IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CEMEN TECH, INC., **Employer,** **ACCIDENT FUND NATIONAL INSURANCE COMPANY,** **Insurer/Petitioners** **v.** **ROBERT BAILEY,** **Claimant/Respondent.**	**Case No. CVCV060463** **RULING ON PETITION FOR JUDICIAL REVIEW**

The above-captioned matter came before this Court for hearing on November 20, 2020. Petitioners, Cemen Tech, Inc. (Cemen) and Accident Fund National Insurance Company, were represented by attorney Laura Ostrander. Eric Loney appeared for Respondent Robert Bailey. Having entertained the arguments of counsel and reviewed the court file, including the briefs provided by the parties, the certified administrative record, and being otherwise fully advised in the premises, the Court now rules and, for the reasons stated herein, **DENIES** Petitioners' Petition for Judicial Review.

I. BACKGROUND FACTS AND PROCEEDINGS.

Robert Bailey was working as a welder/fabricator for Cemen on August 24, 2017. Bailey testified at the hearing before a Deputy Workers' Compensation Commissioner that on that date, while at work, he was welding on the inside of a bin when a "hot" wire poked through his welding glove and into in right index finger. Transcript (Tr.) at 12. He took the wire out of his finger, took his glove off, and immediately went and told his lead supervisor, Bo Seidenkranz, about his injury. Seidenkranz told Bailey he would report it, and if Bailey had any further issues to tell Production Manager Gary Neer or Michelle Eggleston in HR. *Id.* at 13-15.

Bailey testified that on August 25, 2017, he went to work despite the fact his finger was getting worse. It was "swelled up, got infected," and the infection moved down his finger and into his palm over the next few days. *Id.* at 15. On August 25, Neer spoke to Bailey about the injury because Seidenkranz had told him about it. Neer told Bailey that he had notified Eggleston about it because "it was work-related" and to let him know if he needed anything else. *Id.* Bailey further testified that on that same date he also told Neer and Seidenkranz he would probably go see a doctor about it either that day or the next. They said that was fine and to let them know so they could tell Eggleston. Bailey went to UnityPoint clinic on August 26, 2017, and saw Adam Andrews, D.O. The medical records show he stated a "red-hot metal wire [went] into his finger" and he received some antibiotics. Joint Exhibit (JE) 1-1.

Bailey returned to work on Monday, August 28, 2017, but the infection had become worse. He asked for permission to leave work early that day to see a doctor and returned to Dr. Andrews at UnityPoint. The medical records from that visit indicate the redness was "spreading from the finger to the palm of the hand," throbbing, and he had a fever. JE 1-3. Bailey was referred to the emergency room (ER) at Mercy Medical Center. In the ER he was seen by John Littler, M.D., who noted Baily had a puncture wound to his right index finger and "swelling diffusely from the tip of the finger to the base of thenar eminence."[1] JE 1-10. Bailey was then examined by hand surgeon Shane Cook, M.D. Dr. Cook determined that given the significance of the infection surgery was needed. He then performed surgery, with Bailey under general anesthesia, to remove infection from Bailey's finger and palm on August 29, 2017. JE 2 at 4-6; Claimant's Exhibit (CE) 4-2; Tr. at 29.

Bailey returned to work on August 30, 2017, with his right hand and index finger bandaged.

[1] The thenar eminence is the "fleshy, muscular mass on the palm at the base of the thumb." *Available at* https://medical-dictionary.thefreedictionary.com/thenar+eminence.

CE 4-3; Tr. at 18. Bailey testified that Seidenkranz saw his bandaged hand that day and Eggleston saw it that weekend (on or about September 2017) when she came and spoke to him. Tr. at 19. Eggleston asked what happened, Bailey told her he had been poked with a wire from a welding gun and notified Seidenkranz the day it happened. Eggleston said Neer had told her Bailey was going to the doctor for such. She told Bailey if he needed to go back to the doctor to let her know, the employer would pay for his time off, and he would not have to use his paid time off (PTO). *Id*. The next week Bailey had a follow up appointment with Dr. Cook on Tuesday, September 5, 2017. He provides an email from Eggleston, dated September 5, 2017, to Neer and Ken Jokerst stating that Bailey had a follow up appointment that day for "his finger and will be leaving at 1[:]45 pm. Please enter an end of day punch for him for 4[:]30 pm to regular time." CA 2-1. Dr. Cook recommended physical therapy. The Social History on the medical record of this encounter identified Bailey as a "self-employed welder." JE 2 at 8. Bailey testified he does not do welding on the side and does not own a welder. Tr. at 31.

Bailey incurred medical expenses from his injury and infection. The billing summary shows that his medical bills were paid with Medicaid, and his hospital bill of $20,083.11 had not been paid at the time of the agency hearing. JE 3. Bailey was terminated from employment by Cemen in February 2018 for matters unrelated to his hand/finger injury. Bailey admits he did not tell any of his medical providers that he was injured at work, and none of the medical records indicate he stated such. Tr. at 27-28; JE 1 and 2. At the agency hearing, Bailey denied telling anyone at Cemen he did not want to report a work injury and denied that he told the employer he injured his finger at home. Tr. at 30-31.

On March 7, 2018, Bailey emailed Eggleston to her inform her of his work injury and that he had informed Seidenkranz and Neer that same day, and Eggleston the next week. CE 2-2. On

that same date, Eggleston emailed Seidenkranz to ask if Bailey had reported an injury to him in August 2017. On March 9, 2018, Seidenkranz replied, "I do remember him having the weld wire poke through his glove but I can't remember what month it was so yes he did report it to me." CA 2-4. On March 12, 2018, Bailey was sent a letter by United Heartland, Cemen's third-party carrier as underwritten by Petitioner Accident Fund National Insurance Company, concerning his claim for workers' compensation. The letter stated they were in receipt of his claim for an injury on or around August 24, 2017, in which he had an injury to his "hand/finger that resulted in infection requiring medical treatment." Petitioners' Exhibit (PE) B-1. It went on to state, "You declined to file a worker's compensation claim for benefits at the time of the injury . . . it was not until after you were terminated for unrelated reasons, you advised your employer you wanted to file . . . ." *Id.* The letter then stated an injured employee is required to report an injury within 90 days of the date of injury alleged, and due to Bailey's late filing they were denying the claim. *Id.*

On September 7, 2018, Sunil Bansal, M.D., issued an independent medical examination (IME) report for Bailey. CE 1-7. Dr. Bansal stated Bailey injured his right index finger and hand while at work on August 24, 2017. *Id.* at 1-4, 1-6. He also noted that he now holds his tools without using his right index finger. *Id.* at 1-4. Dr. Bansal found that Bailey had numbness of his right index finger that extended into his palm, and he has decreased grip strength in his right hand. He also found that Bailey does not have full range of motion of his right index finger, he cannot make a full fist or flex it completely, and the finger was swollen. *Id.* at 1-5, 6. In addition, Dr. Bansal noted he would place a restriction of no lifting greater than 10 pounds with the right hand. *Id.* at 1-7. Based on such, Dr. Bansal assigned a 10 percent upper extremity impairment rating to Bailey's right hand. *Id.* at 1-6. Dr. Bansal billed Bailey $2,079.00 for the report and $559.00 for the examination. *Id.* at 1-10. Petitioners submitted several invoices for payment for impairment

ratings by other providers in other cases, with charges ranging from $150.00 to $500.00. PE H.

A First Report of Injury or Illness (FROI) was filed by Petitioners with the Iowa Workers' Compensation Commission.[2] It lists the date the employer had knowledge of the injury as August 24, 2017, and the date the claim administrator had knowledge as of March 9, 2018. CE 2-7. The FROI notes Bailey alleged he immediately reported the injury to his supervisor, but it could not be confirmed whether he reported that day or at a later date. However, it does not seem to challenge that it occurred while Bailey was at work, as it states the alleged injury was a weld wire that poked through his "work glove." Dean Wampler, M.D., performed a record review IME of Bailey for Petitioners on July 19, 2019. CE 3-6. Dr. Wampler was critical of Dr. Bansal's use of loss of grip strength as a means of determining Bailey's impairment rating. Dr. Wampler provided a 66 percent permanent partial impairment of Bailey's right index finger.

Bailey filed a Petition with the Iowa Workers' Compensation Commission seeking benefits from Petitioners. A hearing was held before a Deputy Commissioner on August 13, 2019, and the Deputy issued an Arbitration Decision on November 19, 2019.

Ryan LeRoque, HR Generalist at Cemen, testified at the agency hearing. He was asked by Cemen's counsel, "[W]hen the employer saw Mr. Bailey had a bandage on his hand, did the employer offer medical treatment under work comp if there actually had been a work comp injury?" LeRoque replied, "Yes." Tr. at 38. LeRoque also stated Bailey refused to file a workers' compensation claim and told the employer the injury happened at home. *Id.* at 39. However, on cross-examination LeRoque agreed he never talked to Bailey about his injury. *Id.* at 43. He also stated he was aware Eggleston offered to pay for Bailey's time off so he could attend his doctor's appointments. *Id.*

[2] It is noted the date on the copy of the FROI in the Certified Agency Record appears to be cut off. It shows it was in June but no day or year can be seen. However, it appears likely it was in June 2018.

The Deputy found Bailey's testimony was "consistent as compared to the evidentiary record, and his demeanor at the time of evidentiary hearing gave [the Deputy] no reason to doubt [Bailey's] veracity." Arbitration Decision (Arb. Dec.) at 3. The Deputy concluded Bailey injured his finger and hand, and such injury arose out of and in the course of his employment at Cemen. *Id.* at 8, 11. He also concluded the medical bills introduced in Joint Exhibit 3 were all due to Bailey's work-related injury, and as such Petitioners were to pay any outstanding medical bills therein. The Deputy noted Bailey did not tell his medical providers he had a work injury. However, based on the FROI, Bailey's credible testimony, Seidenkranz's email to Eggleston, and Eggleston allowing Bailey to attend his medical appointment without taking PTO, the Deputy concluded Petitioners had actual knowledge of Bailey's work injury on August 24, 2017. He noted even assuming Bailey said he did not want to file a workers' compensation claim, the employer still had notice of a work injury. As such, he determined Petitioners did not meet their burden to prove their notice defense. More specifically, the Deputy concluded the notice defense was "beyond the pale of reasonable argument. The notice defense by [Petitioners] does not appear to be in good faith." Arb. Dec. at 8.

The Deputy also concluded Petitioners ignored the results of their investigation when it was clear that Bailey provided timely notice of his work injury to his supervisors. Arb. Dec. at 10. In addition, the Deputy found Petitioners should have reevaluated the claim when facts came to light about the notice Bailey had provided; including when Seidenkranz acknowledged that Bailey had reported his injury, when Eggleston gave him time off for the injury, and when the FROI was filed. *Id.* Based on such, the Deputy determined that Petitioners were unreasonable in utilizing and continuing to utilize the notice defense. Thus, the Arbitration Decision concluded that Petitioners had no reasonable excuse not to pay benefits and Bailey was entitled to penalty benefits

in the amount of $5,334.09 "to deter such conduct" by Petitioners in the future. *Id.* at 10-11.

Finally, the Deputy concluded that under Iowa Code section 85.39 Bailey was not entitled to the cost of Dr. Bansal's IME examination because he obtained it before Petitioners retained Dr. Wampler. *Id.* at 12-13. However, under Iowa Administrative Code rule 876-4.33 Bailey was entitled to the cost of the preparation of Dr. Bansal's written IME report. *Id.* at 13. Therefore, using his discretion under this rule,[3] the Deputy concluded Dr. Bansal's fee was reasonable and ordered Petitioners to pay Bailey $2,079.00 for the cost of Dr. Bansal's report as well as the $100.00 filing fee. *Id.* He found that none of the invoices submitted by Petitioners appeared to be for comprehensive IMEs. *Id.* at 7.

Based on all of the above, the Deputy ultimately ordered Petitioners to pay 20.9 weeks of permanent partial disability benefits at the rate of $501.44, $5,334.09 in penalty benefits, all unpaid medical expenses in Joint Exhibit 3, and $2,179.00 in costs.

Petitioners appealed the Arbitration Decision to the Iowa Workers' Compensation Commissioner on November 27, 2019. The Petitioners alleged the Deputy erred in finding: (1) Bailey sustained a work-related injury; (2) the Petitioners failed to prove their notice defense; (3) Bailey sustained injury to his finger and hand, as opposed to just his finger; (4) Bailey is entitled to penalty benefits; (5) Bailey is entitled to past medical expenses; and (6) in ordering Petitioners to pay any of Bailey's IME costs. Following the Commissioner's de novo review, he entered his Appeal Decision on July 8, 2020. The Commissioner concluded the Deputy provided a well-reasoned analysis of all issues raised, and the Commissioner reached the same analysis, findings, and conclusions as the Deputy. Accordingly, the Commissioner affirmed and adopted as the final

[3] It is noted the Arbitration Decision states that award of the costs were being made under Iowa Administrative Code rule 876-4.22. However, as this provision is not relevant to the matters at bar, this Court concludes that was a scrivener's error and the Commission meant the costs were ordered under rule 876-4.33.

agency decision all portions of the Deputy's Arbitration Decision that related to the issues raised on intra-agency appeal.

Petitioners appealed the Commissioner's Appeal Decision to this Court on September 9, 2020. They contend the Commissioner erred in finding and concluding: (1) Bailey sustained an injury arising out of and in the course of employment at Cemen; (2) the injury was to the right hand as well as the right index finger; (3) Bailey provided Cemen with actual notice of his injury and as such they did not meet their burden to prove the notice defense; (4) Bailey was entitled to any IME expenses; and (5) Bailey was entitled to penalty benefits. The Court will address these claims in a somewhat different order.

II. SCOPE AND STANDARD OF REVIEW.

The Iowa Administrative Procedure Act, Iowa Code chapter 17A, governs the scope of this Court's review in workers' compensation cases. Iowa Code § 86.26 (2019); *Meyer v. IBP, Inc*., 710 N.W.2d 213, 218 (Iowa 2006). "Under the Act, we 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*, 710 N.W.2d at 218. A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. *See id*. § 17A.19(10). The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co*., 649 N.W.2d 744, 748 (Iowa 2002).

> If the claim of error lies with the agency's findings of *fact,* the proper question on review is whether substantial evidence supports those findings of fact. If the findings of fact are not challenged, but the claim of error lies with the agency's interpretation of the *law,* the question on review is whether the agency's

> interpretation was erroneous, and we may substitute our interpretation for the agency's.

Meyer, 710 N.W.2d at 219 (citations omitted).

Factual findings regarding the award of workers' compensation benefits are within the Commissioner's discretion, so the Court is bound by the Commissioner's findings of fact if they are supported by substantial evidence. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464-65 (Iowa 2004), *superseded by statute on other grounds*, 2004 Iowa Acts 1st Extraordinary Sess. ch. 1001, §§ 12, 20, *as recognized in JBS Swift & Co. v. Ochoa*, 888 N.W.2d 887, 890, 898–900 (Iowa 2016). Substantial evidence is defined as evidence of the quality and quantity "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 serious and of great importance." Iowa Code § 17A.19(10)(f)(1); *Mycogen*, 686 N.W.2d at 464. The application of the law to the facts is also an enterprise vested in the Commissioner. *Mycogen*, 686 N.W.2d at 465. Accordingly, the Court will reverse the Commissioner's application of law to the facts only if it was "irrational, illogical, or wholly unjustifiable." *Id*.; Iowa Code § 17A.19(10)(l). This standard requires the Court to allocate some deference to the Commissioner's application of law to the facts, but less than it gives to the agency's findings of fact. *Larson Mfg. Co. v. Thorson,* 763 N.W.2d 842, 850 (Iowa 2009).

On judicial review the question is not whether the evidence supports a finding different from the Commissioners, but whether the evidence supports the findings the commission actually made. *Ward v. Iowa Dept. of Trans.,* 304 N.W.2d 236, 237-38 (Iowa 1981). The adequacy of the evidence in the record to support a particular finding of fact must be judged in light of all relevant evidence in the record. This includes any determinations of veracity and credibility by the presiding officer who personally observed the demeanor of the witnesses. Iowa Code

§17A.19(10)(f)(3). The workers' compensation law should be liberally construed to accomplish the object and purpose of the legislation: to benefit the worker and his dependents. *Dillinger v. City of Sioux City*, 368 N.W.2d 176, 180 (Iowa 1985).

III. MERITS.

A. Notice Defense.

Petitioners contend the Commissioner's determination that they did not meet their burden of proof on their 90-day-notice defense is not supported by substantial evidence because Bailey provided no credible evidence to support the employer knew of the injury and that it might be work related within 90 days of the injury. They also allege his application of the fact to the law in this regard is irrational, illogical, or wholly unjustifiable.

Under Iowa Code section 85.23, compensation is not allowed unless the employer either has actual knowledge of the injury or the employee has notified the employer of the injury within ninety days of the date of the occurrence of the injury. The employer has the burden of proving this affirmative defense. *DeLong v. Iowa State Highway Comm'n,* 299 Iowa 700, 703, 295 N.W. 91, 92 (1940); *Pella Corp. v. Mennenga*, 753 N.W.2d 18 (Table), 2008 WL 2200095, *5 (Iowa Ct. App. May 29, 2008). The purpose of the notice requirement is to enable the employer to investigate the facts relating to the injury while the information is fresh. *Dillinger v. City of Sioux City,* 368 N.W.2d 176, 180 (Iowa 1985). The test of whether an employer has actual knowledge is based on whether a "reasonably conscientious employer had grounds to suspect the possibility of a potential compensation claim." *Robinson v. Dept. of Trans.,* 296 N.W.2d 809, 811 (Iowa 1980) *superseded on other grounds by Orr v. Lewis Cent. Sch. Dist.,* 298 N.W.2d 256 (Iowa 1980) (emphasis added) (citation omitted).

It is the Commissioner's duty as the trier of fact to determine the credibility of witnesses.

See Arndt v. City of LeClaire, 728 N.W.2d, 389, 394-95 (Iowa 2007). Under a substantial evidence review it is not the task of the reviewing court to weigh the evidence or the credibility of witnesses. *Id.* at 394 (citing *Tim O'Neill Chevrolet, Inc. v. Forristall,* 551 N.W.2d 611, 614 (Iowa 1996)). The Court gives deference to the Commissioner's credibility findings and will affirm if there is substantial evidence in the record to support these findings. *See Clark v. Iowa Dep't of Revenue & Fin.,* 644 N.W.2d 310, 315 (Iowa 2002); *see also* Iowa Code § 17A.19(10)(f)(3) (noting the adequacy of the evidence must be judged in light of "determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses."). The reviewing court only determines whether substantial evidence supports a finding "*according to those witnesses whom the [commissioner] believed.*" *Tim O'Neill Chevrolet, Inc.,* 551 N.W.2d at 614 (emphasis added).

Here, the Deputy found Bailey to be credible because his testimony was consistent with the evidentiary record and his demeanor at the agency hearing gave him no reason to doubt his veracity. Such determinations are fully within his purview as the person who personally observed the witness. The Commissioner adopted these findings in full. More specifically, the Commissioner found Bailey credibly testified that he showed and informed his direct supervisor, Seidenkranz, about the injury while still at work immediately after the injury occurred on August 24, 2017. Bailey testified he and Seidenkranz discussed being poked while welding all the time, that he figured he should tell him because it happened at work, and that Seidenkranz stated he should report any further issues to Production Supervisor Neer or Eggleston. (Tr. at 14). This testimony was supported by an email from Seidenkranz to Eggleston on March 9, 2018, wherein he confirmed he was notified of such by Bailey. CE 2-4. The Commissioner further found Bailey credibly testified that he told Neer about the injury on August 25, who had come to talk to him about it because Seidenkranz had also informed him. Neer told Bailey to tell Eggleston "since it

was a work-related injury." Tr. at 15; Arb. Dec. at 2.

The Commissioner also found Bailey testified he went to work with his hand wrapped on August 30, 2017, Eggleston asked him what happened, and he told her of his work injury and that he had notified Seidenkranz of it the day it occurred. Eggleston said that if he had to go back to see the doctor to let her know and Cemen would pay for the time off, he would not have to use PTO. Tr. at 19; Arb. Dec. at 3. This was supported when Eggleston sent an email on September 5, 2017, allowing Bailey to attend a follow up medical appointment for his finger as regular time. CE 2-1. The Commissioner found this to be evidence the employer was treating the injury as a work injury. Finally, the Commissioner noted the FROI stated that the employer knew of the injury on August 24, 2017. Arb. Dec. at 8. The FROI notes Bailey alleged he immediately reported the injury to his supervisor, but that could not be confirmed. CE 2-7; Arb. Dec. at 8.

The Commissioner also noted there was some testimony that Bailey may have said he did not want to file a workers' compensation claim. Arb. Dec. at 8. However, he specifically stated he was not making that finding and apparently found Bailey's testimony denying he ever said this to be more credible. Tr. at 30-31; Arb. Dec. at 8. Moreover, he determined that even if Bailey had said this such is an entirely separate question from whether the employer had notice of a work injury. Arb. Dec. at 8.

Based on all of the above, the Court concludes there is substantial evidence in the record to support the Commissioner's determination that Bailey's testimony is credible. More specifically, it is credible that he timely informed two supervisors and HR at Cemen that he had sustained a work injury and as such Petitioners had actual knowledge that Bailey was injured at work within 90 days of the injury. The Court further concludes the Commissioner's application of these facts to the law was not irrational, illogical, or wholly unjustifiable. Accordingly, the

Commissioner did not err in concluding Petitioners did not meet their burden of proof that they did not have notice within 90 days of the injury because they had actual knowledge of the injury and that may have been work related.

B. Did the Injury Arise Out of and in the Course of Employment and What was the Extent of the Injury?

A claimant seeking workers' compensation benefits has the burden of proving by a preponderance of the evidence that the injury on which he or she bases a claim arose out of and in the course the claimant's employment. *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 652 (Iowa 2000); *Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996). Petitioners contend there was not substantial evidence to support the Commissioner's determination that Bailey met his burden to show his injury was work-related because none of the medical records from the treating physicians indicate that Bailey's injury was work-related. They also allege the injury was limited to the right index finger and did not include the right hand.

Bailey testified he injured his finger at work, it became infected, the infection spread down into his palm, and due to the infection he had to have surgery on both his finger and palm to clean the infection. In support, Bailey provided photographs of his right hand post-surgery clearly showing incisions to both his finger and palm. CE 4-2. He also provided the medical notes from his return visit to Dr. Andres on August 28, 2017, which indicate the redness and swelling was spreading from his finger to the palm of his hand, and notes from his ER visit that state there was swelling in the palm. JE 1-3 and 1-10.

The Commissioner found that Bailey did not tell his doctor on August 24, 2017, that he had a work injury. Arb. Dec. at 4. However, the Commissioner clearly found Bailey's testimony that the injury occurred at work and he informed his employer of such to be credible. The

Commissioner acknowledged the testimony from LeRoque that Bailey said he did not want to file a workers' compensation claim and that the injury occurred at home. Tr. 38-39; Arb. Dec. at 4-5. However, based on LeRoque's somewhat contradictory testimony on cross-examination and his determination Bailey was credible, the Commission found Bailey's testimony that he never said he did not want to report a work injury and he never told his employer he hurt his hand at home to be more credible. Tr. at 30-31. As detailed above, the Court concludes there is substantial evidence in the record to support the Commissioner's credibility determination.

Finally, the Commissioner gave more weight to Dr. Bansal's opinion over Dr. Wampler's, in part because Dr. Bansal actually examined Bailey. Arb. Dec. at 9. The agency, as the fact finder, determines the weight to be given to any expert testimony. *Sherman v. Pella Corp*., 576 N.W.2d 312, 321 (Iowa 1998); *Dodd v. Fleetguard, Inc.,* 759 N.W.2d 133, 138 (Iowa Ct. App. 2008). Such weight depends on the accuracy of the facts relied upon by the expert and other surrounding circumstances. *Id*. The commissioner may accept or reject the expert opinion in whole or in part. *Sherman,* 576 N.W.2d at 321.

> Making a determination as to whether evidence "trumps" other evidence or whether one piece of evidence is "qualitatively weaker" than another piece of evidence is not an assessment for the district court or the court of appeals to make when it conducts a substantial evidence review of an agency decision.

Arndt, 728 N.W.2d at 394.

Dr. Bansal's IME stated that Bailey injured his right index finger at work, it became infected, and the infection spread down into his right palm. CE 1-4. He further found Bailey had numbness of his right index finger that extended into his palm, he did not have full range of motion of his right index finger, and he could make a full fist or flex completely on his right side. *Id.* at 1-5, 1-6. In addition, Dr. Bansal opined there should be a restriction on Bailey of not lifting greater than 10 pounds with the right hand. *Id.* at 1-7. Evidence in support of the Commissioner's decision

is not insubstantial merely because it would have supported contrary inferences; nor is evidence insubstantial because of the possibility of drawing two inconsistent conclusions from it. *City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 536 (Iowa 1996). Furthermore, when the Court reviews factual questions delegated by the legislature to the Commissioner such as the one here, the question before the Court is not whether the evidence might support different findings than those made by the Commissioner, but whether the evidence supports the findings actually made. *St. Luke's Hosp.,* 604 N.W.2d at 649. Thus, although there may be evidence here to support a different finding, there clearly is evidence in the record to support the findings actually made by the Commissioner that Bailey has shown he injured both his finger and hand and such injury arose out of and in the course of his employment.

Accordingly, the Court concludes there is substantial evidence in the record to support the Commissioner's conclusion that Bailey has met his burden to show his injury was to both his right finger and hand and that such injury arose out of and in the course of his employment at Cemen. The Commissioner's determination of such was not irrational, illogical, or wholly unjustifiable.

C. Penalty Benefits.

Petitioners next contend there is not substantial evidence in the record to support the Commissioner's award of penalty benefits. Our review of the Commissioner's fact findings supporting the denial of penalty benefits is for substantial evidence. *See* Iowa Code § 17A.19(10)(f) (2009); *Schadendorf v. Snap–On Tools Corp.,* 757 N.W.2d 330, 335 (Iowa 2008) (reviewing agency findings supporting penalty decisions for substantial evidence); *City of Madrid v. Blasnitz,* 742 N.W.2d 77, 80 (Iowa 2007) ("The sole issue on appeal is whether the record before the commissioner provides substantial evidence to support an award of penalty benefits.").

Iowa Code section 86.13(4)(a) provides,

> If a denial, delay in payment, or termination of benefits occurs without reasonable or probable cause or excuse known to the employer or insurance carrier at the time of the denial, delay in payment, or termination of benefits, the workers' compensation commissioner shall award benefits in addition to those benefits payable under this chapter or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were denied, delayed, or terminated without reasonable or probable cause or excuse.

This section entitles an employee to penalty benefits unless the employer establishes reasonable and probable cause or excuse for delay, denial, or termination of benefits. *See Robbennolt v. Snap-On Tools Corp*., 555 N.W.2d 229, 236-37 (Iowa 1996). In the absence of such proof by the employer, penalty benefits are mandatory. *Id.* A reasonable cause or excuse exists if the employer had a reasonable basis to contest the employee's entitlement to benefits. *Christensen v. Snap-On Tools Corp*., 554 N.W.2d 254, 260 (Iowa 1996). A "reasonable basis" for denial, delay, or termination of benefits exists if the claim is "fairly debatable." *See id*. Whether the issue was fairly debatable turns on whether there was a disputed factual issue that, if resolved in favor of the employer, would have supported the employer's denial of compensability." *Gilbert v. USF Holland, Inc.,* 637 N.W.2d 194, 199 (Iowa 2001). An employer's bare assertion that a claim is "fairly debatable" does not make it so. *Meyers v. Holiday Express Corp.,* 557 N.W.2d 502, 505 Iowa 1996), *abrogated on other grounds by Keystone Nursing Care Center v. Craddock,* 705 N.W.2d 299, 308-09 (Iowa 2005). The employer must assert facts upon which the commissioner could reasonably find the claim was "fairly debatable." *Id.*

"A denial may be supportable at the time it is made but later lacks a reasonable basis in light of subsequent information. In other words, a continued delay in payment [of benefits] may be unreasonable even though the original denial was not." *Squealer Feeds v. Pickering*, 530 N.W.2d 678, 683 (Iowa 1995), *abrogated on other grounds by Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38 (Iowa 2004). Any documents showing new information

coming to the attention of Petitioners after their initial denial of benefits would be relevant to whether it was reasonable for them to persist in denial of benefits. *See id.*

The Commissioner concluded Petitioners failed to reevaluate Bailey's claim when they received new evidence or facts that Bailey had in fact provided the employer with notice of his injury. This included when Eggleston gave Bailey time off for his work-related injury on September 5, 2017, when Seidenkranz confirmed that Bailey had reported the claim to him in March 2018, and when the FROI was filed and showed the employer had notice as of August 24, 2017. As set forth above, the Commissioner found that Bailey's testimony was consistent with the evidentiary record and found him to be credible. Based on this, the Commissioner determined Bailey had provided his supervisors and HR at Cemen with timely notice of his injury and that such was work related. Therefore, he determined Petitioners had actual knowledge that Bailey timely reported his injury and as such they could not prove their notice defense. Based on such, the Commissioner concluded Petitioners were unreasonable in utilizing the notice defense and continuing to do so at the agency hearing. Accordingly, the Commissioner concluded Petitioners had no reasonable excuse not to pay Bailey benefits and awarded him $5,334.09, 50 percent of the past due amount of permanent partial disability benefits.

This Court concluded above there is substantial evidence to support the Commissioner's credibility determination. More specifically, Bailey's testimony that he timely informed his employer of his work-related injury and his denial that he told the employer he injured himself at home was found by the Commissioner to be credible and given more weight than Petitioners' contradictory allegations. Based on such, the Court also concludes there is substantial evidence to in the record to support the Commissioner's determination that Petitioners had no reasonable excuse to deny Bailey benefits and failed in their duty to reevaluate his claim when new facts came

to light about the notice Bailey provided.

D. Medical Expenses.

Finally, Petitioners allege there is not substantial evidence in the record to support the Commissioner's award of IME reimbursement to Bailey.

Iowa Code section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice when the employer-retained physician has previously evaluated permanent disability and the employee believes that evaluation is too low. This section also states that the "determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted." Iowa Code § 85.39(2). Our supreme court has determined that this section only allows the employee to obtain an IME at the employer's expense if an evaluation of permanent disability has been made by an employer-retained physician and the employee is dissatisfied with that evaluation. *Des Moines Area Reg'l Transit Auth. v. Young,* 867 N.W.2d 839, 846-47 (Iowa 2015).

However, *Young* went on to hold that in cases where reimbursement for the IME medical evaluation is not allowed under Iowa Code section 85.39, the Commissioner can still reimburse claimant expenses associated with the preparation of the written IME report as a cost under Iowa Administrative Code rule 876-4.33. *Young,* 867 N.W.2d at 846-47. Rule 876-4.33 states, in relevant part,

> Costs 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, including convenience fees incurred by using the WCES payment gateway, and (8) costs of persons reviewing health service disputes. . . . Costs are to be assessed at the discretion of the deputy commissioner or workers' compensation commissioner hearing the case unless otherwise required by the Iowa Rules of Civil Procedure governing discovery.

Bailey obtained an IME and rating from Dr. Bansal *before* Petitioners retained Dr. Wampler to provide a record review and rating on Bailey. Therefore, under *Young* the Commissioner correctly determined Bailey was not entitled to the $559.00 Dr. Bansal charged for his physical examination. Petitioners submitted several invoices concerning payments for rating opinions, ranging from $150.00 to $500.00, to show typical fees charged by medical provider to perform impairment ratings in the local area where the examination is conducted. PE H. *See* Iowa Code §85.39(2).

Using his discretion under Iowa Administrative Code rule 876-4.33, the Commissioner concluded Bailey was entitled to the cost of the IME report prepared by Dr. Bansal, the cost billed by Dr. Bansal for preparing the report ($2,079.00) was reasonable, and as such ordered Petitioners to pay this amount plus the $100 filing fee. CE 1-10; Arb. Dec. at 13. The Commissioner found that none of the invoices submitted by Petitioners appeared to be for a comprehensive IME, presumably in contrast to the one performed by Dr. Bansal. Arb. Dec. at 7. The invoices are essentially one-page each showing what appears to be the flat fee charged by various organizations and providers for giving impairment ratings. They did not indicate if these initial flat fees would be more if they had provided the same type of comprehensive IME report as Dr. Bansal. Accordingly, the Court concludes there is substantial evidence in the record to support the Commissioner's discretionary award of costs. It further concludes this determination was not irrational, illogical, or wholly unjustifiable.

IV. CONCLUSION AND DISPOSITION.

For all of the reasons set forth above, the Court concludes there was substantial evidence in the record to support the Commissioner's findings that (1) Bailey timely provided the employer with actual knowledge of his injury and as such Petitioners did not meet their burden to show a notice defense, (2) Bailey met his burden to show he sustained an injury to his finger and hand arising out of and in the course of his employment, (3) Bailey should be awarded penalty benefits because Petitioners' notice defense argument was unreasonable and they did not reevaluate their denial of his claim when it received new information, and (4) in the Commissioner's discretion Bailey was entitled to reasonable costs for the IME report of $2,179.00. The Court further concludes none of the Commissioner's application of the law to these factual findings was irrational, illogical, or wholly unjustifiable. Accordingly, Petitioners' Petition for Judicial Review is hereby **DENIED.** Costs are taxed to Petitioners.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV060463	CEMEN TECH INC ET AL VS ROBERT BAILEY

So Ordered

Robert B. Hanson

Robert B. Hanson, District Court Judge,
Fifth Judicial District of Iowa