

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

ANAMOSA STATE PENITENTIARY and STATE OF IOWA, <i>Petitioners,</i> v. MICHAEL NASSIF <i>Respondent.</i>	Case No. CVCV057375 RULING ON PETITION FOR JUDICIAL REVIEW
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This matter came before the Court on March 15, 2019 for hearing before the District Court on review of a final decision of the Iowa Workers' Compensation Commission. Petitioners Anamosa State Penitentiary and State of Iowa (collectively "Anamosa") appeared through Assistant Attorney General Sarah Brandt. Respondent Michael Nassif ("Nassif") appeared telephonically through attorney Bob Rush. Upon review of the court file and the applicable law, the court enters the following order:

I. Background Facts and Procedural Posture.

Nassif was injured on June 12, 2014, when he was attending a self-defense class as a part of his employment. He was employed as an Electronic Engineer Technician at the Anamosa State Penitentiary. He began working for Anamosa on May 2, 2014, and was required to attend pre-service training in Des Moines, part of which was self-defense training.

While participating in the training, Nassif experienced pains shooting into his neck, shoulder, and arm. He reported the pain to his instructor, but finished the session. When the day was over, Nassif was sent to UnityPoint Family Medicine in West Des Moines. He was

diagnosed with a muscle strain and spasm and prescribed a muscle relaxer and a nonsteroidal anti-inflammatory drug. The doctor instructed Nassif to seek further treatment once he got home. On July 31, 2019, Nassif went to the St. Luke's Work Well Clinic in Cedar Rapids, Iowa, after he continued to have shoulder pain. At St. Luke's, Nassif saw Dr. Shirley Pospisil, an occupational medicine specialist. Dr. Pospisil prescribed physical therapy two-to-three times a week to treat the injury.

After physical therapy was not working and Nassif was still experiencing pain, Dr. Pospisil noted clicking and popping sounds along with new pains. Dr. Pospisil then ordered an MRI of Nassif's left shoulder. The MRI did not reveal any issues. The pain continued, causing Dr. Pospisil to order a second MRI, this time of the cervical spine. The November 24, 2014, cervical spine MRI revealed Nassif had an aneurysmal bone cyst or tumor on the C7 vertebra.

After the tumor was discovered, Dr. Pospisil referred Nassif to an orthopedic oncologist. Nassif received treatment by Dr. Patrick Hitchon, a neurosurgeon, at the University of Iowa Hospitals and Clinics. To prevent excessive bleeding during the removal surgery Nassif first had an embolization on January 6, 2015. The next day, the aneurysmal bone cyst or tumor was removed and a C5-T2 fusion was performed on the spine around the area the tumor was removed. The care for the surgery was paid for by Nassif's personal health insurance. Both parties to this action stipulated Nassif was off work from January 6, 2015 until January 23, 2015 recovering from surgery. Nassif received \$1,459.20 in sick pay for this period.

Nassif returned to work with a temporary ten pound lifting restriction and was released to full duty work on February 23, 2015. Nassif is still employed by Anamosa.

On May 25, 2017, this case was arbitrated before Iowa Deputy Workers' Compensation Commissioner Stan McElderry. Nassif testified on his own behalf. Deputy McElderry found

Nassif's injury entitled him to: healing period benefits for January 6, 2015 through January 23, 2015 at the weekly rate of \$729.18; he was entitled to 100 weeks of permanent partial disability at the weekly rate of \$729.18; reimbursement of medical expenses, Dr. Mila's independent medical exam fee, and costs of the proceedings. Anamosa then filed an intra-agency appeal.

On appeal, Workers' Compensation Commissioner Joseph S. Cortese II, after a de novo review, affirmed Deputy McElderry's decision in all parts except the reimbursement of Dr. Mila's IME fee, finding reimbursement of the IME fee in this factual situation was not in line with Iowa Code Section 85.39. Anamosa filed a timely Petition for Judicial Review to this Court.

II. Standard of Review.

Final decisions rendered by the Iowa Workers' Compensation Commission are reviewed by the District Court under Iowa Code Chapter 17A, the Iowa Administrative Procedures Act. *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 (2019). "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." *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006). The standard of review depends on the type of error alleged by the Petitioner. *Jacobson Transp. Co. v. Harris*, 778 N.W.2d 192, 196 (Iowa 2010). When an agency has been "clearly vested" with a fact-finding function, the "standard of review depends on the aspect of the agency's decision that forms the basis of judicial review." *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Systems, Inc. v. Iowa Utilities Board*, 805 N.W.2d 758, 762 (Iowa 2011)). The standard of review depends on if the alleged error involves an issue of (1) findings of fact, (2) interpretation of law, or (3) an application of the law to facts. *Id.*

If the alleged error is one of fact, the standard of review is whether the findings are supported by substantial evidence. *Harris*, 778 N.W.2d at 196; *Schutjer v. Algona Manor Care Ctr.*, 780 N.W.2d 549, 557 (Iowa 2010). “[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.’” *Burton*, 813 N.W.2d at 256 (quoting Iowa Code § 17A.19(10)(f)). The Court “is limited to the findings that were actually made by the agency and not other findings the agency could have made.” *Id.* “In reviewing an agency’s findings of fact for substantial evidence, courts must engage in a ‘fairly intensive review of the record to ensure the fact finding is itself reasonable.’” *Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 518 (Iowa 2012) (quoting *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 499 (Iowa 2003)).

“Evidence is substantial if a reasonable person would find the evidence adequate to reach the same conclusion.” *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)). The District Court is “not to determine whether the evidence supports a different finding; rather our task is to determine whether substantial evidence, viewing the record as a whole, supports the findings actually made.” *Cedar Rapids Community School District v. Pease*, 807 N.W.2d 839, 845 (Iowa 2011) (internal citations and quotations omitted).

When the alleged error is in the Commissioner’s interpretation of law, the standard of review is whether the commissioner’s interpretation was erroneous. *See Clark v. Vicorp Rests., Inc.*, 696 N.W.2d 596, 604 (Iowa 2005). 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, and the question on review is whether the agency abused its discretion by, for example, employing

wholly irrational reasoning or ignoring important and relevant evidence.” *Meyer*, 710 N.W.2d at 219; Iowa Code § 17A.19(10)(i), (j).

III. CONCLUSIONS OF LAW.

Anamosa argues that the Commissioner committed an *error at law* in determining Nassif’s bone cyst “arose out of his employment.” Anamosa contends the appeal decision did no analysis on the issue of causal connection simply affirming the decision of the deputy commissioner. Anamosa further contends Deputy Commissioner McElderry did not do the necessary analysis for arising out of when he stated “There was an underlying pre-existing aneurysmal bone cyst which had been asymptomatic before, and which the June 12, 2014 incident lit-up and made symptomatic.” Arb. Dec. at 2. Anamosa argues this was an error at law, because it was not consistent with the Iowa Supreme Court’s holding in *Musselman v. Central Telephone Company*. 261 Iowa 352, 355, 154 N.W.2d 128, 130 (1967).

The Iowa Supreme Court has established the basis for “arising out of employment” is: “did claimant establish, by the necessary quantum of proof, a causal connection between the conditions under which work was performed and the resulting injury, i.e., did an injury follow as a natural incident of the work?” *Id.* In this case, there is no argument the tumor was caused by the employment, but rather that the employment resulted in the “flaring up” of a pre-existing condition. The Iowa Supreme court holds, “It is, of course, well settled that when an employee is hired, the employer takes him subject to any active or dormant health impairments incurred prior to this employment. If his condition is more than slightly aggravated, this resultant condition is considered a personal injury within the Iowa law.” *Ziegler v. U.S. Gypsum Co.*, 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960).

In support of its position that the Commissioner erred at law in applying the wrong standard Anamosa places great significance on the Iowa Supreme Court's decision in *Musselman*, citing the following portion of the opinion:

[A] disease which under any rational work is likely to progress so as to finally disable an employee does not become a 'personal injury' under our Workmen's Compensation Act merely because it reaches a point of disablement while work for an employer is being pursued. It is only when there is a direct causal connection between exertion of the employment and the injury that a compensation award can be made. The question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause.

Musselman, 154 N.W.2d at 132. However, the Court believes this reliance is misplaced as the Iowa Supreme Court ultimately upheld the decision of the Commissioner under a substantial evidence analysis. *See id.* In *Musselman*, the claimant was putting on an overshoe while at work when he felt a sharp pain in his back. *Id.* Musselman received treatment for his back injury, but the doctors ultimately found that the pain was due to poor circulation in his lower extremities. *Id.* One of the treating physicians in the case opined there was "No doubt in his mind claimant's difficulty was due to vascular insufficiency in the lower extremities and in no way due to any injury." *Id.* at 132. The Deputy Commissioner denied benefits and the Commissioner affirmed. In affirming the decision of the Commissioner, the Iowa Supreme Court held, "The commissioner was not compelled to accept the opinion of any testifying medical expert. The fair inferences to be drawn from all the medical testimony, the histories related by claimant to the various doctors, and other evidence surrounding the alleged injury may well support a finding his back condition arose independently of any work related incident." *Id.* The Court in *Musselman* upheld the Commissioner's decision because it was supported by substantial evidence. *See id.*

Under Iowa workers' compensation law, the injured worker bears the burden of proving a causal connection between their injury and their right to receive benefits. *George A. Hormel &*

Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). The Claimant must prove a causal connection by a preponderance of the evidence. *Id.* “A preponderance of the evidence exists when the causal connection is probable rather than merely possible.” *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). “(W)hether an injury or disease has a direct causal connection with the employment or arose independently thereof is ‘essentially within the domain of expert testimony.’” *Deaver v. Armstrong Rubber Co.*, 170 N.W.2d 455, 464 (Iowa 1969). The Iowa Supreme Court has noted, “expert testimony is essential to establish causal connection.” *Id.* (citing *Bodish v. Fischer, Inc.*, 257 Iowa 516, 521, 133 N.W.2d 867, 870 (1965)). “Acceptance or rejection of the expert's testimony is within the ‘peculiar province’ of the industrial commissioner. . . . This does not mean the commissioner as trier of fact may totally disregard evidence, but he has the duty to weigh the evidence and determine credibility of witnesses.” *Deaver*, 170 N.W.2d at 464. “[T]he commissioner, not the court, weighs the evidence, and his findings are liberally construed to uphold rather than defeat the decision.” *Id.* at 133.

In this case, Deputy McElderry held, and the Commissioner independently confirmed on de novo review, that Nassif's injury arose out of employment. Anamosa argues because Deputy McElderry stated, “Lighting up of an asymptomatic underlying condition due to work activities is a work injury,” he did not do the relevant analysis required under *Musselman*. See *Musselman*, 154 N.W.2d at 133. However, on the same page of his Arbitration Decision, Deputy McElderry cited the expert opinion of Laren J. Mouw noting Dr. Mouw opined, “the self-defense class activities of June 13, 2014 likely lit up or flared up an underlying asymptomatic condition.” Arb. Dec. at 2. Deputy McElderry also cited the opinion of Robert Milas, M.D., who opined “the surgery was performed as a direct result of the underlying condition being lit up by the June 12, 2014 work activities.” Arb. Dec. at 2. Deputy McElderry also noted that Patrick W. Hitchon,

M.D., the one expert in the case who would not agree that the injury was a work injury said, “I believe the martial arts exercises were responsible for producing the symptoms referable to the left upper extremity in the presence of the tumor.” Arb. Dec. at 2 (citing JE 4, p. 49). Expert testimony was introduced opining that the injury “was a direct result of the underlying condition being lit up” by the work injury and the commissioner was within his powers to weigh the evidence as the fact finder. *See Musselman*, 154 N.W.2d at 133.

Further, the Commissioner’s decision was not out of line with *Musselman* even though he reached a different conclusion. The Iowa Supreme Court in *Musselman* found, “As heretofore stated the commissioner, not the court, weighs the evidence, and his findings are to be liberally construed to uphold rather than defeat the decision. *See id.* There is no such deficiency in the findings of the commissioner as to nullify his conclusions.” *Id.* The same analysis is applied by the Court in this case, Deputy McElderry weighed the evidence and his findings are liberally construed. Based on the record as presented, a neutral, detached and reasonable person could find Nassif’s injuries arose out of and as a result of his employment. The Court finds the legal standard applied by the Workers’ Compensation Commission was legally correct.

Anamosa argues that in the event this Court finds that the Commissioner did not erroneously interpret the Iowa Code contrary to case law, the Commissioner misapplied existing law to the facts of the case, again arguing the injury did not arise out of Nassif’s employment. “Medical causation presents a question of fact that is vested in the discretion of the workers' compensation commission. We will therefore only disturb the commissioner's finding of medical causation if it is not supported by substantial evidence.” *Miron Const. v. Poula*, 815 N.W.2d 410 (Iowa Ct. App. Mar. 28, 2012) (citing *Dunlavey v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 853 (Iowa 1995); Iowa Code § 17A.19(10)(f)). Under a substantial evidence standard, the question for this

Court is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made. *Reed v. Iowa Dept. of Transp.*, 478 N.W.2d 844, 846 (Iowa 1991) (citations omitted).

As set forth above, expert testimony supports Deputy McElderry's findings. Dr. Milas opined "the surgery was performed as a direct result of the underlying condition being lit up." Arb. Dec. at 2 (citing Ex. 2). The cases relied upon by Anamosa in support of its contention that the burden was not met all involve the courts upholding the factual determination made by the commissioner. *See Plumrose USA v. Hathaway*, 844 N.W.2d 469 (Iowa Ct. App. Jan. 23, 2014) (affirming the commissioner's denial of benefits); *Miron Const.*, 815 N.W.2d at 410; (remanding to uphold the Commissioner's denial of benefits because it was supported by substantial evidence); *Musselman*, 154 N.W.2d at 128 (affirming the commissioner's denial of benefits for "substantial evidence and reasonable inferences drawn therefrom"). Giving the appropriate deference, this Court finds substantial evidence supports the Commissioner's findings. The record includes sufficient expert testimony that was properly weighed by the fact-finder providing substantial evidence to support the factual findings. As such, the Commission's decision is AFFIRMED.

Because the Court affirmed the decision of the Commissioner, the awards of temporary total disability benefits, permanent partial disability benefits, causally connected medical expenses, and costs were not erroneous and are affirmed. Anamosa did not appeal the extent of Nassif's industrial loss and Nassif did not cross appeal the issue. As such, this Court will not address this issue further.

The Decision of the Commissioner to deny the reimbursement of the IME fee was not cross-appealed by Nassif to this court. As such, this Court will not address this issue.

IT IS HEREBY ORDERED that the ruling of the Commissioner is **AFFIRMED**.
Costs are assessed to Petitioners.



State of Iowa Courts

Type: OTHER ORDER

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CVCV057375	ANAMOSA STATE PENITENTIARY ET AL VS MICHAEL NASSIF

So Ordered

A handwritten signature in cursive script, reading "Scott D. Rosenberg", is written over a horizontal line.

**Scott D. Rosenberg, District Court Judge,
Fifth Judicial District of Iowa**