

ADVISORY NO. 73

TOPIC: FINALITY OF MMI AND IMPAIRMENT RATING

The Commission has interpreted Rule 130.5(e) in three new opinions. Rule 130.5(e) provides as follows:

The first impairment rating assigned to an employee is considered final, if the rating is not disputed within ninety days after the rating is assigned.

The most recent of those opinions is Appeals Panel decision 92670. It clearly holds that under the provisions of the above quoted rule, both certification of MMI and the assessment of impairment are final **ninety days** after the claimant is notified of the certification and the rating of impairment.

The rule contains no good cause exception. The Appeals Panel declined to create an exception by implication. The rule is, accordingly, absolute.

Two previous Appeals Panel decisions held that unless the carrier could prove that the claimant was actually notified of the certification and the impairment rating, the claimant was not bound and could dispute the rating more than ninety days after it was assessed. Appeals Panel decision 92526 and 92542. Accordingly, in many cases, it will be important to be able to affirmatively establish that the claimant was notified of the certification of MMI and of the assessment of impairment.

We recommend that you independently mail a copy of the TWCC-69 upon which you are relying. If possible, it would be best to mail this by certified mail, return receipt requested. If this is not feasible, we suggest a standard business practice to which you can attest by affidavit or by sworn testimony and prove that all TWCC-69's are independently mailed to the claimant. If this notification is included with the first income benefit check, and if the claimant cashed the check, this would be proof of receipt. A more universal practice, applicable in all cases, would be to attach the TWCC-69 to the TWCC-21 (and so note on the face of the TWCC-21).

The Appeals Panel decision does not address whether Rule 130.5(e) excuses a carrier from further payments of income benefits when the claimant's initial certifying doctor decertifies MMI more than ninety days after the claimant was notified. However, because of the categorical language of Appeals Panel Decision 92670 and Rule 130.5(e) upon which it is based, we are of

the opinion, until decided otherwise by an amendment to the rule or further decision of the Appeals Panel, you may decline to reinstitute income benefits after decertification of MMI, if the claimant failed to challenge the certification of MMI or the impairment rating within ninety days after receiving a copy of the TWCC-69.

This interpretation must be tempered by common sense. If a treating doctor diagnosed a back strain and certified MMI, and then 100 days later diagnosed a ruptured disc requiring surgery, you may wish to agree that MMI was not reached. On the other hand, if the evidence for decertification is not credible, you should insist on strictly applying Appeal Panel Decision 92670. Some claimants are harassing physicians to decertify MMI with no change in condition.