APPEALS PANEL DECISION SUMMARIES
(142008 – 142375)

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Don't rely on the summaries for your arguments. Make sure the decision applies to your case. My summaries focus on why the decision was overturned. I don't go into great depth so any decision may say more than what I write/cut/paste from the AP decision. About 90% of what is here is just cut and paste from the decisions. I try to hit the highlights, even if there are other reasons the hearing officer's decision was overturned. I also do not write about typographical errors that may have been made that resulted in a reversal. Ken Wrobel

142008 – Need a doctor to say not at MMI and need a Designated Doctor when there is an MMI/IR dispute - In Appeals Panel Decision 111393, the Appeals Panel held that a hearing officer can determine that the claimant is not at MMI in the absence of a Report of Medical Evaluation (DWC-69) when the only DWC-69 in evidence certifying a date specific for MMI is contrary to the preponderance of the other medical evidence. However, in APD 111393 there was correspondence which stated that the claimant still has not reached MMI. We distinguish APD 111393 from the case before us, in that there is no medical report from any doctor that states that the claimant has not reached MMI. Furthermore, we note that there is no evidence that a designated doctor was appointed to opine on the disputed issues of MMI and IR. In APD 020385, the Appeals Panel stated that "[u]nder the provisions of Section 408.125, no determination can be made regarding the claimant's IR because there is no report from a designated doctor." Given that there is no medical report from a doctor that opines that the claimant is not at MMI, and a designated doctor has not been appointed to opine on the issues of MMI and IR, we reverse the hearing officer's MMI and IR determinations.

142044 – Mere recitation of conditions in the medical records is not sufficient - In APD 110054, the Appeals Panel stated that "the mere recitation of the claimed conditions in the medical records without attendant explanation how those conditions may be related to the compensable injury does not establish those conditions are related to the compensable injury within a reasonable degree of medical probability." Dr. B mentions the claimant's mechanism of injury and lists an impression "[h]erniated nucleus pulposus at C6-7," however, Dr. B does not provide an explanation of how the mechanism of injury caused an aggravation of the herniated disc at C6-7.

142046 – Evidentiary, admitting photographs over objection of timely exchange - To obtain reversal of a decision based upon error in the admission or exclusion of evidence, it must be shown that the evidentiary ruling was in fact error, and that the error was reasonably calculated to cause, and probably did cause the rendition of an improper decision. *See* Appeals Panel Decision (APD) 051705. In this case, any error was harmless and therefore does not amount to reversible error because the hearing officer did not render a decision based on these documents.

142069 – SIBs, documented work search efforts and reasonable grounds - It was undisputed, and the record reflects, that the claimant failed to make two job searches in weeks two and thirteen of the first quarter qualifying period. The claimant testified that he was told by a Division employee

that he should follow the directions given to him by the Oregon unemployment office regarding his job searches. The claimant further testified that he was told by an employee with the Oregon office that a week is calculated as being Sunday through Saturday, and going by that direction, he understood the qualifying period to start on Sunday, January 19, 2014, rather than Wednesday, January 22, 2014. The DWC-52 noted that the qualifying period for the first quarter began on January 22, 2014, which is a Wednesday, and ended on April 22, 2014, which is a Tuesday. Rule 130.102 provides that an injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the specified work search requirements each week during the entire qualifying period. Although the preamble to Rule 130.102 provides that hearing officers retain discretion in determining if an injured employee has demonstrated reasonable grounds for failure to meet one of the work search requirements in any week during the qualifying period, the Appeals Panel has previously held that ignorance of the law and applicable rules does not excuse noncompliance of the SIBs requirements. *See* APD 033092.

142108 MMI/impairment rating and needing a DWC-69 - The hearing officer determined that the claimant reached MMI on July 24, 2013, with a 5% IR per Dr. S's certification. Review of the record indicates that there is only a narrative report from Dr. S, and there is no DWC-69 in evidence that shows that Dr. S certified that the claimant reached MMI on July 24, 2013, with a 5% IR. There was a DWC-69 in evidence; however, the AP noted Dr. S's DWC-69 certified an MMI date that is: (1) internally inconsistent with the narrative report (*See* Appeals Panel Decision (APD) 140237, decided April 11, 2014); (2) post-statutory MMI (*See* Section 401.011(30)); and (3) prospective (*See* Rule 130.12(c)).

142126 - MMI/impairment rating – No doctor rated the entire compensable injury.

142156 – Decision writing - The hearing officer did not make any findings of fact or conclusions of law on an issue properly before the hearing officer. Because the hearing officer's decision contains no findings of fact or conclusions of law regarding the issue, it does not comply with Section 410.168 and Rule 142.16. Case remanded.

142159 – Extent of injury - Dr. B states that the lumbar MRI shows an L4-5 disc bulge and states that "the [claimant's] mechanism of injury can definitely cause pain in the low back resulting in facet joint pain or SI joint pain, L4-5 and L5-S1 joints." However, Dr. B does not identify a disc bulge at L5-S1 or explain how the compensable injury caused a bulge at either level. Furthermore, the September 26, 2013, MRI of the lumbar spine lists as the sole impression a mild bulge of the L4-5 disc without focal disc protrusion. The MRI does not list a specific diagnosis of an L5-S1 disc bulge. Regarding the remaining conditions, Dr. B describes the conditions as "possible" and states that, in his opinion, the mechanism of injury "can" cause pain in these areas. That trauma could cause these diagnoses states no more than a possibility and is not enough to establish a causal connection. Hearing officer's decision that the injury included disc bulges at C3-4, C4-5, C5-6, L4-5, L5-S1, and SI joint sclerosis was reversed.

142224 – Average weekly wage - The conflict primarily pertained to whether the $59.00 per diem and $125.00 monetary allowance should be included in the calculation of the claimant's AWW. The carrier argued that these payments were made in order to reimburse truck drivers for

any expenses incurred during their time away from home for meals and incidentals and lodging, respectively. As such, they should be considered reimbursements as under Rule 128.1(c)(1) and not included in the AWW. The claimant argued that these payments were not reimbursements but monetary allowances which are defined as part of pecuniary wages in Rule 126.1(3)(D), and therefore, should be included in the calculation of his AWW. The hearing officer states in the Discussion section of the decision that "[b]ased on the nature of the formulation of the per diem in this case, and the basis on which it was paid, the 'per diem' paid to the claimant was more of a monetary allowance, and is therefore wages, regardless of how that payment is denominated for tax purposes by the employer. The same is true for the item labeled 'per diem lay over'/'reimbursements.'" This was upheld. However, the AP corrected a calculation error made by the hearing officer.

142232 – Disqualifying association poisons MMI certification - Rule 127.140(a) and (b). It is undisputed that Injury 1 has a disqualifying association under Rule 127.140(a)(6) since it is part of the same healthcare network that provides medical benefits to the claimant. The evidence, including Designated Doctor's LOC responses that she referred the claimant to Injury 1, the document identifying Dr. G as a team member of Injury 1, and the claimant's testimony that Injury 1 scheduled and transported him to the appointment with Dr. G, was sufficient to establish a reasonable perception of a disqualifying association on the part of Dr. G through his association with Injury 1. Designated Doctor explained in her attached LOC response dated May 28, 2014, that her certification was based on Dr. G's May 26, 2014, evaluation which found that there is no permanent impairment for traumatic brain injury. As Designated Doctor's amended certification was based in part on Dr. G's evaluation report, we reverse the hearing officer's determination.

142257 – Extent of injury and causation analysis - The hearing officer states that a causation analysis was essential to prove that the compensable injury includes the conditions in dispute and because the claimant did not present this essential causation analysis, he failed to meet his burden of proof on extent of injury. However, a review of the record reflects that the narrative report from Dr. T, the designated doctor appointed for the extent-of-injury issue, provided some analysis for his opinion that the conditions in dispute were part of the compensable injury. The AP remanded this back to the hearing officer for further review.

142282 – MMI and impairment rating and the components of Rule 130.1(c)(3) and Rule 130.1(d)(1) - In his DWC-69, based on an examination of that date, Dr. K certified MMI on October 10, 2013 (8 days after the [Date of Injury], date of injury) with no permanent impairment. There was no narrative or information required by Rule 130.1(c)(3), cited above, attached or associated with the DWC-69. There was no accompanying narrative, and a progress note of the same date as the DWC-69 does not meet the requirements of Rule 130.1.

142287 – Finality and withdrawing a DWC-45 - In evidence is a Commissioner Order dated August 23, 2013, that states the Division received a request to withdraw a dispute during a BRC held on August 23, 2013. The order further states that the request was approved and it was determined that the issues of MMI and impairment rating having been withdrawn, the first valid certification of MMI and impairment rating is subject to finality. The order additionally gives notice to the parties that if they disagree with the Division's approval of the request to withdraw

a dispute of MMI and impairment rating, a DWC-45 may be submitted. The evidence does not indicate either party filed a dispute until March 7, 2014, when the claimant again requested a BRC on the issues of MMI and impairment rating. Rule 130.12(b)(3) provides that a dispute may not be revoked or withdrawn to allow the first valid certification of MMI and/or the first valid assignment of impairment rating to become final except by agreement of the parties. The Division approved the claimant's August 23, 2013, request to withdraw the issues of MMI and impairment rating. The carrier did not indicate any disagreement with the claimant's request to withdraw or the Division's approval of such request. The hearing officer's determination that the first certification of MMI and impairment rating became final under Section 408.123 and Rule 130.12 is supported by sufficient evidence and is affirmed.

142287 – Finality and MMI/impairment rating - The first certification from Dr. W certified that the claimant reached MMI on April 15, 2013, not April 22, 2013. Because the first certification from Dr. W became final, the hearing officer's determination that the date of MMI is April 22, 2013, is wrong as a matter of law.

142292 – Extent of injury analysis - The hearing officer acknowledges that the report of the designated doctor has presumptive weight, and the self-insured relies on the opinion of the designated doctor. The hearing officer stated, "[h]owever, the [d]esignated [d]octor was not asked to address lumbar spine annular tear at L5-S1 and he gave no opinion on that disputed condition." However, in evidence is a subsequent report by the Designated Doctor in which he states that he was asked to determine the extent of injury including a midline and left of midline annular tear at L5-S1 without associated canal or significant neural foraminal encroachment. Case was remanded to the hearing officer to review all the evidence.

142307 – Finality exceptions – *Inadequate Treatment* - The hearing officer determined that Dr. H's April 8, 2013, MMI/IR certification did not become final in part because he found that the claimant had not had adequate treatment for the left shoulder SLAP tear of the superior labrum, labral tear and impingement syndrome prior to Dr. H's April 8, 2013, MMI/IR certification. To apply the exception to finality in Section 408.123(f)(1)(C), there must be compelling medical evidence of improper or inadequate treatment before the date of certification or assignment. *See* Appeals Panel Decision (APD) 110527, decided June 3, 2011. In the instant case, no doctor opined that the claimant received improper or inadequate treatment for his injury. There is no compelling medical evidence that the claimant received improper or inadequate treatment for his injury before April 8, 2013, the date of Dr. H's MMI/IR certification.

142307 – Finality exceptions - *Failure To Rate The Entire Compensable Injury*
The hearing officer determined that Dr. H's April 8, 2013, MMI/IR certification did not become final in part because he found that Dr. H failed to rate the entire compensable injury. The Appeals Panel has previously held that a subsequent determination that the compensable injury extends to a disputed condition is not, by itself, an exception to finality. *See* APD 132594-s, decided January 3, 2014, and APD 140114, decided March 10, 2014. In the case on appeal, the hearing officer based his determination that Dr. H's April 8, 2013, MMI/IR certification did not become final in part because Dr. H's MMI/IR certification fails to rate the disputed extent-of-injury conditions found compensable by the hearing officer and affirmed above. Under APD

132594-s, *supra*, this basis for the hearing officer's determination that Dr. H's April 8, 2013, MMI/IR certification did not become final is legally incorrect.

142307 - Finality exceptions - *Undiagnosed Conditions* - The hearing officer determined that Dr. H's April 8, 2013, MMI/IR certification did not become final in part because he found that Dr. H's MMI/IR certification failed to include the previously undiagnosed medical conditions of left shoulder SLAP tear of the superior labrum, labral tear, and impingement syndrome. There was compelling medical evidence of a previously undiagnosed medical condition, which was impingement syndrome, and that the subsequent diagnosis of impingement syndrome constituted a previously undiagnosed medical condition and is an exception to finality under Section 408.123(f)(1)(B).

142336 – Jurisdiction and effect of decision by hearing officer or AP - Section 410.205(b) provides that the decision of the Appeals Panel regarding benefits is binding during the pendency of an appeal under Subchapter F or G (relating to Judicial Review). In *Lopez v. Texas Workers' Comp. Ins. Fund*, 11 S.W.3d 490 (Tex. App.–Austin 2000, pet. denied), the court held that Section 410.205(b) clearly provides that the ultimate administrative ruling—whether granting or denying benefits—remains in effect until overturned by a final and enforceable judicial decision. The hearing officer correctly noted in the Discussion portion of the decision that the Appeals Panel's prior decision is binding until there is a final, non-appealable judgment in this case.

142336 – SIBs and active work search effort - The hearing officer's finding that during the 9th quarter qualifying period the claimant demonstrated an active effort to obtain employment each week during the entire qualifying period is supported by the evidence. However, the hearing officer also found that the claimant did not actively participate in job search efforts conducted through the Texas Workforce Commission (TWC), and that the claimant did not demonstrate that he had reasonable grounds for failure to comply with the work search requirements of Rule 130.102(d). Rule 130.102(d)(1) provides, in pertinent part, that an injured employee demonstrates an active effort to obtain employment by meeting at least the following one work search requirement each week during the entire qualifying period. A claimant does not have to do more than one type of requirement in any given week.

142338 – Finality - In order for a certification to become final under Section 408.123 and Rule 130.12, it must also be the first certification. In evidence is a prior certification by Dr. B dated February 3, 2012, in which he certifies that the claimant reached MMI on February 2, 2012, with a 10% IR. The certification contains an MMI date that is not prospective, an IR is assigned, and it is signed by a certifying doctor who is authorized by the Division under Rule 130.1(a) to make the assigned IR. The AP remanded the issue of finality to the hearing officer to determine what the first valid certification is and whether it became final under Section 408.123 and Rule 130.12.

142339 – Impairment rating if a hernia - The Appeals Panel has held that the AMA Guides require a palpable defect for an impairment to be awarded for a hernia under Table 7. Appeals Panel Decision (APD) 072253-s, decided March 3, 2008. Designated Doctor's report said Claimant did not have a palpable defect, but in a Letter of Clarification Response, the Designated

Doctor said Claimant did have a palpable defect. Remanded back to the Designated Doctor to determine whether or not there is a defect.

142368 – Extent of injury – Claimant had causation letters from three doctors. However, none of the doctors specifically addressed the specific extent issue. They each failed to discuss the specific conditions of cervical canal stenosis from C3-4 to C6-7, and disc herniations at C3-4, C4-5, C5-6, and C6-7.

142375 – Alcohol intoxication - The Appeals Panel has held an alcohol concentration meeting the stated limit contained in Penal Code Section 49.01(2) (currently 0.08 or more) is by definition intoxication, not merely a presumption, and there need be no further analysis of whether the claimant had the "normal use" of his faculties. *See* Appeals Panel Decision (APD) 91012, decided September 11, 1991; APD 972159, decided November 25, 1997; and APD 042113, decided October 11, 2004.