APPEALS PANEL DECISION SUMMARIES

(170984 – 171270)

*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*

170984 – Hearing officer did not accurately state or determine the issue - The Benefit Review Conference Report stated the disputed extent-of-injury issue as follows: Does the compensable injury of (date of injury), extend to and include right knee moderate chondromalacia of the patella, right knee lateral patellar friction syndrome, right ankle rupture of the anterior talofibular ligament, avulsion injury of the calcaneofibular ligament, osteochondral injury of the medial talar, and deltoid sprain?

At the CCH, the parties agreed to modify the extent-of-injury issue by removing the condition of right knee moderate chondromalacia of the patella and stipulating that the compensable injury of (date of injury), does not extend to that condition. However, the hearing officer did not accurately state two of the conditions which were part of the disputed issue. The hearing officer listed chronic appearing tears of the “ATFL” rather than a right ankle rupture of the anterior talofibular ligament and chronic healed avulsion injury of the calcaneofibular ligament rather than an avulsion injury of the calcaneofibular ligament. However, the parties did not agree to modify these conditions. Accordingly, we reverse that portion of the hearing officer’s decision that the compensable injury does not extend to chronic appearing tears of the “ATFL” and chronic healed avulsion injury of the calcaneofibular ligament and remand to the hearing officer for further action consistent with this decision.

170984 – Sprains do not need an expert - The hearing officer in her discussion stated in part that a deltoid ligament sprain is a sufficiently complex condition so as to require expert medical causation evidence to establish a causal connection between the compensable injury and this diagnosis. The Appeals Panel has long held that expert medical evidence is not required for sprains/strains.

171003 – Designated Doctor did not rate the entire compensable injury - Dr. B examined the claimant on June 21, 2016. As noted above, the parties stipulated that the compensable injury consisted of lumbar and thoracic sprains. Dr. B noted in his narrative report a diagnosis of a lumbar sprain. However, nowhere in his report does Dr. B discuss a thoracic sprain. In his explanation of the claimant’s IR Dr. B noted that the claimant “does have some pseudoradicular pain in his buttock and in the proximal thigh” and is “best described as having Category II, or [five percent] whole person impairment.” We note that Dr. B did not specify the spinal region on which he was basing his IR.

171028 – Parties reached MMI stipulation - In her decision signed April 4, 2017, the hearing officer determined that the claimant had not reached MMI as of November 10, 2016, as certified by Dr. R in his alternative Reports of Medical Evaluation (DWC-69s) bearing such date. The hearing officer further determined that no IR could be assigned because the date of MMI had not been determined. Based upon the parties’ stipulation that the date of statutory MMI is March 7, 2017, it is undisputed that the claimant had, in fact, attained MMI prior to the March 22, 2017, date of the CCH. The hearing officer accordingly failed to resolve the disputed issue as certified and, instead, determined that the claimant had not reached MMI as of a date more than four months prior to the date of the CCH.

171082 – Incorrect understanding of mechanism of injury - The hearing officer determined that the compensable injury extends to the disputed conditions. In her discussion of the evidence, the hearing officer noted that, in his report, Dr. L persuasively reasoned that the mechanism of injury was sufficient to cause the conditions in dispute. Dr. L examined the claimant for the purpose of addressing extent of the compensable injury on October 17, 2016. In his report of such examination dated November 28, 2016, Dr. L, in the History of Injury section, described the mechanism of injury as “the chair closed on [the claimant’s] arm and broke it.” Additionally, Dr. L provided the following causation analysis: RATIONALE: The examinee indicated that he was attempting to close electronic seats on an airplane. He indicated that the chair closed on his arm and broke it. This mechanism of injury along with subsequent swelling and inflammation would be consistent with causing the [disputed conditions]. Dr. L’s report, including his causation analysis and opinion that the compensable injury extends to the disputed conditions, is based upon an inaccurate understanding of the mechanism of injury. The claimant testified that he was injured when he repeatedly placed his arm through a tight space in the side of the airline seat. The claimant did not testify, and there is no other evidence in the record, that the chair closed on the claimant’s arm and broke it.

171088 – Hearing officer did not address amended disability period - The disability issue in dispute reported in the Benefit Review Conference Report was as follows: Did the claimant have disability resulting from an injury sustained on [(date of injury)], for the period of [March 22, 2016], through the present? At the CCH the parties agreed to amend the disability issue to read as follows: Did the claimant have disability resulting from the compensable injury of (date of injury), for the period of March 22 through July 31, 2016, and again from September 1, 2016, through March 27, 2017? We note that the hearing officer’s decision and order failed to include the disability issue as modified by the parties. The parties amended the disability issue at the CCH to include two separate periods of disability. The first period of disability in dispute was from March 22 through July 31, 2016. That portion of the hearing officer’s determination that the claimant had disability resulting from the compensable injury of (date of injury), for the period of March 22 through July 30, 2016, is supported by sufficient evidence and is affirmed. The hearing officer failed to make a determination of disability for July 31, 2016. Accordingly, we reverse the hearing officer’s decision as being incomplete and remand to the hearing officer to make a determination of disability for July 31, 2016.

171103 – Hearing officer applied his own medical judgment - In a report dated December 19, 2016, Dr. T opined that disc protrusions at C3-4 and C6-7 “are not supported by objective exam findings on EMG/NCV testing as related to the injury versus pre-existing findings.” The hearing officer noted Dr. T’s opinion, and stated in his discussion that “[t]his does not make sense since an EMG/NCV does not test for disc protrusions.” The hearing officer further stated that Dr. T’s opinion is not supported by the preponderance of the evidence, and determined that the compensable injury extends to disc protrusions at C3-4 and C6-7. On appeal the carrier contends that the hearing officer erred in applying his own medical opinion. We agree. Whether or not an EMG/NCV tests for disc protrusions is not subject to common knowledge, and the evidence in this case did not establish that an EMG/NCV does not test for disc protrusions. The hearing officer based his determination, in part, on a perceived medical fact not in evidence.

171115 – Intoxication presumption - The hearing officer in her discussion of the evidence, referenced the June 2, 2016, urinalysis and stated that the claimant’s urine specimen was tested for cannabinoids and other controlled substances and the claimant tested negative for all controlled substances. However, the June 2, 2016, urinalysis shows a positive result for cannabinoids. The hearing officer additionally stated, in part, that the initial drug screen performed on the date of the injury provided insufficient testing information. The hearing officer found that the evidence concerning drug testing was not persuasive to create a rebuttable presumption that the claimant was intoxicated and did not have the normal use of his mental or physical faculties at the time of the injury event of (date of injury). In evidence are two drug tests based on a urinalysis which reflect the claimant tested positive for marijuana. The hearing officer’s failure to apply a rebuttable presumption to the facts of this case is legal error.

171133 – Hearing officer failed to make Conclusion of Law and Decision - Left scapholunate bones was a condition included in the extent-of-injury issue in dispute before the hearing officer. Although the hearing officer made a finding of fact concerning the left scapholunate bones, the hearing officer failed to make a conclusion of law or a decision on the extent-of-injury condition of left scapholunate bones. Accordingly, we reverse the hearing officer’s extent-of-injury determination as being incomplete.

171136 – Disability does not require a DWC-73 - The hearing officer noted that one of the witnesses testified that she observed the claimant performing his duties normally and with no apparent problems on February 11, 2016, and that the claimant had told the witness that he injured his arm the previous day. In describing why she found the claimant’s testimony to be more credible, the hearing officer stated “[i]t is somewhat difficult to believe that the [c]laimant was performing these physically demanding tasks normally with a ruptured biceps tendon in his left arm.” In fact, the claimant testified that he has been unable to perform his pre-injury job duties since the date of the injury. While we have often held that a claimant can move in and out of disability (see APD 031317, decided June 25, 2003), the claimant’s uncontroverted testimony was that he had been unable to perform his duties since the date of injury and that an orthopedic consult had been requested but has not occurred due to denial of the claim.

171154 – Tendon lacerations and appointment of a Designated Doctor - Rule 127.130(b)(7) provides, in part, that for examinations performed on or after January 1, 2013, a designated doctor must be a licensed medical doctor or doctor of osteopathy to perform an examination of an injured employee who has tendon lacerations. The hearing officer found that the claimant’s injuries include tendon lacerations or tears, which injuries require a medical doctor or doctor of osteopathy to examine or treat them. However, Rule 127.130(b) only requires a medical doctor or doctor of osteopathy for tendon lacerations, not tears. Rule 127.130(b) does not prohibit a chiropractor from being appointed as a designated doctor to examine a claimant who has suffered a tendon tear. No medical records in evidence reflect that the claimant suffered a tendon laceration. The carrier argued based on dictionary definitions admitted into evidence that a laceration is a tear. We disagree.

171268 – Rating the foot - In his attached narrative report Dr. P assigned 3% impairment for 40° of plantar flexion, 3% impairment for 10° of dorsiflexion, 1% impairment for 10° of eversion, and 1% impairment for 10° of inversion using Tables 42 and 43 on page 3/78 of the AMA Guides, for a total 8% impairment for loss of range of motion (ROM) of the claimant’s left ankle. Dr. P also assigned 2% impairment for a superficial peroneal nerve dysesthesia using Table 68 on page 3/89. Using the combined values chart, Dr. P combined 8% impairment for loss of ROM of the left ankle and 2% impairment for the superficial peroneal nerve dysesthesia for a combined whole person impairment (WPI) of 10%.

However, Table 42 on page 3/78 provides that 40° of plantar flexion results in 0% impairment, not 3% impairment as assigned by Dr. P. Dr. P’s 8% impairment for loss of ROM of the left ankle was in error.

171270 – Designated Doctor did not rate the entire compensable injury - Dr. Y considered and rated a cervical strain, lumbar strain, and concussion. As previously noted the parties stipulated that the carrier has accepted as compensable a left wrist sprain. Dr. Y did not consider or rate a left wrist sprain. Because Dr. Y did not rate the entire compensable injury his certification of MMI and IR cannot be adopted.