

**IN THE COURT OF APPEALS OF IOWA**

No. 9-024 / 08-0636  
Filed March 11, 2009

**KIMBERLY BOWN,**  
Plaintiff-Appellant,

**vs.**

**HANDY INDUSTRIES, L.L.C.,**  
Employer-Appellee,

**and**

**ZENITH INSURANCE COMPANY,**  
Insurance Carrier-Appellee.

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Appeal from the Iowa District Court for Marshall County, David R. Danilson, Judge.

A workers' compensation claimant appeals from the decision dismissing her petition for judicial review. **AFFIRMED.**

Joanie Grife of Bennett, Steffens & Grife, P.C., Marshalltown, for appellant.

Jean Dickson of Betty, Neuman & McMahon, P.L.C., Davenport, for appellees.

Considered by Sackett, C.J., and Potterfield and Mansfield, JJ.

**MANSFIELD, J.**

This is an appeal from a dismissal of a petition for judicial review of a workers' compensation award. Kimberly Bown sustained a work-related injury while employed by Handy Industries, L.L.C. on August 1, 2002. She subsequently received workers' compensation benefits. However, Bown contends that the commissioner should have awarded her benefits for injuries to her right shoulder, in addition to her right elbow. Bown also contends that in awarding permanent partial disability benefits for the right elbow injury, the commissioner erroneously allowed credit for certain healing period benefits that had been previously paid to her. For the reasons set forth herein, we affirm.

**I. Background Facts & Proceedings**

Bown began working in 2000 for Handy Industries, a company that makes truck parts and accessories, including tailgates. One of Bown's job duties was operating a grinder, which is a large vibrating disk, to "grind tailgates," i.e., to round out their welds and smooth their surfaces.

On August 1, 2002, Bown sustained a work-related injury. She reported pain in her right elbow, and also some mild right shoulder pain. She was diagnosed with recurrent epicondylitis (inflammation of the elbow joint). On September 2, 2002, she returned to work without restrictions, but did not engage in grinding activities again until December 2. At that time, Bown experienced pain again. She was placed on a work restriction to avoid grinding activities. The employer had no work available within her restrictions. Her last day of work with Handy Industries was December 5, 2002.

Bown received healing period benefits beginning December 6, 2002. Meanwhile, she was treated by Dr. Bruce Murphy. As noted by Dr. Murphy, Bown had a previous history of a work-related right shoulder injury. While employed by the Iowa Veterans Home in the late 1980's, Bown had been diagnosed with an impingement syndrome of the right shoulder. She had undergone surgery for that condition. On April 26, 1989, she entered into workers' compensation settlement with the State, under which it was agreed that she had a twenty-percent permanent partial disability to the body as a whole. Bown received a full commutation of benefits under that settlement.

Despite her prior history of right shoulder injury, Dr. Murphy concluded on March 13, 2003, that Bown's EMG's in this area were "normal." After reviewing a videotape of Bown's job at Handy Industries, he concluded that it placed stress "predominantly on the elbow, forearm and wrist and occasionally at the shoulder. The grinding unit produces marked vibration and is often operated at very awkward angles of the elbow and wrist."

On May 2, 2003, Dr. Murphy performed a surgical release of the ulnar nerve at the elbow, also known as a cubital tunnel release. Dr. Murphy determined Bown reached maximum medical improvement on August 28, 2003. Bown was given restrictions of no lifting over thirty pounds and no use of vibrating tools. Dr. Murphy found Bown had a four percent permanent impairment to the right upper extremity.

The employer paid healing period benefits from December 6, 2002, until October 18, 2003. Thereafter, in accordance with Dr. Murphy's rating of four

percent permanent impairment, the employer paid permanency benefits for ten weeks from October 19, 2003, through December 27, 2003.

Bown is a right-handed bowler who participated in a bowling league. She admits she bowled throughout 2003, although she maintains she bowled with her left hand.

On October 30, 2003, approximately six months after the elbow surgery, Bown saw Dr. Murphy, complaining of shoulder pain and headaches radiating from her head down into her arm. Dr. Murphy determined the shoulder pain “is most likely unrelated to the cubital tunnel release.” He recommended an MRI to look at the cervical spine and the brachial plexus, although nothing remarkable was found.

In January 2004, Bown underwent an independent medical examination arranged by her attorney with Dr. Keith Riggins. Dr. Riggins noted that “Ms. Bown reports the presence of aching pain extending throughout the entirety of the right upper extremity, being most severe at the elbow, extending proximally and distally in the extremity from the elbow.” Dr. Riggins found that Bown had full and complete range of motion in the shoulder. He diagnosed her as having “[p]ain right upper extremity, etiology undetermined.” Ultimately, after review of additional medical records, Dr. Riggins rated Bown as having a three percent permanent impairment of the right upper extremity due to residuals of her right cubital tunnel syndrome.

In March 2004, Handy Industries’ compensation carrier scheduled Bown for an independent medical examination with Dr. Gary Skaletsky. Dr. Skaletsky concluded that “there has not been any injury as the basis for Ms. Bown’s

complaints, from July 2002 to the present; this includes acute or cumulative.” Dr. Skaletsky stated “there is no objective clinical or diagnostic study to support that these [work] activities caused any injury or pathology.” Dr. Skaletsky believed Bown demonstrated symptom magnification. He determined that other than Bown’s subjective complaints of pain, her examination was entirely normal. Also, an EMG and nerve conduction studies were all normal. Dr. Skaletsky concluded that “there is no anatomic or physiologic basis for the ongoing complaints of right upper extremity pain.”

Bown then saw Dr. Shahin Bagheri in October 2004. A new MRI taken at Dr. Bagheri’s direction indicated a partial tear in the rotator cuff of the right shoulder. Dr. Bagheri referred Bown to an orthopedic surgeon, Dr. Daniel Fabiano, who performed surgery on November 3, 2004. Dr. Fabiano gave the opinion that Bown’s injury was work-related and attributable to her grinding tailgates at Handy Industries. He determined she should have a fifteen percent impairment of the right upper extremity, which would translate to nine percent of the whole person.

At the request of the employer, Bown was also examined by Dr. Jerry Jochims, who stated he did not believe Bown had a true shoulder injury, and that Bown had magnified her symptoms of shoulder dysfunction. He found that her shoulder complaints were not work-related issues. Dr. Jochims stated:

I believe that the shoulder is not compensable to the original injury as described in August of 2002 and the late presentation of surgical intervention further leads me to believe that there is not a causal relationship to her 2002 injury.

Bown had limited employment after leaving Handy Industries. She worked for six weeks at Pioneer Hi-Bred in September–October 2004, and then approximately a year later she worked one month as a dishwasher in a restaurant.

Bown filed a claim for workers' compensation benefits from Handy Industries. A deputy workers' compensation commissioner determined Bown had a permanent partial injury to her right elbow caused by her work-related injury on August 1, 2002. The deputy assigned her a permanent partial disability rating of ten percent to the right arm. Bown was awarded twenty-five weeks of benefits. The deputy found, however, that the right torn rotator cuff was not causally related to the work injury of August 1, 2002. Accordingly, Bown was not eligible for disability benefits or healing period benefits related to her shoulder.

The original decision of the deputy stated that Bown was entitled to “twenty-five (25) weeks of permanent partial disability benefits . . . commencing from December 6, 2002”—the date when Bown's employment ended and her healing period benefits commenced. The deputy went on to say that “Defendants shall take credit for the ten weeks of benefits previously paid to claimant.” However, Bown had actually received over a year of benefits, from December 6, 2002, to December 27, 2003. Healing period benefits had been paid from December 6, 2002, until October 18, 2003; permanent partial disability benefits from October 19, 2003, until December 27, 2003.

The employer sought clarification on this issue. The employer pointed out that the credit should be in excess of ten weeks and should cover a time period going back either to August 28, 2003, the date when Bown reached maximum

medical improvement, or to December 6, 2002, the date mentioned by the deputy in her decision. In response to the employer's motion, the deputy modified the sentence regarding the appropriate credit to read, "Defendants shall take credit for *all* benefits previously paid to claimant" (emphasis added).

The workers' compensation commissioner affirmed and adopted the decision of the deputy.

On judicial review, the district court determined the commissioner's decision to deny benefits for the shoulder injury was supported by substantial evidence. The court also rejected Bown's argument that the employer should be entitled to credit for only ten weeks of benefits, from October 19, 2003, through December 27, 2003. The court noted that the corrected decision clarified that the employer was to take credit for "all benefits previously paid," which was consistent with the commissioner's determination that December 6, 2002, was to be the commencement date for permanent partial disability benefits.

This appeal followed.

## **II. Standard of Review**

Our review is governed by the Iowa Administrative Procedure Act. Iowa Code ch. 17A (2005); *Acuity Ins. v. Foreman*, 684 N.W.2d 212, 216 (Iowa 2004). We review the district court's decision by applying the standards of section 17A.19 to the agency decision to determine if our conclusions are the same as those reached by the district court. *University of Iowa Hosps. & Clinics v. Waters*, 674 N.W.2d 92, 95 (Iowa 2004).

### III. Substantial Evidence

Bown contends the record lacks substantial evidence to support the commissioner's finding that her shoulder injury was not causally related to her work injury on August 1, 2002. She states the medical evidence supports her claim that the shoulder injury arose out of and in the course of her employment with Handy Industries. She points out that she complained of shoulder pain immediately after the injury, and that she often mentioned her shoulder while receiving treatment for her elbow.

Under section 17A.19(10)(f), we may grant judicial relief from agency action if the agency decision is:

Based upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole. For purposes of this paragraph, the following terms have the following meanings:

(1) "*Substantial evidence*" means the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance.

It is for the commissioner, as the finder of fact, to determine the weight to be afforded expert testimony. *Terwilliger v. Snap-On Tools Corp.*, 529 N.W.2d 267, 272 (Iowa 1995). We are bound by the commissioner's factual findings if they are supported by substantial evidence in the record as a whole. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). Evidence is substantial when a reasonable person could accept it as adequate to reach the same finding. *Asmus v. Waterloo Cmty Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). The question is not whether we agree with the commissioner's findings, but whether



there is substantial evidence in the record to support the findings made by the commissioner. *Meyer*, 710 N.W.2d at 218. Although we may be able to draw inconsistent conclusions from the same evidence, this does not mean the commissioner's conclusions were unsupported by substantial evidence. *Murillo v. Blackhawk Foundry*, 571 N.W.2d 16, 17 (Iowa 1997).

Viewing the record as a whole, substantial evidence supports the commissioner's determination that Bown did not establish a connection between the rotator cuff injury that was diagnosed in October 2004 and her August 1, 2002 work injury. Only one medical expert—Dr. Fabiano—offered an opinion that the two were related. As the commissioner pointed out, Dr. Fabiano's initial examination of Bown occurred over two years after the work injury. Other physicians who had examined or treated Bown in the interim, such as Drs. Murphy, Riggins, and Skaletsky, were unable to find any objective signs of a shoulder injury. Furthermore, Dr. Jochins, who examined Bown around the same time as Dr. Fabiano, specifically disagreed with his finding of a work-related shoulder injury.

#### **IV. Credit for Benefits**

On appeal, Bown argues that the commissioner erred in determining that permanent partial disability benefits should commence as of December 6, 2002, and by giving the employer credit for *all* benefits previously paid. She asserts that maximum medical improvement was not attained until August 28, 2003. She also asserts that no credit should be given for healing period benefits paid even after that date because Handy Industries did not provide notice of the conversion to permanent partial disability payments until October 2003. Thus, Bown

contends that no more than ten weeks of credit (October 19, 2003, to December 27, 2003) should have been allowed.

After careful consideration, we agree with Handy Industries that Bown's present arguments were not preserved for appeal. See *Tussing v. George A. Hormel & Co.*, 417 N.W.2d 457, 458 (Iowa 1988) ("Contentions not raised at the agency hearing or in district court may not be argued before us for the first time."). Before the district court, Bown did not challenge the December 6, 2002 permanent partial disability commencement date. Given that commencement date, as the district court noted, it was appropriate for the employer to receive credit for all benefits previously paid, unless the employer failed to exercise "good faith"—another argument that was not developed by Bown below. See Iowa Code § 85.34(4). We note also that Bown's brief does not "state how this issue was preserved for review, with references to the places in the record where the issue was raised and decided." See Iowa R. App. P. 6.14(1)(f).

For the foregoing reasons, we affirm the district court.

**AFFIRMED.**