APPEALS PANEL DECISION SUMMARIES

(161927 – 162510)

*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 95% of what is here is just cut and paste from the decisions. I try to hit what I think are the highlights, even if there are other reasons the hearing officer’s decision was overturned. My original contributions are limited to the comment giving a summary of the summary. Anything that can be construed as my opinion is just that, my opinion and does not reflect the opinion of the Division. Ken Wrobel*

161927 – Hearing officer needs to address each certified condition - The hearing officer failed to make a finding of fact, conclusion of law, or a decision on the following conditions that were included in the extent-of-injury issue as stated in the BRC Report and agreed to by the parties at the CCH: lumbar nerve root compression at L3-4, spondylolisthesis at L5-S1, lumbar stenosis at L5-S1, and lumbar disc herniation/protrusion at L4-5 and L5-S1.

161985 – Course and scope, motor vehicle accident - The claimant was told to choose a crew to bring with him to Baytown for a May 4, 2016, safety meeting. The claimant testified that he went to work at the Midland location on the morning of (date of injury), then, along with one of the two employees he chose to go to Baytown, went to pick up the second employee at that employee’s hotel. The claimant testified that he and the two employees drove to an RV park in which the claimant was staying to pick up the claimant’s luggage. Upon arriving at the RV park the claimant discovered that his wife had not completed packing his luggage. The claimant testified that he decided to drive to a Discount Tire store approximately five miles from the RV park to have the tires on his truck repaired while waiting for his luggage to be packed because he felt his tires were unsafe for the approximate 10-hour drive from Midland to Baytown. After the tires were repaired and while on the way back to the RV park to pick up his luggage the claimant’s truck was rear-ended by another vehicle. The hearing officer found that changing and repairing tires on the claimant’s truck was a personal errand and that the claimant deviated from the course and scope of employment during that personal errand.

Course and scope of employment as defined in Section 401.011(12) generally does not include transportation to and from the place of employment except in certain limited circumstances; one of these, the “special mission” exception, arises where the employee is directed in his employment to proceed from one place to another. Section 401.011(12)(A)(iii). Generally, an employee on a special mission does not go into and out of the course and scope of employment while on that special mission. This is sometimes referred to as the principle of “continuous coverage.” It applies to special missions unless there is a deviation from or abandonment of the course and scope of employment while on a personal errand.

The claimant contended that he was furthering the employer’s business affairs when he went to Discount Tire to have his tires repaired because he was transporting himself and two other employees to the work site in Baytown as directed by his employer. The Appeals Panel agreed. In reviewing this evidence in the instant case, the claimant did not deviate from the course and scope of his employment when he traveled to Discount Tire to repair the tires on his truck in preparation of the 10-hour drive to Baytown directed by the employer.

161989 – Untimely appeal by Carrier - Records of the Division reflect that the hearing officer’s decision was placed in the carrier’s Austin representative’s box on August 30, 2016. Pursuant to 28 TEX. ADMIN. CODE § 102.5(d), the carrier is deemed to have received the hearing officer’s decision the first working day after the decision was placed in the carrier’s Austin representative’s box. Therefore, the carrier’s deemed date of receipt of the hearing officer’s decision is August 31, 2016. With the deemed date of receipt of the hearing officer’s decision on August 31, 2016, in accordance with Section 410.202, excluding Saturdays and Sundays, and holidays listed in Government Code Section 662.003, the carrier’s cross-appeal had to be filed or mailed no later than Thursday, September 22, 2016. We note that September 5, 2016, Labor Day, is a holiday listed in Government Code Section 662.003, and as such it was excluded in the computation of the 15-day period to file an appeal. The carrier’s response was sent to the Division by facsimile transmission on October 12, 2016, and was received by the Division on that same date. The carrier’s pleading is timely as a response to the claimant’s appeal but as far as it is considered an appeal of the hearing officer’s MMI and IR determinations, it is untimely as a cross-appeal, because it was not received by September 22, 2016.

161989 - Doctor did not rate the entire compensable injury - The hearing officer found in an unappealed finding of fact that the carrier has accepted a (date of injury), compensable injury in the form of a lumbar sprain/strain and a right hip sprain/strain. Dr. C does not mention or discuss in either of his MMI/IR certifications a right hip sprain/strain. Therefore, Dr. C did not consider and rate the entire compensable injury.

162058 – MMI date has to match in the medical reports and the DWC-69 - Dr. Q noted on April 27, 2016, the hand surgeon discharged the claimant and documented that the claimant was not a candidate for additional surgeries or injections. Dr. Q assessed two percent IR based on loss of ROM of the claimant’s left wrist and left thumb. However, on the Report of Medical Evaluation (DWC-69) Dr. Q certified that the claimant reached clinical MMI on April 25, 2016, with a two percent IR. There is an internal inconsistency between the MMI date Dr. Q certified in his narrative report and the MMI date Dr. Q certified on the DWC-69. Because the narrative report and DWC-69 list completely different dates regarding when the claimant reached MMI, we do not consider that internal inconsistency to be a clerical error that can be corrected.

162182 – Evidence did not support an acute exacerbation was different than an chronic condition - The parties stipulated at the CCH that the carrier has accepted an acute exacerbation of chronic Achilles tendinosis of the right ankle. The evidence did not establish that an acute exacerbation of chronic Achilles tendinosis of the right ankle is a distinct and separate condition from the disputed Achilles tendinosis of the right ankle. The hearing officer’s determination that the (date of injury), compensable injury does not extend to Achilles tendinosis, apart from the acute exacerbation of chronic Achilles tendinosis of the right ankle accepted by the carrier, is internally inconsistent with the parties’ stipulation.

162270 – A Ph.D. is capable of giving expert medical opinion – The death certificate listed the chain of events causing death as: 1) astrocytoma of the brain; 2) intracranial hemorrhage; and 3) respiratory failure. The claimant beneficiary relied upon the report and testimony of Dr. H, a cancer research biologist who holds a Ph.D. in biochemistry and biophysics and is engaged in investigating the etiology and treatment of brain tumors. The AP has previously held that medical evidence may be generated by a number of sources other than the individuals who are defined as “doctors” in Section 401.011(17). *See* Appeals Panel Decision (APD) 150372, decided April 27, 2015, and cases cited therein. Dr. H’s narrative and testimony should not be discounted as an expert medical opinion concerning causation merely because a Ph.D. is not listed under the definition of “doctor” in Section 401.011(17). As noted above, Dr. H is a cancer research biologist with a Ph.D. in biochemistry and biophysics investigating the etiology and treatment of brain tumors. The weight to be given such medical evidence is within the province of the hearing officer.

162262 – Hearing officer needs to make Findings of Fact and Conclusion of Law - Although the hearing officer discussed the extent conditions at issue in the Discussion portion of her decision, the hearing officer made no findings of fact, conclusions of law, or a decision as to whether the compensable injury of (date of injury), extends to a right foot stress fracture of the calcaneus, left foot Achilles tendon rupture, and synovitis of the right ankle. 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.

162301 – Impairment of burns and skin disorders - The parties stipulated that the compensable injury of (date of injury), includes chemical burns over 45% of the claimant’s total body surface area and post-traumatic stress disorder. The claimant indicated that his activities of daily living have been affected by the injury in that he is now sensitive to heat and sunlight and cannot effectively perform outdoor activities and additionally, that his ability to write is impaired due to pain and tightness of the skin on his right hand. Dr. K determined that the claimant qualified for a Class 1 impairment for skin disorders and assigned an IR of 9%. Dr. K indicated in his report that the claimant does need intermittent topical attention to his burn areas. Dr. S found that the claimant qualified for Class 2 impairment and assigned an IR of 18%.

The AMA Guides provide that “[t]he impact of the skin disorder on daily activities should be the primary consideration in determining the class of impairment. The frequency and intensity of the signs and symptoms and the frequency and complexity of medical treatment should guide the selection of an appropriate impairment percentage and estimate within any class.” We note the hearing officer asserts that inclusion in Class 2 under Table 2, page 280 of the AMA Guides requires a showing that the claimant’s condition requires intermittent to constant treatment. The Appeals Panel disagreed. The Class 2 criterion regarding treatment is that intermittent to constant treatment *may* be required [emphasis added]. The criterion under Class 1 is that *no* treatment or intermittent treatment is required [emphasis added].

162632 – Finality and deemed receipt - The hearing officer found in Finding of Fact No. 7 that Dr. KM’s MMI/IR certification was provided to the claimant by verifiable means on June 2, 2015, and found in Finding of Fact No. 8 that the claimant did not timely pick up the United States Postal Service (USPS) certified mail package, and therefore she was “deemed to have received [Dr. KM’s] certification by June 7, 2015.” We note that neither Section 408.123 nor Rule 130.12 provide for a deemed receipt of the first valid MMI/IR certification; therefore, Finding of Fact No. 8 is wrong as a matter of law. In evidence is a USPS tracking sheet which correlates with the green card receipt number that shows the letter was accepted by a USPS facility on June 2, 2015, in Illinois, arrived at a North (city) USPS facility on June 4, 2015, and unclaimed by the claimant with a maximum time expiring on June 24, 2015, at a (city 2) USPS facility. The evidence reflects that on June 2, 2015, Dr. KM’s MMI/IR certification was in a USPS facility in Illinois, and did not arrive in (city), Texas, until after that date. Based on the evidence presented, there are different dates on which the claimant could have received Dr. KM’s May 18, 2015, MMI/IR certification; therefore, we do not find it appropriate to render a decision as to when, or if, the claimant received Dr. KM’s MMI/IR certification by verifiable means.

162431 – Commutation of IIBs - The claimant’s DWC-51 in evidence shows that the claimant filled out the blanks for the MMI date (although as noted by the hearing officer this date is difficult to read), the IR, the rating doctor’s name, that neither he nor the carrier disputed the IR, and the weekly IIBs amount as being $340.84. The claimant also stated that he had “no lost time” in the date returned to work blank, and checked the box stating that he had returned to work for at least three months. The AP held that in this case the DWC-51 on its face was sufficient to meet the statutory requirements to commute IIBs under Section 408.128. Therefore, the hearing officer’s determination that the claimant’s commutation of IIBs on August 5, 2011, is not valid or final is legal error. The hearing officer relied on Appeals Panel Decision No. 991241 to deny the request. Unlike the facts in APD 991241, *supra*, the evidence in the case on appeal established that the claimant had returned to work for at least three months earning at least 80% of the AWW. The claimant’s attorney completed the DWC-51, and the carrier approved it. The DWC-51 did not contain an MMI date, did not indicate whether the IR was disputed, did not indicate the present rate of pay, but underneath the blank for rate of pay stated that “% varies by sales.”

162437 – MMI/impairment rating and a previous Designated Doctor opinion - Dr. A next examined the claimant on April 25, 2016, and certified that the claimant reached MMI on September 9, 2015, with a 6% IR. Dr. A noted that he had previously examined the claimant on September 22, 2015, for MMI and IR purposes, and that he had at that time opined that the claimant had not reached MMI. Dr. A stated in his narrative report that at the time of his previous examination on September 22, 2015, active symptomatology and examination findings persisted but slow improvement had been noted, and that “substantive improvement could be anticipated.” Dr. A explained that he chose the September 9, 2015, date of MMI because the claimant had completed 21 physical therapy sessions after his surgery, there were no records indicating further treatment, and no further material recovery was anticipated. Dr. A’s reports regarding MMI are inconsistent. Dr. A did not explain why he placed the claimant at MMI on September 9, 2015, when he had previously opined on September 22, 2015, that substantive improvement could be anticipated; Dr. A merely indicated that the claimant’s condition had not improved after September 9, 2015.

In Appeals Panel Decision (APD) 012284, decided November 1, 2001, the Appeals Panel noted that the question regarding the date of MMI was not whether the claimant actually recovered or improved during the period at issue, but whether based upon reasonable medical probability, material recovery or lasting improvement could reasonably be anticipated. The Appeals Panel held that it is of no moment that the treatment did not ultimately prove successful in providing material recovery or lasting improvement in the claimant’s condition if improvement could reasonably be anticipated.

*See also* APD 110670, decided July 8, 2011; APD 120071, decided March 9, 2012.

162441 – Extent, the hearing officer has to address each condition - The benefit review conference (BRC) report lists the extent of injury in dispute as follows: Does the compensable (date of injury), injury extend to and include L5-S1 facet arthropathy, L5-S1 spondylitic ridging, L5-S1 4 mm concentric annular bulge, L5 radiculopathy, and L5-S1 left foraminal disc protrusion? The hearing officer read the disputed extent-of-injury issue from the BRC report into the record and the parties agreed that was the disputed extent-of-injury issue to be litigated. However, the hearing officer in her decision and order does not include the specific condition of L5-S1 spondylitic ridging and does not make findings of fact, conclusions of law, or a decision regarding that condition. The record does not reflect that the parties agreed to modify the issue to omit the condition of L5-S1 spondylitic ridging from the issue. Accordingly, we reverse the hearing officer’s extent-of-injury determination as being incomplete, and remand for the hearing officer to make a determination on L5-S1 spondylitic ridging.

162441 – MRI date may have influenced D&O - The record contained various diagnostic tests that pre-dated the compensable injury. Specifically, there was an MRI in evidence dated March 31, 2015, which pre-dated the (date of injury), compensable injury. Based on the discussion in the decision and order, the hearing officer mistakenly believed that the March 31 MRI was performed after the compensable injury. The hearing officer mistakenly references the March MRI as being performed on March 31, 2016, rather than the correct date of March 31, 2015. The hearing officer misread the evidence with respect to the pre-injury MRI and based her decision regarding the extent of the compensable injury in part on the MRI. The case was remanded for further consideration.

162488 – Hearing officer got certifications mixed up - The hearing officer mistakenly found that Dr. W alternatively found that the claimant reached MMI on October 9, 2015, with a four percent IR. There is no certification in evidence from Dr. W that certifies an MMI date of October 9, 2015, with a four percent IR. Dr. W certified that the claimant reached MMI on April 8, 2015, rather than October 9, 2015, and assigned a four percent IR. Dr. W’s certification that the claimant reached MMI on April 8, 2015, with a four percent IR considering and rating the entire compensable injury is supported by the evidence.

162498 – Disability and internal inconsistencies in the D&O - In Finding of Fact No. 4, the hearing officer found that the compensable injury was a cause of the claimant’s inability to obtain and retain employment at wages equivalent to his pre-injury wage from November 5, 2015, through November 13, 2015, but was not a cause of the claimant’s inability to obtain and retain employment at wages equivalent to his pre-injury wage from November 14, 2015, and continuing through the date of the CCH. However, in Conclusion of Law No. 5, the hearing officer determined that the claimant did not have disability resulting from the compensable injury of (date of injury), from November 5, 2015, through the CCH. In the decision the hearing officer determined that the claimant did have disability from (date of injury), through November 13, 2015, but did not have disability from November 14, 2015, through the CCH, resulting from an injury sustained on (date of injury). We reverse the hearing officer’s decision as being internally inconsistent because her Finding of Fact No. 4 is inconsistent with her Conclusion of Law No. 5 and remand the case for the hearing officer to make a decision on disability which is consistent and is supported by the evidence.

162510 – Finality of subsequent certification after a D&O - In the case on appeal it must be determined whether the certified date of MMI of May 22, 2015, can be adopted given the prior decision holding the claimant had not reached MMI as of November 18, 2015. In a prior decision and order dated January 19, 2016, the presiding hearing officer stated the claimant had not reached MMI as of November 18, 2015, as determined by (Dr. H), and because the claimant had not reached MMI he could not be assessed an IR at that time. The AP determined the fact that the certified date of MMI of May 22, 2015, is prior to the previous decision holding the claimant had not reached MMI as of November 18, 2015, has no bearing upon whether or not the certification became final. Given that Dr. A’s April 1, 2016, MMI/IR certification is the first valid certification

and that the claimant did not dispute that certification within 90 days after receipt of written notice of the certification by verifiable means, Dr. A’s April 1, 2016, MMI/impairment rating certification became final pursuant to Section 408.123 and Rule 130.12. The evidence was insufficient to establish any of the exceptions to finality found in Section 408.123(f).