ADVISORY NO. 431
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TOPIC: BEWARE OF A NEW 90-DAY RULE TRAP

We have recently noticed an increase in cases where claimant's representatives are laying a 90-day trap for the unwary adjuster.

As you know, the 90-day rule provides that the first certification of MMI and/or impairment becomes final if the carrier or the claimant does not dispute it within 90 days of receipt. Filing a request for designated doctor (DWC-32) or a request for benefit review conference (DWC-45) are the two methods by which a party disputes an impairment rating.

The trap is established when a designated doctor's appointment is requested by either the carrier or the claimant on the issue of MMI and/or impairment. Shortly before the designated doctor's appointment is scheduled to take place, some treating doctors are sending the carrier a DWC-69 (certification of MMI) that assigns a high impairment rating (usually over 15 percent).

Because there is already an appointment scheduled on the MMI/IR issue with a designated doctor, claims representatives may be tempted to ignore the first certification, thinking that the already-scheduled appointment will suffice to dispute the first rating.

The same problem exists when you receive a designated doctor's certification of MMI and impairment, and subsequently receive a report from the treating doctor, but with a certification date that precedes the date of the designated doctor's report. Arguably, the finality provision is not triggered by the *receipt* of the certification; only the dispute period is. In other words, what matters is the *date of certification*. If, after receiving the designated doctor's report, the carrier subsequently receives a prior certification, then it should still dispute it timely.

The law is far from settled at this time whether a previously requested designated doctor's examination on the issue of MMI and/or impairment rating will be treated by the Division as an adequate dispute of a certification under these facts.

Until the Appeals Panel or a court holds otherwise, you should be wary of any case in which you receive a request for a designate doctor or a report and a certification of MMI from the treating doctor at about the same time, where one of the reports contains a certification that you disagree with.

We recommend that you review any pending case in your office where a designated doctor has been requested on the issue of MMI or impairment within the last 90 days. In that review, you should determine whether an impairment rating was received shortly before or after the

designated doctor's appointment. If you find any such case, and if you disagree with the impairment rating assigned by the non-designated doctor, you should immediately file a DWC-45 (Request for Benefit Review Conference) with the Division, which challenges the validity or applicability of the offending certification in the case.

Moreover we recommend that this issue be made the subject of discussion and training with all claims staff (including your medical only staff) so that anyone handling a Texas claim in the future will recognize the trap and know how to avoid being caught in it.