APPEALS PANEL DECISION SUMMARIES

(162591 – 170321)

*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*

162591 – Waiver of compensability and *Williamson* - Section 409.021(c) provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives the right to contest compensability. In evidence is a Notice to Carrier of Injury (Notice) from the Division dated July 6, 2015, that was placed in the carrier’s Austin representative’s box on that same date, so pursuant to 28 TEX. ADMIN. CODE § 102.5(d) (Rule 102.5(d)), the carrier was deemed to have received the Notice on July 7, 2015. Also in evidence is a Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1) dated October 7, 2015, and file stamped as received by the Division on October 8, 2015, in which the carrier disputed the claimed injury. The hearing officer correctly noted in her Discussion that the carrier did not file a dispute within 60 days of written notice of the claimed injury.

However, the hearing officer determined the carrier did not waive the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021 under the reasoning found in *Continental Casualty Company v. Williamson*, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.), because she found that the claimant did not show that he sustained damage or harm to the physical structure of his body as a result of repetitious, physically traumatic activities that occurred over time and arose out of and in the course and scope of his employment. We note that the hearing officer stated in the Discussion that the claimant “did show that he sustained damage or harm to the physical structure of his body as a result of repetitious, physically traumatic activities that occurred over time and arose out of and in the course and scope of his employment.”

If the hearing officer believed that there was no injury, that is no damage or harm to the physical structure of the body, she could not have found liability pursuant to Section 409.021. In *Williamson*, *supra*, the court stated that “if a hearing officer determines that there is no injury, and that finding is not against the great weight and preponderance of the evidence, the carrier’s failure to contest compensability cannot create an injury as a matter of law.” Applying the rationale in *Williamson*, carrier waiver cannot create an injury that does not exist. *Williamson, supra,* does not apply in this case because the medical records reflected that there was damage or harm to the physical structure of the claimant’s body on (date of injury).

162624 – Designated Doctor made calculation error - Table 3 on page 3/20 of the AMA Guides provides that a 46% upper extremity impairment equals a 28% impairment of the whole person rather than 26% as determined by Dr. E. 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 IR. Under the facts of this case, the certifying doctor’s assigned IR can be mathematically corrected based upon the right upper extremity impairment figures documented in her narrative report. The hearing officer found that the preponderance of the other medical evidence is not contrary to Dr. E’s assigned IR, and after a mathematical correction, that finding is supported by the evidence. Accordingly, we reverse the hearing officer’s determination that the claimant’s IR is 26% and render a decision that the claimant’s IR is 28% as mathematically corrected.

170017 – Hearing officer got certifications mixed up - The hearing officer found that Dr. H examined the claimant on May 10, 2016, and certified that the claimant reached MMI on October 9, 2013, with a one percent IR for the compensable injury. However, there is not a certification in evidence from Dr. H or any other doctor that assigns a date of MMI of October 9, 2013, and assigns a one percent IR. The hearing officer determined that the certification from Dr. H is supported by the preponderance of the evidence. However, the hearing officer mistakenly listed the date of MMI for that certification as October 9, 2013, rather than the date of November 21, 2014.

170041 – MMI/impairment rating can only be based on one doctor, even if they are the same opinions - The initial carrier-selected required medical examination (RME) doctor, Dr. Capello (Dr. C), also certified, on May 7, 2015, that the claimant reached MMI on August 13, 2014, with an IR of zero percent. The second carrier-selected RME doctor, Dr. G also certified, on November 18, 2015, that the claimant reached MMI on August 13, 2014, with an IR of zero percent. Section 408.125(c) provides that if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one (emphasis added) of the other doctors. Although determining that the claimant’s MMI date is August 13, 2014, and the IR is zero percent, the hearing officer failed to specify which of the other doctor’s certifications of MMI/IR she was adopting and, instead, found that the preponderance of the evidence supported the opinions of Drs. S, C and G. Although the reports from Drs. S, C and G each certify the same MMI date and assign the same IR, the hearing officer erred in failing to adopt the certification of MMI/IR of one of these doctors after determining that the certification of MMI/IR of the designated doctor was contrary to the preponderance of the evidence.

170042 – A certification cannot be adopted if it is potentially after statutory MMI, stat MMI has to be determined - Given there is some evidence that the eighth day of disability was June 25, 2014, the date of statutory MMI for the claimant could be June 22, 2016, which is the expiration of 104 weeks from June 25, 2014. Additionally, there is some evidence that the date of statutory MMI is June 21, 2016. Dr. K’s September 8, 2016, MMI/IR certification that the claimant has not reached MMI but is expected to do so on or about December 1, 2016, is potentially legally incorrect, and as such cannot be adopted.

170141 – Extent of injury and causation - The claimant was injured on (date of injury), when he was struck and run over by an automobile. The parties stipulated that the compensable injury extends to at least a left pneumothorax; left pulmonary contusion; displaced ribs 1, 2, 3, 4, 5, 7, 8, 9, and 10; left hip dislocation; right and left sacral fractures; left femoral head fracture; left acetabular fracture; pubic fractures; and vascular injury right cervical carotid artery at C1-2. Claimant had a significant amount of surgeries, treatment and inpatient rehabilitation. In evidence is an MRI report dated April 16, 2016, which notes that the claimant has mild to moderate lower/mild upper lumbar spondylosis with several disc bulges and disc herniations at L2-3, L3-4, and L4-5; and mild to moderate neural foraminal narrowing on the right at L4-5 and left at L5-S1, the conditions in dispute at the CCH. The hearing officer determined that the compensable injury does not extend to he disputed conditions. Under the facts of this case as discussed above, and given the mechanism and severity of the injury, the medical record in evidence, and the causation analysis contained in Dr. C’s report, the hearing officer’s determination that the compensable injury does not extend to the disputed conditions is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

170148 – Disability, hearing officer exceeded scope of issue - The disability issue before the hearing officer was “[d]oes the claimant have disability resulting from the compensable injury from October 28, 2015, to the present?” The hearing officer stated in the Discussion portion of the decision that the preponderance of the evidence does support that the compensable injury was a cause of the claimant’s inability to obtain and retain employment at wages equivalent to her pre-injury wage beginning on October 28, 2015, through the date of the CCH. However, the hearing officer found in Finding of Fact No. 5 that the compensable injury was a cause of the claimant’s inability to obtain and retain employment at wages equivalent to her pre-injury wage beginning on October 22, 2015, and continuing through May 25, 2016, but the claimant did not have disability from May 26, 2016, through the date of the CCH. The hearing officer also stated in the Decision and Order on the first page of the decision, Conclusion of Law No. 5, and the Decision that the claimant had disability beginning on October 22, 2015, and continuing through May 25, 2016, but the claimant did not have disability from May 26, 2016, through the date of the CCH. The hearing officer’s disability determination exceeded the scope of the disability issue before him to decide. Accordingly, we strike that portion of the hearing officer’s determination that the claimant had disability from October 22, 2015, through October 27, 2015.

170159 – Stat MMI, extent and Designated Doctor improperly combined impairment rating - A letter of clarification was sent to Dr. MG notifying her that the date of statutory MMI was December 24, 2015, and requested Dr. MG to provide an amended Report of Medical Evaluation (DWC-69) reflecting the correct statutory MMI date. We note that the parties did not stipulate to the date of statutory MMI, nor did the hearing officer make any findings of fact regarding that date. We note the parties did not stipulate that the compensable injury extended to a medial meniscus tear, nor was that condition actually litigated at the CCH. We note that when using the Combined Values Chart (CVC), Dr. MG’s figures yield a 24% IR, not a 28% impairment rating as assessed by Dr. MG. It appears from Dr. MG’s report that she added her figures rather than combining each organ system using the CVC as instructed by page 2/8 of the AMA Guides.

170182 – Specific injury v. repetitive trauma - The hearing officer resolved the disputed issues by deciding that: (2) the appellant (claimant) did not sustain a repetitive trauma injury on (date of injury). In the Discussion section of his decision the hearing officer stated: *The other problem with [Dr. R] opinions . . . is that he is describing acute type injuries, not repetitive trauma injuries. An acute injury is consistent with the claimant’s and Holt’s [Mr. H] testimony that there was no apparent problem with the claimant’s left knee prior to January 2016, and that it began swelling on (date of injury).* It is clear from the hearing officer’s statement and the record that the issue of whether or not the claimant sustained a specific injury as opposed to a repetitive trauma injury was actually litigated by the parties; however, the hearing officer failed to include in his Decision and Order, findings of fact, conclusions of law and a decision concerning such issue. We accordingly reverse the hearing officer’s decision as being incomplete and remand the issue of compensability to the hearing officer to make findings of fact, conclusions of law, and a decision consistent with the evidence in this case concerning whether or not the claimant sustained a compensable specific or acute injury.

170210 – SIBs – no ability to work theory - The claimant’s sole theory of entitlement to SIBs for the 13th quarter is based on a total inability to work. In Appeals Panel Decision 011152, decided July 16, 2001, the Appeals Panel held that Rule 130.102(d)(4) (now found in Rule 130.102(d)(1)(E)) does not contemplate the combining of reports from more than one doctor to somehow fashion a combination narrative report. We have held that the reports from different doctors cannot be read together to create a narrative report. The narrative report must come from one doctor. The hearing officer was persuaded the claimant had a total inability to work during each week of the qualifying period of the 13th quarter of SIBs by combining numerous records from more than one doctor to constitute a narrative explaining how the claimant was unable to work because of the compensable injury. In the instant case, there was not a narrative from a doctor who specifically explained how the compensable injury caused a total inability to work.

170230 – Proper DWC-45 disputing SIBs - In her decision the hearing officer indicated that the self-insured’s failure to provide the claimant’s current mailing address on its initial DWC-45 amounted to a failure to request a BRC “in the form and manner required by the Division,” reasoning that the Division relies upon the information contained in the DWC-45 to be correct and that if such information is found to be incorrect, it is reasonable that the request be denied. Under the facts of this case, we disagree. The record reflects that the self-insured filed a dispute of the claimant’s entitlement to SIBs for the 18th quarter within 10 days after receiving the claimant’s DWC-52 as provided by Rule 130.108(c) by requesting a BRC. The record further reflects that the self-insured’s DWC-45 met the requirements of Rule 141.1(d)(1)-(4) in that it identified and described the disputed issue; documented efforts made by the self-insured to resolve the disputed issue; contained a signature by the requesting party attesting that reasonable efforts had been made to resolve the disputed issue; and was sent to the Division, the claimant’s attorney and to the claimant. We note that while the original DWC-45 lists the claimant’s former address, which is the address listed on her DWC-52 for the 18th quarter, the self-insured delivered a copy of its DWC-45 on October 25, 2016, to the claimant’s current address.

170251 – Disputing appointment of Designated Doctor and adding finality - It is clear from the decision, the record, the argument of the parties and the hearing officer’s Finding of Fact No. 3 that the issue of finality of Dr. BF’s February 9, 2010, certification has not been resolved, that the issue of whether the first certification of MMI/IR became final pursuant to Section 408.123 and Rule 130.12 was made a basis of the hearing officer’s decision that Dr. BR was not properly appointed as designated doctor in this matter; however, the hearing officer failed to add the issue of finality and include findings of fact, conclusions of law and a decision concerning such issue in her Decision and Order. We hold under the facts of this case where finality of the first valid certification of MMI/IR is a basis for the carrier’s argument and the hearing officer’s decision that a designated doctor was not properly appointed to address MMI/IR, the hearing officer erred in not adding and making a determination regarding the issue of finality.

170260 – Disability, claimed injury v. compensable injury – Hearing officer found Claimant did not sustain a compensable injury. The medical records in evidence document that the claimant sustained multiple open fractures of the forefoot with significant soft tissue damage as a result of the (date of injury), claimed injury; that he was hospitalized for seven days during which he underwent amputation of the second, third, fourth and fifth toes; and that his physician found him incapable of performing his work duties for a period of at least four months following the date of the injury. Given the severity of the injury and the medical record in evidence, the hearing officer’s finding that the claimant was not unable to obtain and retain employment at wages equivalent to his pre-injury wage as a result of the claimed injury is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. However, Section 401.011(16) defines disability as the inability because of a *compensable injury* [emphasis added] to obtain and retain employment at wages equivalent to the pre-injury wage.

170321 – DWC-69 has to have the impairment rating written in the blank for it to be adoptable - Dr. K opined that the claimant reached MMI on March 21, 2014, and, using range of motion measurements of the claimant’s right ankle taken by Dr. P on April 21, 2014, determined that the claimant’s IR is six percent. However, none of the Reports of Medical Evaluation (DWC-69) in evidence from Dr. K specify the claimant’s IR; the boxes stating that Dr. K certified that the claimant has permanent impairment as a result of the compensable injury are checked but the space provided to record the claimant’s IR is left blank. Dr. K’s six percent IR cannot be adopted.