions of lifting ten pounds continuously, eleven to twenty pounds occasionally, no lifting over twenty pounds, and occasional pushing, pulling, gripping, and handling with the right upper extremity. (JE 3, p. 40)

Clark returned to Dr. Gibbons on November 8, 2016. (JE 3, p. 44) Dr. Gibbons recommended Clark receive right wrist magnetic resonance imaging, and continued her restrictions. (JE 3, pp. 45-46) The reviewing radiologist listed an impression of:

1. Chronic ununited ulnar styloid fracture with edema in the fracture ossicle, likely stress related edema.

2. Tiny to triangular fibrocartilage perforation.

3. Otherwise normal right wrist MRI.

(JE 2, p. 34; JE 4, p. 1) After receiving the imaging, Dr. Gibbons ordered Clark to return to work on November 15, 2016. (JE 3, p. 37)

During Clark's appointment on November 17, 2016, Dr. Gibbons listed an impression of arthralgia of the right wrist. (JE 3, p. 50) Dr. Gibbons noted:

> I told the patient that I have nothing else to offer her at this point. I do not have any objective evidence that she has wrist pain. I talked with her about return to work issues. Thought she may have pain, I do not think that she is doing any tissue damage. Therefore, I will declare her at maximum medical improvement (MMI). I have nothing else to offer her. I suggested that she find a job that would be more suited to her capacities. I gave her work restrictions and these work restrictions are based solely on her capacities, and not necessarily on otherwise medical opinion. I do not believe that she sustained any permanent partial impairment secondary to her employment, but I do believe that she would benefit from a different work assignment that she is more tolerant of, which would

> include avoiding power tools, especially the power tools that cause a torque.

(JE 3, p. 50) Dr. Gibbons recommended a twenty pound lifting restriction and restrictions of occasional pushing and pulling with the right upper extremity, and to avoid power tools or job assignments that require torque at the right wrist. (JE 3, p. 52)

On December 4, 2016, Dr. Gibbons responded to a form letter from Winnebago, checking a box responding Clark's work restrictions were not related to her reported work injury, the work restrictions were due to a personal medical condition, and were permanent. (JE 3, p. 53) Dr. Gibbons wrote the work restrictions were permanent "[a]s per pt. tolerance." (JE 3, p. 53)

Winnebago's third-party administrator sent Clark a letter on December 7, 2016, notifying her Dr. Gibbons had determined she had reached maximum medical improvement, he issued a zero percent impairment rating regarding her wrist injury, and he had indicated her permanent restrictions are personal in nature and not related to her work incident on July 8, 2016. (Ex. C, p. 19)

On January 5, 2017, Winnebago sent Clark a letter notifying her she was being placed on inactive status because she had reached maximum medical improvement "with permanent restriction and, at this time, we are unable to place you in a regular full-time position within your restrictions." (Ex. C, p. 25) The letter further provided Clark could request a reasonable accommodation to perform the essential functions of her position. (Ex. C, p. 25) Upon receiving the letter Clark requested an accommodation from Winnebago. (Ex. C, p. 11) Winnebago determined it could not accommodate Clark's restrictions in January 2017, and found she was eligible for leave under the Family Medical Leave Act effective January 11, 2017. (Ex. C, pp. 11, 26)

Clark's attorney sent Winnebago's attorney a letter on March 14, 2017, stating, in part, "it seems to me that Winnebago should be paying Ms. Clark [permanent partial disability] compensation at this time," asking Winnebago to state its position regarding disability payments, and requesting Clark's pay and leave records. (Ex. E, p. 30) On April 20, 2017, Winnebago's attorney responded stating Winnebago believed Clark had not sustained an industrial disability as a result of her work injury, as supported by Dr. Gibbons' opinion, and enclosed a statement of Clark's earnings. (Ex. E, p. 31)

Joshua Kimelman, D.O., an orthopedic surgeon, performed an independent medical examination of Clark for Winnebago in July 2017. (Ex. B) Dr. Kimelman examined Clark and reviewed her medical records. (Ex. B) Dr. Kimelman diagnosed Clark with chronic right wrist pain, and opined her right wrist condition and subsequent need for care were causally related to her work activities at Winnebago on July 8, 2016. (Ex. B, p. 4) When questioned whether he agreed with Dr. Gibbons' conclusion that Clark's imaging supports a preexisting condition, Dr. Kimelman responded, "[n]o, her imaging does not reveal a diagnosis to explain her musculoskeletal pain in her right

forearm, but I do not believe the nonunion of her ulnar styloid is in any way related to her complaint of dorsal wrist pain." (Ex. B, p. 4)

When questioned about permanency, Dr. Kimelman relayed, "[a]s regards to permanent impairment, that is difficult to determine as she demonstrates essentially full range of motion and while she does demonstrate relative atrophy of the right arm compared to the left, her measurement, particularly with pinch grip, was very variable, probably not indicative of organic disease." (Ex. B, p. 5) Dr. Kimelman opined Clark was not in need of any additional medical care. (Ex. B, p. 5) With respect to permanent work restrictions, Dr. Kimelman opined, "I believe she should be on a light lifting status that is 20 pounds occasionally without repetitive work due to the level of symptoms in her right hand. I do believe those restrictions are secondary to her job-related injury, although again I am unable to do [sic] attribute an anatomic injury to her arm at this point." (Ex. B, p. 5)

Sunil Bansal, M.D., an occupational medicine physician, performed an independent medical examination for Clark in August 2017. (Ex. 1) Dr. Bansal examined Clark and reviewed her medical records. (Ex. 1) Dr. Bansal found Clark sustained a work injury to her right wrist on July 8, 2016, causing a permanent impairment. (Ex. 1, p. 12) Dr. Bansal opined,

> The mechanism of injury of forceful wrist torqueing from tightening screws would lead to loaded ulnar deviation, making it highly pathognomonic for a triangular fibrocartilage complex tear. Given her immediate wrist pain and her lack of pre-existing wrist pain, this is highly suggestive of an acute tear or the aggravation of a pre-existing tear to make it clinically relevant.

(Ex. 1, p. 12) Using Table 16-34 of the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), Dr. Bansal assigned an impairment rating of ten percent to the upper extremity. (Ex. 1, p. 13) Dr. Bansal recommended a ten pound lifting restriction with no frequent or forceful turning or twisting of the right hand, and recommended Clark receive a consultation with a specialist in triangular fibrocartilage complex tears at a tertiary health center, such as the Mayo Clinic. (Ex. 1, p. 13)

Clark lives with her fiancé, Wilson. (Tr., p. 14) Clark reported that at the time of her work injury she was living with Wilson and two of her dependent children. (Ex. A, p. 5) Wilson testified Clark is currently married and she is seeking a divorce. (Tr., p. 14) Wilson reported Clark cannot do household chores, including dishes, laundry, and cleaning. (Tr., pp. 21-22)

CONCLUSIONS OF LAW

I. Nature of the Injury

Clark alleges she sustained a permanent impairment to her right upper extremity as a result of the July 8, 2016 work injury. Winnebago avers Clark did not sustain a permanent impairment as a result of the work injury and her right upper extremity problems are preexisting and not causally related to the July 8, 2016 work injury.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

> it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. *An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.*

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (emphasis in original).

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997). The cause does not need to be the only cause, [i]t only needs to be one cause." Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 64 (Iowa 1981).

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 deputy 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).

Dr. Gibbons, the treating orthopedic surgeon, Dr. Kimelman, an orthopedic surgeon retained to conduct an independent medical examination for Winnebago, and Dr. Bansal, an occupational medicine physician retained to conduct an independent medical examination for Clark, have provided opinions on causation and permanency. I find the opinion of Dr. Kimelman most persuasive, and the impairment rating issued by Dr. Bansal unrebutted.

Dr. Gibbons diagnosed Clark with arthralgia of the right wrist and determined she did not sustain a permanent impairment caused by her employment. (JE 3, p. 50) Dr. Gibbons documented he did not find any objective evidence Clark has wrist pain, and "suggested that she find a job that would be more suited to her capacities . . . and gave her work restrictions . . . based solely on her capacities, and not necessarily on otherwise medical opinion." (JE 3, p. 50)

Dr. Kimelman diagnosed Clark with chronic right wrist pain, and opined he did not believe Clark's imaging supported a preexisting condition, but also found the nonunion of her ulnar styloid was not related to her complaint of dorsal wrist pain. (Ex. B, p. 4) Dr. Kimelman imposed a permanent lifting restriction of twenty pounds without repetitive work with her right hand, and opined, "I do believe those restrictions are secondary to her job-related injury, although again I am unable to do [sic] attribute an anatomic injury to her arm at this point." (Ex. B, p. 5) Dr. Kimelman agreed Clark had reached maximum medical improvement, but he did not issue a permanent impairment rating. (Ex. B, pp. 4-5) Dr. Bansal assigned a permanent impairment rating of ten percent to the right upper extremity based on the loss of strength. (Ex. 1, p. 13) His opinion is unrebutted.

II. Rate

The parties stipulated Clark's average weekly wage is $546.34 per week, and that she is entitled to three exemptions. The parties disagree whether Clark was married at the time of her work injury. Clark contends at the time of her work injury she was married, and asserts her weekly rate is $372.30. Winnebago contends Clark was not married at the time of her work injury, and alleges her weekly rate is $363.86.

The payroll withholding rules under the Internal Revenue Code and applicable regulations govern entitlement to exemptions in weekly rate determinations. Iowa Code § 85.61(6); 876 IAC 8.8; see also James R. Lawyer, Iowa Practice Series – Workers' Compensation § 12.2., at 128.

The determination of whether Clark was married at the time of her work injury raises an issue of credibility. When assessing witness credibility, the trier of fact "may consider whether the testimony is reasonable and consistent with other evidence, whether a witness has made inconsistent statements, the witness's appearance, conduct, memory and knowledge of the facts, and the witness's interest in the [matter]." State v. Frake, 450 N.W.2d 817, 819 (Iowa 1990).

Clark testified she left her husband in 2014 and requested a divorce, which he refused. (Tr., p. 68) Clark's boyfriend also testified Clark is still married. Clark has a financial interest in the outcome of this case. Clark's boyfriend also has an interest in the case given his relationship with Clark.

Clark's medical records from 2015, document Clark was "recently divorced" and she wanted to return to work, which is inconsistent with Clark's testimony. (JE 1, p. 8) When Winnebago hired Clark, Clark completed a W-4 form noting she was single. (Ex. C, p. 9) The form provided, "[n]ote: If married, but legally separated, or spouse is a nonresident alien, check the 'Single' box." (Ex. C, p. 9) Clark testified she marked zero exemptions, even though she could have taken three because she wanted the most tax withheld. (Tr., p. 69)

Clark reported that she has lived in Iowa and Minnesota. No public court records were produced at hearing documenting dissolution proceedings in Iowa or Minnesota. No tax returns were submitted supporting or refuting Clark's assertion she was married.

During the hearing I found Clark's rate of speech, and eye contact appropriate. I did not observe her engage in any furtive movements. I found Clark's testimony that she was married at the time of the work injury credible. Based on my observations at hearing, and considering all of the evidence, I conclude Clark was married at the time of her work injury, and her weekly rate is $372.30.

III. Extent of Disability

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2). If the claimant's injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(t), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995). "The compensation allowed for a scheduled injury 'is definitely fixed according to the loss of use of the particular member.'" Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant's injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Id.; Iowa Code § 85.34(2)(u). "Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury." Bergeson, 526 N.W.2d at 547.

The injury Clark sustained is to the right upper extremity. The schedule provides a maximum award of 250 weeks of compensation. Iowa Code § 85.34(2)(m). Considering all of the evidence, including lay testimony and the expert opinions, I find Clark is entitled to twenty-five weeks of permanent partial disability benefits, commencing on July 19, 2016, pursuant to the parties' stipulation, at the rate of $372.30 per week. Winnebago is entitled to a credit for benefits previously paid and shall pay accrued benefits in a lump sum with interest on all weekly benefits pursuant to Iowa Code section 85.30.

IV. Alternate Care

Clark seeks an evaluation of her right upper extremity through the Mayo Clinic, as recommended by Dr. Bansal. Winnebago asserts Clark is not entitled to alternate care.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers' compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. "The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee." Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner "may, upon application and reasonable proofs of necessity therefore, allow and order other care." Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting "[t]he employer's obligation under the statute turns on the question of reasonable necessity, not desirability"). The Iowa Supreme Court has held the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010).

After receiving Dr. Bansal's opinion, Winnebago did not authorize an evaluation at the Mayo Clinic. As analyzed above, Clark has sustained a permanent impairment. Clark continues to have symptoms related to her work injury. Winnebago has refused to provide the requested medical evaluation. Clark is entitled to a referral for an evaluation at the Mayo Clinic with a specialist in triangular fibrocartilage complex tears. The cost of the evaluation shall be paid by Winnebago. Winnebago is responsible for all causally related medical care.

V. Penalty

Under the statute's plain language, if there is a delay in payment absent "a reasonable or probable cause or excuse," the employee is entitled to penalty benefits,

of up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse. Iowa Code § 86.13(4); see also Christensen v. Snap-On Tools Corp., 554 N.W.2d 254, 260 (Iowa 1996) (citing earlier version of the statute). "The application of the penalty provision does not turn on the length of the delay in making the correct compensation payment." Robbennolt v. Snap-On Tools Corp., 555 N.W.2d 229, 236 (Iowa 1996). If a delay occurs without a reasonable excuse, the commissioner is required to award penalty benefits in some amount to the employee. Id.

The statute requires the employer or insurance company to conduct a "reasonable investigation and evaluation" into whether benefits are owed to the employee, the results of the investigation and evaluation must be the "actual basis" relied on by the employer or insurance company to deny, delay, or terminate benefits, and the employer or insurance company must "contemporaneously convey the basis for the denial, delay, or termination of benefits to the employee at the time of the denial, delay, or termination of benefits." Iowa Code § 86.13(4)(a). An employer may establish a "reasonable cause or excuse" if "the delay was necessary for the insurer to investigate the claim," or if "the employer had a reasonable basis to contest the employee's entitlement to benefits." Christensen, 554 N.W.2d at 260. "A 'reasonable basis' for denial of the claim exists if the claim is 'fairly debatable.'" Burton v. Hilltop Care Ctr., 813 N.W.2d 250, 267 (Iowa 2012). "Whether a claim is 'fairly debatable' can generally be determined by the court as a matter of law." Id. The issue is whether the employer had a reasonable basis to believe no benefits were owed to the claimant. Id. "If there was no reasonable basis for the employer to have denied the employee's benefits, then the court must 'determine if the defendant knew, or should have known, that the basis for denying the employee's claim was unreasonable.'" Id.

Benefits must be paid beginning on the eleventh day after the injury, and "each week thereafter during the period for which compensation is payable, and if not paid when due," interest will be imposed. Iowa Code § 85.30. In Robbennolt, the Iowa Supreme Court noted, "[i]f the required weekly compensation is timely paid at the end of the compensation week, no interest will be imposed . . . . As an example, if Monday is the first day of the compensation week, full payment of the weekly compensation is due the following Monday." Robbennolt, 555 N.W.2d at 235. A payment is "made" when the check addressed to the claimant is mailed, or personally delivered to the claimant. Meyers v. Holiday Express Corp., 557 N.W.2d 502, 505 (Iowa 1996) (abrogated by Keystone Nursing Care Ctr. v. Craddock, 705 N.W.2d 299 (Iowa 2005) (concluding the employer's failure to explain to the claimant why it would not pay permanent benefits upon the termination of healing period benefits did not support the commissioner's award of penalty benefits)).

When considering an award of penalty benefits, the commissioner considers "the length of the delay, the number of delays, the information available to the employer regarding the employee's injuries and wages, and the prior penalties imposed against the employer under section 86.13." Schadendorf v. Snap-On Tools Corp., 757 N.W.2d 330, 336 (Iowa 2008). The purposes of the statute are to punish the employer and

insurance company and to deter employers and insurance companies from delaying payments. Robbennolt, 555 N.W.2d at 237.

Clark seeks an award of penalty benefits based upon Winnebago's denial of her claim, and failure to pay benefits at the correct rate. The evidence presented by both parties concerning Clark's marital status was thin. I conclude the issue of whether Clark was married at the time of the work injury was fairly debatable. No penalty benefits should be awarded to Clark based upon the incorrect rate.

Winnebago contends no penalty benefits should be awarded to Clark because it relied on the opinion of Dr. Gibbons when it denied Clark's claim. On December 4, 2016, Dr. Gibbons responded to a form letter from Winnebago, checking a box responding Clark's work restrictions were not related to her reported work injury, the work restrictions were due to a personal medical condition, and were permanent. (JE 3, p. 53) Dr. Gibbons wrote the work restrictions were permanent "[a] per pt. tolerance." (JE 3, p. 53) Winnebago's third-party administrator sent Clark a letter on December 7, 2016, three days after Dr. Gibbons issued his opinion, notifying her Dr. Gibbons had determined she had reached maximum medical improvement, he issued a zero percent impairment rating regarding her wrist injury, and he had indicated her permanent restrictions are personal in nature and not related to her work incident on July 8, 2016. (Ex. C, p. 19) I conclude Clark's claim was fairly debatable and she is not entitled to penalty benefits.

VI. Costs

Clark seeks to recover the $100.00 filing fee, and the $7.61 cost for service. Rule 876 Iowa Administrative Code 4.33(6), provides

> [c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

The rule expressly allows for the recovery of the $100.00 filing fee, and the $7.61 service fee.

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendant shall pay the claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of three hundred seventy-two and 30/100 dollars ($372.30), commencing on July 19, 2016.

Defendant shall pay accrued benefits in a lump sum with interest on all received weekly benefits pursuant to Iowa Code section 85.30.

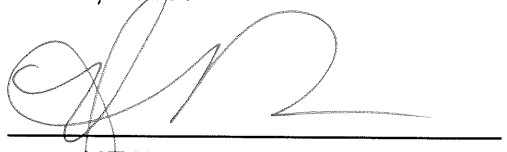
Defendant is entitled to a credit for benefits previously paid.

Defendant shall provide the medical care ordered in this decision.

Defendant shall reimburse the claimant one hundred and 00/100 dollars ($100.00) for the filing fee, seven and 61/100 dollars ($7.61) for service costs.

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

Signed and filed this 21st day of December, 2017.



HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

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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 in writing and received by the commissioner's office 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 a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.