APPEAL NO. 080985
FILED SEPTEMBER 3, 2008

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on May 28, 2008. With regard to the issues before him the hearing officer determined that the appellant's (claimant) impairment rating (IR) is 5% and that the claimant's first valid IR did not become final under 28 TEX. ADMIN. CODE § 130.12 (Rule 130.12) and/or Rule 130.102(g).

The claimant appealed, contending that the 15% IR had become final under Rule 130.102(g) because no request for a letter of clarification (LOC) was ever submitted until the IR was already final and that the 15% IR had become final under Section 408.123 and Rule 130.12. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and a new decision rendered.

The parties stipulated that the claimant sustained a compensable neck injury on _____, and that the claimant reached maximum medical improvement (MMI) on January 9, 2006, as certified by Dr. K and Dr. V. In an unappealed finding the hearing officer found that Dr. K's certification of MMI and IR was the first valid certification in this claim.

Dr. K, the first designated doctor (DD), examined the claimant on January 9, 2006, and in a Report of Medical Evaluation (DWC-69) certified MMI on that date with a 15% IR using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). The hearing officer, in unappealed findings, determined that the carrier received Dr. K's DWC-69 certifying MMI and IR on January 16, 2006, and that the carrier did not by the 90th day after January 16, 2006, request a benefit review conference (BRC) to dispute Dr. K's certification of MMI and IR. It is undisputed that the carrier received Dr. K's DWC-69 by verifiable means. Dr. K noted hypoesthesias (decreased sensitivity) over the left fourth and fifth metacarpal small and ring finger. Dr. K notes in his report that an MRI of the cervical spine dated August 25, 2004, showed "C5-C6 protrusions" and another MRI of the cervical spine dated September 29, 2004, showed C4-5 spur and C5 bulge. Dr. K's report notes a loss of reflexes in the claimant's upper extremities. Dr. K does not comment on atrophy and assessed the 15% IR based on Diagnosis-Related Estimate (DRE) Cervicothoracic Category III: Radiculopathy.

The hearing officer, in the Background Information portion of his decision, comments that Dr. K's "report raises significant questions about his rationale for this [15%] IR. Reflexes seem to be identical bilaterally. Ultimately, he premises the IR on

hypoesthesias in the 4th and 5th fingers on the left." A rating for DRE Cervicothoracic Category III: Radiculopathy, as set out on page 104 of the AMA Guides requires significant signs of radiculopathy "such as (1) loss of relevant reflexes or (2) unilateral atrophy with greater than a 2-cm decrease in circumference compared with the unaffected side, measured at the same distance above or below the elbow." *See also* Appeals Panel Decision (APD) 072220-s, decided February 5, 2008, regarding significant signs of radiculopathy such as loss of relevant reflexes, or measured unilateral atrophy of 2-cm or more. Dr. K's physical examination documents a loss of relevant reflexes of the claimant's upper extremities. There is no evidence that Dr. K's certification of MMI and assigned IR was disputed within 90 days of delivery of written notice through verifiable means as required by Rule 130.12(b)(1), by requesting a BRC.

The carrier's argument at the CCH was that Dr. K had "disappeared" and could not be located in order to respond to a LOC. In a letter dated November 30, 2007, the Texas Department of Insurance, Division of Workers' Compensation (Division) notified the carrier that "Since the prior [DD] [Dr. K] no longer is on the [Division] DDL [designated doctor list], a new DD will be selected." Subsequently, Dr. A was appointed as the second DD on December 20, 2007. Dr. A certified MMI on "1-9-08," and assessed a 15% IR based on DRE Cervicothoracic Category III: Radiculopathy. Dr. A indicated his examination was on "1-9-08" and dated the DWC-69 "1-9-08." A letter dated February 27, 2008, from the Division to the carrier notes that "DD [Dr. A] died before he could respond to [LOC]."

Subsequently, Dr. V was appointed as the third DD. In a DWC-69 dated March 11, 2008, Dr. V certified MMI on January 9, 2006 (the stipulated date of MMI), with a 5% IR, based on DRE Cervicothoracic Category II: Minor Impairment.

FINALITY UNDER SECTION 408.123(e) AND RULE 130.12

Section 408.123(e) provides that except as otherwise provided by Section 408.123, an employee's first valid certification of MMI and first valid assignment of an IR is final if the certification or assignment is not disputed before the 91st day after the date written notification of the certification or assignment is provided to the employee and the carrier by verifiable means. Section 408.123(f) provides in pertinent part that an employee's first certification of MMI or assignment of an IR may be disputed after the period described by Subsection (e) if: (1) compelling medical evidence exists of: "(A) a significant error by the certifying doctor in applying the appropriate [AMA] guidelines or in calculating the [IR]." *See also* Rule 130.12. The hearing officer, in the Background Information, comments:

> The claimant asserts that [Dr. K's] IR became final. This IR would have become final but for the compelling medical evidence of a significant error in the application of the AMA Guides by [Dr. K] in arriving at his rating. Specifically, his evidence of radiculopathy was hypoesthesias in two fingers. The AMA Guides do not authorize an award of a 15% IR rating

> for radiculopathy on this basis. For this reason, [Dr. K's] IR did not become final under Rule 130.12.

While we agree that hypoesthesias in two fingers does not support a rating of DRE Cervicothoracic Category III: Radiculopathy, Dr. K documents loss of relevant reflexes sufficient to support his radiculopathy rating. The evidence does not support the hearing officer's finding that there was compelling medical evidence of a significant error by Dr. K in applying the AMA Guides. We reverse the hearing officer's determination that the claimant's first valid IR did not become final under (Section 408.123(e) and Rule 130.12). We render a new decision that the claimant's first valid IR became final pursuant to Section 408.123 and Rule 130.12.

FINALITY UNDER RULE 130.102(g)

Rule 130.102(g) provides that if there is no pending dispute regarding the date of MMI or the IR prior to the expiration of the first quarter of supplemental income benefits (SIBs), the date of MMI and the IR shall be final and binding. The claimant represented, and the hearing officer found, that based on the stipulated MMI date of January 9, 2006, and a 15% IR the claimant's first quarter of SIBs ended on February 19, 2007. There is no evidence when Dr. K's 15% IR was disputed. In evidence is a Division "Notice of Non-Entitlement to [SIBs] for Quarter #1" based on a finding that the claimant had not made a good faith effort to obtain employment equal to the claimant's ability to work. The hearing officer in his Background Information, commented:

> The [c]laimant further argues that under the 15% IR, the first quarter of [SIBs] would end on February 19, 2007. Because the IR was not disputed before then, [c]laimant argues it became final under Rule 130.102(g). This argument is not persuasive under the facts of this case. The pertinent facts are that at all relevant times [Dr. K's] IR was under scrutiny through the accepted practice of seeking clarification, he disengaged from the system without notifying anyone, and a second designated doctor passed away before essential clarification could be obtained. The proper application of Rule 130.102(g) is in those cases where first quarter SIBs are actually pursued and entitlement for or against adjudicated. The evidence established a pending dispute under Rule 130.102(g).

There is no evidence when a LOC was sent to Dr. K or how Dr. K's IR "was under scrutiny."[1] The claimant, in her appeal, contends that it was not until a BRC in the summer of 2007 that the carrier announced its dispute of the IR. The claimant also contends "there was no request for an LOC filed until approximately September of 2007" (a date well after 90 days after January 16, 2006, the date that the carrier received Dr. K's report and after February 19, 2007, the end of the first quarter of SIBs). There is no evidence to the contrary and there is no LOC in evidence.

[1] In a case involving a dispute of finality under Rule 130.12(b)(1) the Appeals Panel held that requesting a LOC from the DD is insufficient to constitute a dispute. APD 042163-s, decided October 21, 2004.

In APD 041649, decided August 30, 2004, the Appeals Panel cited the preamble to Rule 130.102(g) which states 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 (January 22, 1999). In this case there is no evidence that either party disputed Dr. K's IR prior to February 19, 2007.

Based on the plain language of Rule 130.102(g) and with no evidence of a pending dispute of Dr. K's certification of MMI and assigned IR of 15% prior to the expiration of the first quarter of SIBs, we reverse the hearing officer's determination that the claimant's first valid IR did not become final under Rule 130.102(g) and render a new decision that the claimant's first valid IR became final under Rule 130.102(g).

IR

Because we have rendered a new decision that the claimant's first valid IR had become final under either or both Rule 130.12 (and Section 408.123) and Rule 130.102(g), we also reverse the hearing officer's determination that the claimant's IR is 5%. We render a new decision that the claimant's IR is 15% as assessed by Dr. K.

SUMMARY

We reverse the hearing officer's determination that the claimant's first valid IR did not become final under Rule 130.12 and/or Rule 130.102(g) and render a new decision that the claimant's first valid IR of 15% had become final under either or both Rule 130.12 (and Section 408.123) and Rule 130.102(g). We also reverse the hearing officer's determination that the claimant's IR is 5% and render a new decision that the claimant's IR is 15% as assessed by Dr. K.

The true corporate name of the insurance carrier is **TASB RISK MANAGEMENT FUND** and the name and address of its registered agent for service of process is

BURNS, ANDERSON, JURY, BRENNER & DONOVAN
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_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Veronica L. Ruberto
Appeals Judge

_____
Margaret L. Turner
Appeals Judge