

Update: Impairment Rating Disputes

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Does anything change faster than Texas workers' compensation law? Even without a statute or rules change, it's hard to keep up. The Appeals Panel has been busy the last few months addressing impairment rating issues. That's no surprise because the Division has been forcing litigation of maximum medical improvement (MMI) and impairment rating even when it doesn't make sense for either party. So here are three cases that seem to make the most significant changes to what we thought we knew. And they only mean what they say...for now:

The "Not At MMI" Decision & Order APD 131674

While the facts of this case have been around for a while, there has never been a definitive answer about how to handle it. The parties attended a contested case hearing (CCH) and it was determined that the claimant was not at MMI. That CCH decision was dated December 1, 2011. The Hearing Officer relied upon a report from the treating doctor dated July 7, 2011, to make that finding, and it became final.

In June 2013, the parties came up again on MMI and impairment following surgery and multiple new impairment ratings. The Hearing Officer then found that the claimant reached MMI on June 23, 2011, a date prior to the first CCH decision finding that the claimant was not at MMI. How could the claimant be at MMI in June 2011 when there was a final ruling in a decision and order dated December 2011 that he was not at MMI?

The Appeals Panel ruled that the MMI date could not be backdated to June 2011 because "the issue of MMI was previously litigated on November 29, 2011, and a decision was rendered on December 1, 2011, that the claimant has not reached MMI." However, the Panel then ignores the prior decision and order holding that the claimant has not reached MMI, and says that because the Hearing Officer relied upon a report dated July 7, 2011, "a date of MMI that is prior to July 7, 2011, cannot be adopted." Nevermind the fact that on December 11, 2011, the final decision and order read that the claimant "has not reached MMI."

None of the impairment ratings in evidence could be adopted because they either had a date of MMI prior to July 7, 2011, or the rating included non-compensable conditions.

Many questions are left open after this decision. There was no explanation why the date of the report relied upon for a finding of “not at MMI” becomes the swing date for future certifications of MMI rather than the CCH decision and order ruling that the claimant has not reached MMI. There was no explanation how the Appeals Panel could overrule that prior CCH decision that had become final. Will Hearing Officers be given new instructions on how to write findings of fact and conclusions of law regarding MMI so that a claimant is not at MMI as of a certain date rather than the date of the decision and order?

What if there had been a later certification of MMI and impairment after the treating doctor’s July 7, 2011, report that was rejected by the Hearing Officer when the ruling was made in December 2011 that the claimant had not reached MMI? Would the date of the rejected MMI certification then become the swing date for future certifications because it was considered by the Hearing Officer? What if there is no single report that the Hearing Officer relies upon to determine that a claimant is not at MMI but relies instead on the “preponderance of the evidence,” the totality of all of the evidence? It appears there will be a lot of confusion in this regard moving forward.

Unrelated but interesting, the Appeals Panel reversed the decision on MMI but remanded this case back to the Hearing Officer to make a ruling on extent of injury in addition to MMI and impairment. The instruction said that when making a decision on extent of injury the Hearing Officer is to consider “the evidence, including the April 2, 2012, DWC-32 submitted by the carrier.”

***The Next Certification of MMI and Impairment Becomes the First
Extent of Injury and The Ninety Day Rule – Rating More Than The Compensable Injury
APD 132117***

Like the case above, a designated doctor was appointed who certified that the claimant reached MMI with a 5% impairment rating, and then a CCH decision and order was entered that the claimant was not at MMI. Thereafter, the carrier requested a designated doctor and the exam was scheduled. Just days before the designated doctor exam, the treating doctor certified MMI on January 30, 2013, with a 22% impairment rating. Then the designated doctor examined the claimant and certified MMI on January 30, 2013 with a 5% impairment rating.

The Appeals Panel determined that the carrier failed to timely dispute the first certification of MMI and impairment. The carrier argued that it filed a DWC-32. Because a designated doctor had been appointed and a certification was made, which was overturned at CCH, the next valid impairment rating becomes the certification that must be disputed under the ninety day rule provision (Rule 130.12(a)(3)). Because a designated doctor had already been

appointed, the DWC-32 was not sufficient to dispute the treating doctor's impairment rating. It also was not timely because it was filed before the treating doctor's certification.

The Hearing Officer had determined that the first valid impairment rating did not become final because the rating included more than the compensable injury. It included a hernia that was not compensable. Therefore, that constituted a significant error in applying the AMA Guides. The Appeals Panel, however, determined that rating a non-compensable condition has nothing to do with applying the AMA Guides. Application of the AMA Guides involves the exam, the report and an explanation of how the rating was derived consistent with the Guides. They stated, "there is no provision in either Section 408.123 or Rule 130.12 that states that the mere inclusion of a condition in an assignment of IR constitutes an exception for finality."

Therefore, the treating doctor's certification became final. This decision overturned prior cases holding that rating more than the compensable injury is an error in applying the AMA Guides and a reason why the impairment rating could not become final pursuant to the ninety day rule.

***Extent of Injury and The Ninety Day Rule – Rating Less Than The Compensable Injury
APD 132594-S***

This case is the opposite of the one above. The Hearing Officer determined that the first impairment rating did not become final because she was ruling that the compensable injury includes new conditions that were not rated. According to the case law that day, adding to the extent of injury and including conditions that were not rated would be an exception to finality because it was considered an error in applying the AMA Guides.

Because of its ruling in the case above, APD 132117, this issue had to be addressed by the Appeals Panel. The Panel noted that "the preamble to Rule 130.12 states that, 'a party that wishes to dispute the certification or any of the ratings should not wait until after the extent-of-injury dispute is resolved as this resolution may occur after the 90-day period expires and the certification may have already become final'. See 29 Texas Register 2330, March 5, 2004."

The Appeals Panel addressed APD 132117 and said that if rating more than the compensable injury does not avoid finality, rating less than the compensable injury would not avoid finality either.

Once again, the Appeals Panel and the Division have failed to address extent of injury and finality in the context of the Statute. The reason why the Appeals Panel has now overruled its prior findings that finality is not reached when the rating has more or less than the

compensable injury is because the reasoning to get there was wrong in the first place. It was never an AMA Guides problem. It was a statute problem.

In §401.011(24) the legislature stated: "Impairment rating' means the percentage of permanent impairment of the whole body resulting from a compensable injury." Therefore, any impairment rating that has more or less than the compensable injury does not meet the statutory definition of "impairment rating." If a rating does not meet the statutory definition of "impairment rating," then it is not an impairment rating. So how can it become final or even be adopted? That's a question the Appeals Panel continues to avoid.

Conclusion

Once a Decision & Order is issued finding that the claimant is not at MMI, a future certification of MMI cannot be backdated to a date prior to the report the Hearing Officer relied upon to find that the claimant is not at MMI. After a CCH finding that the claimant is not at MMI, the next certification of MMI becomes the one that must be disputed to avoid finality. If a designated doctor has ever been appointed, that dispute must be made by requesting a benefit review conference. If an impairment rating rates conditions that are not compensable, or fails to rate conditions that are compensable that should have been rated, then that impairment rating is still subject to the ninety day rule and may become final.