APPEALS PANEL DECISION SUMMARIES

(161289 – 161877)

*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*

161245 – Impairment rating has to be based only on the compensable injury. Designated Doctor incorrectly assumed he was ordered to put Claimant at MMI as of stat MMI date - The hearing officer found that Dr. W determined the claimant reached MMI on May 8, 2015, with a 16% IR and the preponderance of the other medical evidence is not contrary to this report. However, Dr. W makes clear in his narrative that he certified that the claimant reached MMI on the statutory date because he believes he was ordered to do so and based his IR on all of the disputed diagnoses which were determined not to be part of the compensable injury.

161289 – Disability has to be due to the compensable injury – Parties stipulated Claimant sustained a compensable knee strain. The evidence supporting the claimed period of disability is based upon a diagnosis of right knee lateral meniscus tear, found by the hearing officer not to be part of the compensable injury, or upon conditions other than a right knee contusion and right knee strain stipulated by the parties to be compensable.

161313 – Right to an expedited CCH to dispute Designated Doctor appointment - Rule 127.1(f) provides, in part, that a party is entitled to seek an expedited CCH under Rule 140.3 to dispute an approved or denied request for a designated doctor examination. Rule 127.1(f) also provides that the Division, upon timely receipt and approval of the request for expedited proceedings, shall stay the disputed examination pending the decision and order of the expedited CCH, and that parties seeking expedited proceedings and the stay of an ordered examination must file their request for expedited proceedings with the Division within three working days of receiving the order of the designated doctor examination.

Rule 140.3 provides that in addition to expedited proceedings provided by any other Division rule (such as Rule 127.1(f)), the Division may provide expedited benefit review conferences and benefit CCHs for resolution of disputes involving compensability, liability for essential medical treatment, or any type of issue as defined by Division policy for which the executive director or delegate determines an expedited proceeding will serve the best interests of the workers’ compensation system or its participants.

It is undisputed that the March 23, 2016, examination with Dr. H had already occurred by the time the self-insured filed its request for an expedited CCH. The self-insured requested the expedited CCH pursuant to Rule 140.3, not Rule 127.1(f). Nothing in Rule 127.1 implies that a party waives their right to contest the appointment of a designated doctor or approval of an examination if the party fails to file their request within the three-day timeframe provided in Rule 127.1(f). Although a party that fails to request expedited proceedings within the three-day period provided in Rule 127.1(f) has not met the requirement to stay the designated doctor examination, that party may still dispute the approval of the designated doctor through the general expedited CCH procedures contained in Rule 140.3.

161338 – MMI/impairment rating, certification has to have a valid DWC-69 - (Dr. M) the claimant’s treating doctor examined the claimant on September 22, 2015, and certified the claimant reached MMI on that date with no permanent impairment. Dr. M diagnosed the claimant with a rash and noted that on exam the skin is well healed. The evidence does not contain a Report of Medical Evaluation (DWC-69) signed by Dr. M. Rule 130.1(d)(1) provides that a certification of MMI and assignment of an IR for the compensable injury requires the completion, signing, and submission of the DWC-69 and a narrative report. *See* Appeals Panel Decision (APD) 142708, decided February 23, 2015; APD 100510, decided June 24, 2010; APD 101734, decided January 27, 2011, and APD 141332, decided August 11, 2014. Because the DWC-69 was not signed by Dr. M, it was error for the hearing officer to adopt her certification.

161343 – Timely notice to Employer and determination of compensability – The hearing officer found Claimant did not timely report the injury but that Claimant had a compensable injury. The Appeals Panel has previously held that if an employee fails without good cause to timely notify the employer of an injury sustained in the course and scope of her employment, thereby relieving the carrier of liability under Section 409.002, the employee does not have a compensable injury because compensation is not payable.

161411 – Requirements of a D&O - The hearing officer discusses disability in the Discussion portion of the decision and states that the claimant did not have disability from November 13, 2015, through the date of the CCH in the decision and order paragraph on the first page of the decision. However, the hearing officer made no findings of fact, conclusions of law, or a decision regarding disability for the claimed period. Section 410.168 provides that a hearing officer’s decision contain findings of fact and conclusions of law, a determination of whether benefits are due, and an award of benefits due. 28 TEX. ADMIN. CODE § 142.16 (Rule 142.16) provides that a hearing officer’s decision shall be in writing and include findings of fact, conclusions of law, and a determination of whether benefits are due and if so, an award of benefits due.

161461 – Incorrectly calculated impairment rating - Dr. T mistakenly assigned 0% impairment for 30 degrees extension of the left shoulder. Figure 38 on page 3/43 of the AMA Guides provides 1% upper extremity impairment for 30 degrees of extension.

The Appeals Panel has previously stated that, where the certifying doctor’s report provides the component parts of the rating that are to be combined and the act of combining those numbers is a mathematical correction which does not involve medical judgment or discretion, the Appeals Panel can recalculate the correct IR from the figures provided in the certifying doctor’s report and render a new decision as to the correct impairment rating. Under the facts of this case, the certifying doctor’s assigned IR can be mathematically corrected based on the documented measurements of the left shoulder.

161476 – Impairment rating assessment can only include compensable conditions - The hearing officer based his determination that the claimant had not attained MMI on the certification of Dr. K, who examined the claimant on March 10, 2016, and determined that the claimant had not reached MMI with regard to the disputed conditions. In his report Dr. K considered the claimant’s failed conservative care for de Quervain’s syndrome, a condition found by the hearing officer not to be related to the compensable injury. For such reason, the hearing officer erred in adopting Dr. K’s certification and we accordingly reverse the hearing officer’s determination that the claimant has not reached MMI.

161491 – Finality based on Carrier’s PLN-3 - In the case on appeal the hearing officer clearly believed that the carrier received Dr. S’s MMI/IR certification certifying that the claimant reached MMI on September 5, 2014. However, the hearing officer found that because the PLN-3 did not contain the IR, even though it acknowledged the number of weeks the claimant would receive IIBs which is based on the IR, the carrier’s PLN-3 did not constitute the carrier’s acknowledgement of receipt of Dr. S’s MMI/IR certification. Although the carrier’s PLN-3 does not list the IR number itself, it does state that based on Dr. S’s certification the claimant would receive 153 weeks of IIBs, which is the correct number of weeks of IIBs based on a 51% IR. The PLN-3 also states that a copy of Dr. S’s DWC-69 was included with the PLN-3. The hearing officer’s finding that Dr. S’s September 5, 2014, date of MMI and 51% IR was not provided to the carrier by verifiable means is so against the great weight and preponderance of the evidence as to be manifestly unjust. See also APD 080301-s. The only avenue by which the carrier could dispute Dr. S’s MMI/IR certification was by requesting a BRC no later than February 12, 2015. The record contains no evidence as to the date the carrier filed a Request for [BRC] (DWC-45). Without knowing the date the carrier disputed Dr. S’s October 31, 2014, MMI/IR certification, a determination whether or not the carrier timely disputed that certification cannot be made.

161503 – Finality and undiagnosed condition exception - The hearing officer determined that the first MMI/IR certification from Dr. W on August 26, 2014, did not become final under Section 408.123(f)(1)(B) and Rule 130.12 because “the medical information is compelling enough to equate [to] a finding of an undiagnosed condition of the left ulnar entrapment.” The claimant sought medical attention at several urgent care clinics where she was diagnosed with left wrist pain, a hand contusion and ulnar nerve radicular pain. On July 21, 2014, she came under the care of Dr. W, her treating doctor, whose records diagnose a left ulnar injury through March 20, 2015, the date of Dr. W’s last record in evidence. On March 10, 2015 and April 10, 2015, the claimant was seen by (Dr. C) who diagnosed injury of the ulnar nerve and who recommended decompression of the nerve. On June 5, 2015, the claimant underwent left ulnar nerve decompression surgery performed by (Dr. We).

We hold that under the facts of this case which reflect consistent diagnosis by the claimant’s medical providers of injury to the left ulnar nerve, including Dr. W in his DWC-69 dated August 26, 2014, ulnar nerve entrapment is not a previously undiagnosed condition and that no exception applies which would allow the claimant’s first valid certification of MMI/IR to be disputed after expiration of the period described in Section 408.123(e).

161605 – Average weekly wage - It was error for the hearing officer to apply Section 408.041(a) to determine the AWW in this case. The evidence is undisputed that the claimant did not work for the employer for the 13 consecutive weeks prior to the date of injury. The claimant quit working for the employer and worked for a different employer for a 2-week period prior to being re-hired by the employer to work in a different position in a different location. Under the facts of this case, the hearing officer should use a fair, just, and reasonable method to calculate the claimant’s AWW pursuant to Section 408.041(c) and Rule 128.3(e) and (g).

161628 – Remanding cases - Pursuant to Section 410.203(c) the Appeals Panel may not remand a case to a hearing officer more than once. Accordingly, based on the evidence in the record before us, we will resolve the finality issue based on Rule 130.102(h).

161628 – Finality under Rule 130.102(h) - Rule 130.102(h) provides that if there is no pending dispute regarding the date of MMI or the IR prior to the expiration of the first quarter SIBs, the date of MMI and IR shall be final and binding. The preamble to Rule 130.102(g) (Rule 130.102(g) was subsequently re-lettered as 130.102(h) with no change to its text) makes clear that “[t]his provision will not apply to any situation where a party has raised a dispute prior to the first quarter of [SIBs].” 24 Tex. Reg. 408 (1999). The appointment of a designated doctor does not resolve a carrier’s dispute of a claimant’s IR by a referral doctor. *See* APD 061788, decided November 27, 2006. The appointment of Dr. J as the designated doctor did not resolve the self-insured’s dispute of the claimant’s IR assigned by Dr. P.

In the instant case, the claimant’s IR was in dispute prior to the expiration of the first quarter of SIBs. Therefore, the 15% IR assigned by Dr. J, the designated doctor, did not become final and binding under Rule 130.102(h).

161780 – Extent of injury, Designated Doctor opinion needs to be in the narrative report, not just the DWC-68 - The condition of lumbar radiculitis is a condition that requires expert evidence to establish a causal connection with the compensable injury. *See* APD 132361. In his Designated Doctor Examination Data Report (DWC-68) dated February 17, 2016, Dr. M checked the “yes” box under Section 16 indicating his opinion that the compensable injury extended to lumbar radiculitis. In his accompanying narrative report; however, Dr. M did not specifically discuss lumbar radiculitis or how the compensable injury caused lumbar radiculitis. Also in evidence are records from (Dr. T), (Dr. S) and (Dr. C) which list an impression or diagnosis of lumbar radiculitis, among other conditions. However, none of these doctors explain how the compensable injury caused lumbar radiculitis.

161816 – Finality, needs to be disputed in 90 days - In the instant case the hearing officer found that Dr. L’s certification of MMI and determination of no impairment was delivered to the claimant by verifiable means on February 11, 2016. The 90th day from February 11, 2016, is Wednesday, May 11, 2016. As previously stated, the parties stipulated that on May 9, 2016, the claimant filed a DWC-32 requesting a designated doctor be appointed on the issues of MMI and IR. The hearing officer found that the claimant did not dispute Dr. L’s January 7, 2016, certification of MMI and determination of no impairment within 90 days of delivery. However, May 9, 2016, is within 90 days of February 11, 2016. The claimant requested a designated doctor be appointed on the issues of MMI and IR within 90 days of the date the hearing officer found the first certification was delivered to the claimant by verifiable means.

161870 – Hearing officer abused discretion by addressing issue not certified - We note that in evidence is a Carrier’s Response to Benefit Review Officer’s Report dated June 14, 2016, which states the following:

At the [BRC] held May 17, 2016, the [c]arrier’s representative specifically requested that the issue of contribution be added for the [CCH]. The [BRC] Officer responded that the issue of contribution was not a separate issue for a CCH determination and could not be added. The [c]arrier asserts that it does not waive its request to seek contribution in the event that the [h]earing [o]fficer adopts an [IR] which includes an impairment from the [c]laimant’s prior workers’ compensation injury for which he was awarded a 3% [IR] for lost range of motion. Once the final [IR] in the current claim is determined, the [c]arrier intends to seek contribution for the compounded effect of the prior injury. If contribution is a separate issue for a CCH, the [c]arrier requests that the issue be set for a determination because it was raised at the [BRC].

The carrier’s response to the BRC Report was not discussed at the CCH, and neither party requested that the contribution be added as an issue at the July 13, 2016, CCH. Although the carrier argued in part at the CCH for the adoption of one of the MMI/IR certifications from Dr. N, which subtracted the 3% IR awarded for the previous compensable injury, the issue of contribution itself was not actually litigated at the CCH. In this case the hearing officer abused her discretion in adding the contribution issue. The issue was not certified out of the BRC, neither party requested the issue be added at the CCH, and the issue of contribution itself was not actually litigated at the CCH.

161877 – Impairment rating has to be based on Claimant’s condition as of the MMI date - The hearing officer erred in adopting Dr. Eg’s certification because the claimant’s partial medial meniscectomy was performed after the date of statutory MMI and therefore the assigned 1% IR under Table 64 on page 85 of the AMA Guides was not an assignment of IR based upon the claimant’s condition as of the MMI date as required by Rule 130.1(c)(3). For such reason, we reverse the hearing officer’s determination that the claimant’s IR is 1%.