

ADVISORY NO. 320
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TOPIC:*FULTON V. ASSOCIATED INDEMNITY CORPORATION*

On April 12, 2001, the Austin Court of Appeals delivered an opinion that holds that the 90-day rule (Rule 130.5) is invalid as it imposes a restriction in excess of that found in the plain language of the Worker’s Compensation Act. The case, *Fulton v. Associated Indemnity Corporation*, reversed a summary judgment granted in favor of the insurance carrier that the first impairment rating became final for lack of timely dispute. The Commission was not a party.

The court stated:

By enacting the 90-day Rule, the Commission has effectively shortened the time period in which an injured worker may revisit the issue of maximum medical improvement. The plain language of the statute allows up to two years for MMI to be reached. Doctors may believe a claimant’s condition has stabilized and assess an earlier MMI date; despite all reasonable medical probability, that claimant’s condition may deteriorate within the two-year time period. Nothing in the statute would foreclose reevaluating that claimant’s medical condition within the two-year period; indeed, the statute specifically gives an injured worker up to two years to reach maximum medical improvement. Because Rule 130.5(e) severely restricts the statutory time period for assessing a final MMI, we hold that the agency exceeded its authority in enacting the rule.

(Citations omitted).

The court concluded that it will not add to the definition of MMI “a reading that once MMI is assessed, it becomes final by some arbitrary deadline not contained in the statute; we may not imply restrictions on injured employees that are not found in the plain language of the Act.”

The 90-day rule has since been repealed for certifications that had not become final by January 2, 2002.

On January 31, 2002, the Texas Supreme Court denied the petition for review in this case. No basis for the denial was stated. The Commission has been advised that no motion for rehearing was filed with the Texas Supreme Court. As a result, the decision of the 3rd Court of Appeals has become final.

Because the Commission was not a party to the *Fulton* decision, it might be argued that

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the decision is only binding on the parties to the case, and is not binding on the Commission. Generally only a proper declaratory judgment action may invalidate a rule. However, as stated in Commission Advisory 2002-04, after consultation with the Office of the Attorney General, the Commission takes the position that the 90-day provision, as it existed in the previous versions of Rule 130.5(e), cannot be utilized as a basis for asserting the finality of a MMI certification or an impairment rating made before the statutory MMI defined periods as specified in Texas Labor Code section 401.011(30).

In recent Appeals Panel decisions, the Appeals Panel has indicated that the 90-day rule will not act as a bar to a dispute of an impairment rating that has not previously been litigated.

Therefore any argument that the 90-day rule does act as a bar to disputing an impairment rating will require a commitment to judicial review. As the Austin Court of Appeals is the only court with jurisdiction to issue a declaratory judgment invalidating a Commission rule, and as they have already spoken in the *Fulton* case (regardless of the binding effect on the Commission), any relief will have to come from the Supreme Court.

In the meantime, you can expect to see numerous MMI/IR certifications previously thought final being sent to a designated doctor.