

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SHANE A. SCHOENBERGER

Claimant/Petitioner,

vs.

ZEPHYR ALUMINUM PRODUCTS,

Employer/Respondent,

**ACUITY A MUTUAL INSURANCE
COMPANY,**

Insurance Carrier/Respondent.

Case No. CVCV063079

**RULING ON PETITION FOR
JUDICIAL REVIEW**

On August 12, 2022, the above-captioned matter came before this Court for hearing. Petitioner, Shane A. Schoenberger, appeared through attorney Thomas M. Wertz. Respondents Zephyr Aluminum Products (“Zephyr”) and Acuity, A Mutual Insurance Company (“Acuity”) were represented by attorney Stephanie L. Marett. After hearing the arguments of Counsel and reviewing the court file, including the briefs filed by the parties and the Certified Administrative Record, the Court enters this Order.

I. BACKGROUND FACTS AND PROCEEDINGS

Shane A. Schoenberger filed a petition in arbitration with the Iowa Workers’ Compensation Commission seeking workers’ compensation benefits from Zephyr, his employer, and Acuity as a result of a stipulated injury sustained on September 18, 2017. Certified Administrative Record, (“C.A.R.”), Part 2, p. 14. An Arbitration Decision was filed by a Deputy Commissioner on June 21, 2021. *Id.* p. 22.

The Deputy determined that Petitioner’s injury was to his left shoulder, including his rotator cuff, supraspinatus tendon, and biceps long head tendon. *Id.* p. 18. As such, Petitioner’s left

shoulder injury was determined to be a scheduled shoulder injury and was limited to a functional impairment rating per Iowa Code section 85.34(2)(n). *Id.* The Deputy reached this determination by relying on the Commissioner's appeals decisions in *Deng v. Farmland Foods, Inc.*, File No. 5061883 (App. Dec'n Sept. 29, 2020), *Chavez v. MS Technology, LLC*, File No. 506270 (App. Dec'n Sept. 30, 2020), and *Smidt v. JKB Restaurants, LC*, File No. 5067766 (App. Dec'n Dec. 11, 2020). In *Deng*, *Chavez*, and *Smidt*, the Commissioner determined that all body parts Petitioner injured in this case (rotator cuff, supraspinatus tendon, and biceps long head tendon) have been determined to be parts of the shoulder covered by Iowa Code section 85.34(2)(n). C.A.R., Part 2, p. 18.

There were two expert opinions regarding the permanent impairment rating of Petitioner's left shoulder. Dr. Field found that Petitioner sustained a 15% permanent impairment to the left upper extremity. C.A.R., Part 2, p. 18; C.A.R., Part 3, p. 119. Dr. Kuhnlein found that Petitioner sustained a 19% permanent impairment to the left upper extremity. C.A.R., Part 2, p. 18; C.A.R., Part 3, p. 38. The Deputy gave the greatest weight to Dr. Kuhnlein's rating of permanent impairment because they were able to follow along with his analysis using AMA Guides to the Evaluation of Permanent Impairment, fifth edition. C.A.R., Part 2, pp. 18-19. Thus, the Deputy determined that Petitioner sustained a 19% permanent impairment to his left shoulder and was entitled to 76 weeks of permanent partial disability benefits. *Id.* at 19.

The Deputy further found that Respondents were not liable for penalties under Iowa Code section 86.13. *Id.* at 21. The Deputy determined the approximately six weeks between Petitioner's finding of maximum medical improvement (MMI) and impairment rating were not due to a delay by Respondents and as such, a penalty was not appropriate. *Id.* The Deputy additionally concluded that a penalty should not be imposed based on Respondents calculating Petitioner's weekly

benefits incorrectly on several occasions. *Id.* The Deputy reached this determination because Petitioner had provided incorrect information with regard to his number of dependents, and he had multiple hourly rates and overtime. *Id.* Additionally, Respondents attempted to promptly issue checks for underpayments and interest once a proper rate was able to be determined. *Id.* Thus, a penalty was not found to be appropriate.

The Deputy did not rule on Petitioner's claim that the statutory provisions of Iowa Code sections 85.34(2)(n), 85.34(2)(v), and 85.34(2)(x) violate the Iowa Constitution because the Agency has not been vested with the power to make such a ruling. *Id.* The Deputy also ordered Respondents to pay all costs. *Id.* p. 22.

Petitioner filed a Notice of Appeal with the Iowa Workers' Compensation Commissioner on July 9, 2021, appealing Deputy Christenson's June 21, 2021, Arbitration Decision. *Id.* p. 11. Petitioner appealed all adverse findings of fact and conclusions of law, with the exception of the penalty claim related to the late initiation of permanent partial disability benefits. The other penalty claim related to an allegedly improper calculation of benefits remained part of the appeal. *Id.*

The Commissioner filed an Appeal Decision on January 5, 2022. C.A.R., Part 1, p. 13. The Commissioner adopted all parts of the Arbitration Decision not on appeal as part of his Appeal Decision. *Id.* p. 14. The Commissioner additionally adopted the same analysis, findings, and conclusions in full as those reached by the Deputy Commissioner on the appealed issues. *Id.*

Specifically, the Commissioner affirmed that Petitioner sustained a permanent scheduled member disability of 19% to his left shoulder as a result of the work injury on September 18, 2017. *Id.* The Commissioner also affirmed that Petitioner failed to prove his injury extends beyond his left shoulder into his body as a whole and thus, industrial disability benefits were not appropriate. *Id.* Additionally, the Commissioner affirmed that Petitioner is not entitled to receive penalty

benefits and that Respondents are to pay Petitioner's costs of the arbitration proceeding. *Id.* Lastly, the Commissioner affirmed that the Agency could not rule on Petitioner's assertion that Iowa Code sections 85.34(2)(n), 85.34(2)(v), and 85.34(2)(x), violate the Iowa Constitution and such claims were preserved for potential judicial review. *Id.* Petitioner subsequently filed this Petition for Judicial Review on February 2, 2022. Petition for Judicial Review ("Petition"), p. 1.

II. SCOPE AND STANDARDS OF REVIEW

The Iowa Administrative Procedure Act ("IAPA"), Iowa Code Chapter 17A, governs the scope of the Court's review in workers' compensation cases. Iowa Code § 86.26 (2021); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006). The Court's review of final agency action is "severely circumscribed." *Sellers v. Emp. Appeal Bd.*, 531 N.W.2d 645, 646 (Iowa Ct. App. 1995). Nearly all disputes are won or lost at the agency level; the cardinal rule of administrative law is that judgment calls are within the province of the administrative tribunal, not the courts. *See id.*

"Under the [IAPA], 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. The 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" when the record is viewed as a

whole. *Meyer*, 710 N.W.2d at 219. 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. *Clark v. Vicorp Rest., Inc.*, 696 N.W.2d 596, 604 (Iowa 2005). 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); *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 850 (Iowa 2011). The burden on the movant to prove there is not substantial evidence in the record is a heavy one. *See McComas-Lacina Constr. v. Drake*, 884 N.W.2d 225 (Table), 2016 WL 2744948, at *1 (Iowa Ct. App. May 11, 2016) ("A case reversing final agency action on the ground the agency's action is unsupported by substantial evidence . . . is the Bigfoot of the legal community - an urban legend, rumored to exist but never confirmed.")

The application of the law to the facts is also vested in the commissioner. *Larson Mfg. Co. v. Thorson*, 763 N.W.2d 842, 850 (Iowa 2009). Accordingly, the Court will reverse only if the commissioner's application 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*, 763 N.W.2d at 850.

III. MERITS

A. Industrial Disability per Iowa Code Section 85.34(2)(v)

Petitioner asserts that the Commissioner's affirmance of the Arbitration Decision was in violation of Iowa Code sections 17A.19(10)(a)-(n). Petition, pp. 1-2. Specifically, Petitioner

alleges that his injury should have been compensated for industrial disability based on scheduled injuries to the shoulder *and the arm* under Iowa Code section 85.34(2)(v).

Respondents allege that Petitioner has changed his argument on how to extend his left shoulder injury into the body as a whole over time because of the impact of two recent Iowa Supreme Court opinions finding that shoulder injuries are scheduled member injuries under Iowa Code section 85.34(2)(n). *See Chavez v. MS Technology LLC*, 972 N.W.2d 662, 668-669 (Iowa 2022); *Deng v. Farmland Foods, Inc.*, 972 N.W.2d 727, 728 (Iowa 2022). At the Arbitration, Petitioner argued that his left shoulder injury was an injury to his body as a whole. With that argument now precluded by recent Iowa Supreme Court opinions, Petitioner now argues that he sustained a permanent left shoulder injury *and* a permanent left arm injury, which would entitle him to industrial disability under Iowa Code section 85.34(2)(v). *See Anderson v. Bridgestone Americas, Inc.*, File No. 5067475 (App. Dec'n Jan. 25, 2022); *Carmer v. Nordstrom, Inc.*, File No. 1656062 (App. Dec'n Dec. 29, 2021).

Respondents assert that Petitioner's new claim (left shoulder injury combined with left arm injury) is not properly on appeal to this Court. Specifically, Respondents assert that Petitioner did not preserve for appeal the issue that he sustained a permanent shoulder injury and a permanent arm injury that should be compensated under Iowa Code section 85.34(2)(v) because it was not presented and considered by the Commissioner on appeal due to it not being presented to the Deputy Commissioner at the arbitration hearing. Respondents further argue that if the claim were properly on appeal, Petitioner still failed to establish a permanent left arm injury, which would make Iowa Code section 85.34(2)(v) irrelevant.

The district court's appellate jurisdiction in this matter limits it to addressing only such arguments as were raised and addressed by the agency. In contested cases the court's review is

limited to those questions considered by the administrative agency. *General Tel. Co. v. Iowa State Commerce Comm'n*, 275 N.W.2d 364, 367 (Iowa 1979).

An appellate court will consider only such questions as were raised and reserved in the lower court. The same principle . . . applies on review by courts of determinations of administrative agencies so as to preclude from consideration questions or issues which were not properly raised in the proceedings before the agency.

Chicago and Northwestern Transp. v. Iowa Transp. Regulation Bd., 322 N.W.2d 273, 276 (Iowa 1982) (quoting 2 Am. Jur. 2d *Administrative Law* § 724, at 624 (1962) with footnotes deleted). A party is precluded from raising issues in the district court that were not raised and litigated before the agency. *Interstate Power Co. v. Iowa State Commerce Comm'n*, 463 N.W.2d 699, 701 (Iowa 1990). It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the lower tribunal before they can be decided on appeal. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). A failure to properly preserve an issue leaves nothing for the appellate court to review. Our error preservation rules serve the salutary purpose of giving notice to the court and opposing counsel what is being challenged. *State v. Johnson*, 476 N.W.2d 330, 334 (Iowa 1991).

In addition, the district court only reviews final agency action on judicial review, Iowa Code § 17A.19(1), and the decision of the Workers' Compensation Commissioner is the final agency action. *See* Iowa Code § 86.24(5); *see also Myers v. F.C.A. Servs., Inc.*, 592 N.W.2d 354, 358 (Iowa 1999) (“[D]eputy . . . commissioner’s proposed findings are not a consideration on judicial review. Only final agency action is subject to judicial review.”). Thus, the Court is only reviewing what was specifically raised and litigated before the Commissioner.

Petitioner asserts in his Reply Brief that although he did not argue an arm injury during arbitration before the Deputy Commissioner, he raised it on appeal with the Commissioner, and thus it was an alternate theory of recovery aside from the theory of a whole-body impairment.

However, the Commissioner can only review on appeal those things considered and ruled on in the Arbitration Decision absent certain circumstances. Iowa Administrative Code section 876-4.28 provides:

The commissioner shall decide an appeal upon the record submitted to the deputy worker's compensation commissioner unless the commissioner is satisfied that there exists additional material evidence, newly discovered, which could not with reasonable diligence be discovered and produced at the hearing.

There is no indication that the Commissioner believed there to be additional material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the arbitration hearing. Rather, the Commissioner specifically stated in his Appeal Decision "I find the deputy commissioner provided a well-reasoned analysis of all the issues raised in the arbitration proceeding." C.A.R., Part 1, p. 14. The Commissioner did not make any indication that the Arbitration Decision was improper or lacking any evidence. Nor was there any mention of additional material evidence on appeal. Thus, the Commissioner could not consider the Petitioner's newly raised alternate theory of recovery on appeal. Additionally, the Court has reviewed the hearing report and Petitioner's post-hearing brief and finds no mention of the alternate theory of recovery based on an alleged left arm injury. C.A.R., Part 2, pp. 52-55 and pp. 41-51. Rather, Petitioner argued that injuries "proximal (nearer to the center of the body) to the glenohumeral joint are to be compensated as body as a whole injuries." *Id.* p. 8.

Petitioner cites various cases asserting the position that failing to cite a specific statute does not preclude an argument and, as such, failing to mention his alleged arm injury does not bar his claim on appeal. Petitioner's Reply Brief pp. 3-7. However, failing to cite a statute and failing to put forth a specific theory of recovery are not the same. The Deputy Commissioner was never asked to consider the possibility that Claimant's shoulder injury and arm injury should be jointly considered to be an injury to the body as a whole.

Accordingly, to the extent Petitioner attempts to raise any arguments on judicial review that were not raised and adjudicated at the agency level, the Court concludes such issues are not properly before this Court. Thus, the Court concludes the Petitioner's claim for industrial disability compensation based on scheduled injuries to the shoulder and arm under Iowa Code section 85.34(2)(v) are not properly on appeal and the Court cannot review the issue.

B. Penalty Benefits

1. Late Initiation of Permanent Partial Disability Benefits

Petitioner asserted that the Commissioner erred in denying him penalty benefits for the Respondents' failure to timely initiate permanent partial disability benefits. However, in his Reply Brief, Petitioner agrees that he waived his penalty claim related to late initiation of permanent partial disability benefits on appeal. Reply Brief pp. 9-10. Thus, the Court concludes Petitioner's claim for penalty benefits due to Respondents' late initiation of permanent partial disability benefits is not properly on appeal and the Court cannot review the issue.

2. Incorrect Weekly Calculations

Petitioner also asserts that the Commissioner erred in denying him penalty benefits for Respondents' failure to calculate his correct weekly benefit rate. Respondents assert that the Commissioner's finding is supported by substantial evidence, and thus correct.

The Commissioner performed a detailed review of the evidentiary record and arguments of the parties. Additionally, the Commissioner reviewed the analysis, findings of facts, and conclusions of law of the Deputy Commissioner. C.A.R., Part 1, p. 14. The Commissioner found that Respondents promptly issued checks for underpayments and interest once a proper rate was determined. C.A.R., Part 2, p. 21. The Commissioner also found that there were issues with Petitioner's reporting of the number of his dependents, and that the case was complicated by his

multiple hourly rates as well as overtime issues. *Id.* Thus, the Commissioner determined that Respondents were not acting without reasonable or probable cause in the delay as required by Iowa Code section 86.13 and a penalty was not appropriate.

The record, when viewed as a whole, has substantial evidence to support the Commissioner's finding that penalty benefits for incorrect weekly benefit calculations were not appropriate in this case. Specifically, there is evidence within the record that indicates to a neutral, detached, and reasonable person, the determination that a penalty award was not appropriate, and was supported by substantial evidence. Iowa Code § 17A.19(10)(f)(1); *Cedar Rapids Cmty. Sch. Dist. v. Pease*, 807 N.W.2d 839, 850 (Iowa 2011). Accordingly, the Court concludes that the denial of penalty benefits for incorrect weekly calculation of benefits is supported by substantial evidence.

C. Constitutionality of Iowa Code Sections 85.34(2)(n), 85.34(2)(v), and 85.34(2)(x)

Petitioner throughout the course of the proceedings below has asserted that Iowa Code sections 85.34(2)(n), 85.34(2)(v), and 85.34(2)(x), are unconstitutional. However, Petitioner makes no mention of the alleged unconstitutionality of Iowa Code sections 85.34(2)(n), 85.34(2)(v), and 85.34(2)(x) in his Judicial Review Brief. Thus, this issue is also waived.

IV. CONCLUSION AND DISPOSITION

For all of the reasons set forth above, the Court concludes that Petitioner's substantial rights were not prejudiced. The Court further concludes there is substantial evidence in the record viewed as a whole that the Commissioner's decision was not irrational, illogical, or wholly unjustifiable, or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion in any way. Accordingly, the Commissioner's decision is AFFIRMED in all respects.



State of Iowa Courts

Case Number
CVCV063079

Case Title
SHANE SCHOENBERGER VS ZEPHYR ALUMINUM
PRODUCTS ET AL
Type: OTHER ORDER

So Ordered

David Nelmark, District Judge
Fifth Judicial District of Iowa

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