APPEALS PANEL DECISION SUMMARIES

(150797 – 151112)

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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*

150607 – Stipulating to issue and properly writing the decision - The parties stipulated at the CCH that the compensable injury does not extend to a disc bulge at T7-8. Although the hearing officer noted the parties’ stipulation in the decision, the hearing officer did not amend the extent-of-injury issue to exclude that condition, nor did the hearing officer make any findings of fact, conclusions of law, or a decision on that condition. The hearing officer’s extent-of-injury determination is incomplete.

150607 – MMI/impairment rating cannot include non-compensable conditions - Dr. S considered and rated conditions that have been determined to not be part of the compensable injury, and as such his MMI/IR certification cannot be adopted. Accordingly, we reverse the hearing officer’s determinations that the claimant reached MMI on October 18, 2013, with a 10% IR.

150613 – 90 day finality - The hearing officer’s finding that the claimant did not dispute Dr. T’s IR within 90 days after the date the rating was provided was not appealed. The hearing officer found that compelling medical evidence exists of improper or inadequate treatment of the injury before the date of the certification or assignment that would render the certification or assignment invalid. In her discussion, the hearing officer stated the following: “[a]lthough two surgeries were performed, given that [the] [c]laimant was no better off as a result, and was sent to pain management with a diagnosis of possible [complex regional pain syndrome], the treatment appears to have been inadequate. To have [the] [c]laimant’s condition improve so dramatically following a surgery performed by a second doctor is compelling evidence that the treatment was, at the very least, inadequate.”

Just because there is subsequent surgery or treatment which proves beneficial to the claimant does not automatically amount to inadequate treatment. Appeals Panel Decision (APD) 052666-s, decided February 1, 2006. Further, just because a surgery did not result in the best, or hoped for, outcome does not mean that it is automatically, in and of itself, inadequate or improper. APD 050378, decided April 19, 2005. Because the hearing officer used the wrong standard to determine finality we reverse the hearing officer’s determination that the first certification of MMI and assigned IR from Dr. T on March 1, 2013, did not become final under Section 408.123 and Rule 130.12 and remand this issue to the hearing officer for further action consistent with this decision. The AP noted that in a medical narrative dated September 12, 2014, (Dr. W) stated: “[i]f the [extent of injury] now extends to include the ligament injury, then [the claimant] was not afforded the appropriate treatment that within reasonable medical probability, would have been anticipated to have resulted in further material recovery. *See* APD 111393, decided November 23, 2011.

150631 – MMI/impairment rating – How not to rate carpal tunnel syndrome. The doctor did not properly round his ROM figures and he combined range of motion with sensory and motor deficits.

150662 – CCH must have the proper parties – Hearing officer found a date of injury for a repetitive trauma case based on trivialization. That date was different than the date of injury on the BRC report. The date on the BRC report had one insurance carrier. The date the hearing officer found had a different insurance carrier who was not at the first CCH. The case was remanded for the second insurance carrier to be able to participate. In Houston Gen. Ins. Co. v. Association Cas. Ins. Co., 977 S.W.2d 634 (Tex. App.-Tyler 1998, no writ), the Tyler Court of Appeals held that workers’ compensation coverage may not be extended by waiver or estoppel.

150703 – Extent of injury needs expert opinion - Dr. RH responds in his letter that:

“With regard to the meniscal tear finding on the [post-operative] MRI of March 19, 2014, this incomplete tear may have been missed by [the surgeon] (even the very best arthroscopist available can occasionally miss an incomplete tear). . . . Similarly, even the best radiologist can over read an MRI occasionally such that an incomplete tear may not be present. It is more likely that an MRI in my opinion would be under read than over read, however.” Under the facts of this case, right knee horizontal tear of the medial meniscus is a condition that is a matter beyond common knowledge or experience and requires expert medical evidence. Dr. RH did not explain how the compensable injury of [date of injury], extends to a right knee horizontal tear of the medial meniscus tear. Dr. RH did not explain how the mechanism of injury caused a right knee horizontal tear of the medial meniscus tear. Rather Dr. RH opined that the surgeon and radiologist may have missed identifying a medial meniscus tear during surgery and diagnostic studies and recommended another arthroscopic evaluation on the claimant’s right knee.

150718 – Certification cannot include non-compensable conditions - The hearing officer determined that Dr. C’s certification of MMI is supported by the evidence; however, Dr. C’s assignment of IR did not include contusion of the right foot, a condition accepted by the carrier as part of the compensable injury. Dr. C considered conditions that are not part of the compensable injury so his certification could not be adopted.

150720 – Extent of injury, temporal proximity a factor - The claimant in this case offered evidence that the acute tear of the lateral meniscus was diagnosed shortly after the date of injury and treatment was administered for the tear of lateral meniscus. The letter from Dr. S provides an explanation of how an acute tear of the lateral meniscus was caused by the mechanism of injury. Furthermore Dr. E, the designated doctor, opined that the acute tear of the lateral meniscus was part of the compensable injury based on the mechanism of injury and the MRI of the right knee which indicated an acute tear of the lateral meniscus was part of the compensable injury. We note that in *Guevara*, *supra*, evidence of an injury followed closely by the manifestation of or treatment for conditions that did not appear prior to the injury may be combined with other causation evidence to be probative in determining causation. We further note that there was no medical evidence that an acute tear of the lateral meniscus was caused by something other than the mechanism of injury.

150750 – Aggravation requires expert opinion - In the case on appeal, an aggravation of the degenerative disc at L4-5 is a condition that is outside the common knowledge and experience of the fact finder, and as such requires expert medical evidence to establish causation. The medical records do not contain any explanation of how the compensable injury caused an aggravation of the degenerative disc at L4-5.

150750 – MMI and treatment - The Appeals Panel has noted that MMI does not mean there will not be a need for some further or future medical treatment, and that the need for additional or future medical treatment does not mean that MMI was not reached at the time it was certified. *See* APD 122627, decided February 19, 2013; APD 020834, decided May 16, 2002; APD 991932, decided October 25, 1999; and APD 941488, decided December 16, 1994. Although there are medical records recommending the claimant undergo surgery at L4-5, there is no medical record in evidence from a doctor stating that the claimant has not reached MMI due to the proposed surgery.

150797 – SIBs and attending school and reasonable grounds - The claimant testified that he was in compliance with his Individualized Plan for Employment (IPE) by attending school full-time, and that his IPE did not require him to look for work. The claimant testified that at the end of the fall semester, he studied math and registered for the spring semester. The claimant’s theory of entitlement to SIBs for the sixth quarter is active participation in a vocational rehabilitation program (VRP). The IPEs dated December 3, 2014, and January 14, 2015, encompass the qualifying period in dispute. The claimant’s responsibilities were to maintain and complete a full-time course load, and obtain and maintain employment after earning a bachelor’s degree. The record reflects that the claimant did not attend school during the winter break from December 22, 2014, through January 2, 2015, which encompasses weeks 12 and 13 of the qualifying period for the sixth quarter. The claimant testified that during weeks 12 and 13, he used that time to study and register for the next semester. 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. The hearing officer made a specific written finding regarding whether the claimant had reasonable grounds for failing to make five or more job contacts during each week of the qualifying period for the sixth quarter of SIBs. The claimant did not look for work during weeks 12 and 13 and no evidence was offered that the claimant performed any other activity in connection with his IPE for weeks 12 and 13 of the qualifying period in dispute. Furthermore, the claimant presented no evidence of any other active efforts during weeks 12 and 13 to meet the work search requirements of Rule 130.102(d)(1). The AP reversed the hearing officer’s determination that the claimant is entitled to SIBs for the sixth quarter

150866 – MMI/IR has to rate the entire compensable injury – The hearing officer choose a certification of the Designated Doctor that did not rate the entire compensable injury. There were several certifications in evidence. One of them rated the entire compensable injury. It happened to have the same MMI date and impairment rating as the certification by the Designated Doctor that was not adoptable.

150873 – The correct parties have to be present - The parties stipulated at the CCH, in part, that: (1) on (date of injury), the claimant was the employee of Marriott International Inc., employer, and (2) on (date of injury), the employer provided workers’ compensation insurance through New Hampshire Insurance Company, carrier. However, the carrier contends that, the correct name of the employer is Hospitality Staffing Solutions LLC, and the correct carrier is Pennsylvania Manufacturers Association Insurance Company. The carrier attached a new carrier information sheet listing Pennsylvania Manufacturers Association Insurance Company, as the carrier. Because of the uncertainty as to the identity of the proper employer and carrier in this case, we remand the case to the hearing officer to determine the proper employer and carrier, and, if it is a different employer and/or carrier other than the employer and carrier listed on the hearing officer’s decision, the hearing officer is to hold another hearing with the proper employer and carrier present at the CCH.

150877 – Coming and going rule, MVA and travelling salesmen - The claimant testified that his job is to travel to businesses, such as convenience stores, in a company owned vehicle to obtain and place orders for merchandise. The claimant testified that the employer provided him via email with a list of business contacts for him to travel to. Also, the claimant testified that he kept the company owned vehicle at his home, and he traveled from his home to the business contacts provided by his employer. On (date of injury), the claimant traveled to and obtained orders from all the businesses on his contact list with the exception of one business which his supervisor had agreed to help with obtaining an order. The claimant testified that after he left the premises of a business on his contact list, he proceeded to drive to the employer’s premises. There was conflicting evidence as to whether the claimant was in route to the employer’s premises or whether he was in route to his home.

In evidence are contact logs that show that on (date of injury), the claimant traveled to a business and placed an order for that business at 4:26 p.m. In evidence is a police report dated (date of injury), that indicates the claimant was in a MVA and the crash time was 4:37 p.m. The claimant testified that while en route to the hospital by ambulance he received a call on his cell phone from his supervisor. There was conflicting evidence of whether the claimant was traveling to the employer’s premises or to his home. The hearing officer found that the claimant was not furthering the affairs of the employer on the evening of (date of injury), at the time of the MVA, which implies that the hearing officer was persuaded that the claimant was traveling to his home, rather than the employer’s premises. However, given the nature of the claimant’s employment and the terms of his employment as a traveling salesman, this is not a straightforward case which involves the coming and going rule.

Although the hearing officer found that the claimant was driving a company car at the time of the MVA, this fact alone does not place the claimant in the course and scope of employment. It is well established that the employer’s furnishing or paying transportation by itself does not render compensable an injury occurring during such transportation. “Special mission” - the Supreme Court has construed this exception to include “those situations in which the employee proceeds from one place to another under the terms of an employment which expressly or impliedly requires that he do so to discharge the duties of his employment.” *Jecker v. W. Alliance Ins. Co.*, 369 S.W.2d 776, 778 (Tex. 1963), *overruled on other grounds by McKelvy v. Barber*, 381 S.W.2d 59 (Tex. 1964). At the time of *Jecker’s* accident, he was returning from servicing a range so it was clear that he had acted both in furtherance of his employer’s business and in performance of duties imposed by the employment. Also, *Jecker* discussed the exception in terms of “[t]he rationale of it is that since the workman’s employment requires him to subject himself to the risks and hazards of streets and highways, his injuries grow out of his employment. *Smith v. Texas Empl’rs Ins. Ass’n*, 129 Tex. 573, 105 S.W.2d 192 (Tex. 1937). *See also* APD 111516, decided December 19, 2011, and APD 050874-s, decided June 9, 2005, both citing *Jecker.* We note that *Jecker* is not a true special mission case but rather a situation where an employee whose very nature of employment required travel from one place to another throughout the day was found to be in the course and scope of employment. The case goes on to say that to hold otherwise “would be wholly unjust to salesmen, servicemen, repairmen, deliverymen, and a host of others who may be required to use their own automobiles in their work, and would be a strict rather than a liberal interpretation of the Workmen’s Compensation Act.” *Id*. at 779. Under the facts of this case, the claimant’s terms of employment as a traveling salesman required that he travel to businesses to obtain and place orders throughout his day. At the time of the claimant’s MVA, the claimant acted both in furtherance of his employer’s business and in performance of duties imposed by his employment as a traveling salesman.

150925 – MMI/impairment rating – The certification must rate the entire compensable injury.

150931 – Impairment rating for bilateral upper extremities - The Guides provide on page 3/66 that when both upper extremities are involved, derive the whole person impairment percent for each and then combine both values using the Combined Values Chart.

151036 - MMI/impairment rating – The certification must rate the entire compensable injury. At least four MMI/impairment rating certifications in evidence and none rated the entire compensable injury.

151112 – Admission of evidence/testimony - To obtain a reversal for the admission of evidence, the appellant must demonstrate that the evidence was actually erroneously admitted and that “the error was reasonably calculated to cause and probably did cause rendition of an improper judgment.” It has also been held that reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. In the present case, after listening to the arguments of the parties, the hearing officer found good cause for allowing Dr. O to testify. Under the facts of this case, the hearing officer’s admission of the complained-of evidence does not constitute reversible error.

151112 – Requirements of a decision – Hearing officer forgot to include conclusions of law regarding some issues. Remanded to the hearing officer to write those conclusions of law.