APPEAL NO. 93224

Pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act), a contested case hearing was held in (city), Texas, on February 18, 1993, (hearing officer) presiding as hearing officer. She determined that the appellant (claimant) does not continue to have disability from a compensable injury of (date of injury), that a (Dr. K) is not the claimant's treating doctor, and that a dispute still exists concerning the claimant's impairment rating. Claimant timely appeals the first two matters urging that the great weight of medical evidence is against the hearing officer's determination that the claimant does not continue to have disability and her determination that Dr. K is not the claimant's treating doctor. Respondent (carrier) in a timely response mailed April 21, 1993 to these two issues, asserts that the great weight of medical evidence along with other evidence of record is sufficient to support the hearing officer's findings and conclusions. The response is deemed to be timely because it is due not later than 15 days after receipt of the request for review. Although the response was not made within 15 days of the date the request for review was sent to the carrier, it was sent to a wrong address and was not received by the carrier in normal course. Carrier, in its response, also attempts to appeal the third issue, that is, the matter of a dispute still existing regarding the claimant's impairment rating. Since the carrier acknowledges it received a copy of the hearing officer's decision on March 17, 1993 (well before receiving a copy of the claimant's appeal), it had 15 days from that date to timely file any request for review or appeal that it desired to raise. Article 8308-6.41(a); Texas Workers' Compensation Commission Appeal No. 92530, decided November 23, 1992. Consequently, the matter of a dispute still existing concerning the claimant's impairment rating is not properly before us.

DECISION

Finding sufficient evidence to support the hearing officer's determination that the claimant does not continue to have disability and that Dr. K is not the claimant's treating doctor, we affirm the decision.

That the claimant suffered a severe burn to his left foot on (date of injury), as a result of a molten copper spill, is not in dispute. He underwent considerable medical treatment including a skin graft on his left foot. Following the accident, he was immediately taken to an industrial clinic by the employer, treated by a (Dr. B), and later referred to (Dr. T) who treated him from the latter part of January to early September including performing the skin graft. Although the claimant indicated he still has some pain, Dr. T, noting in medical write-ups that the graft had healed well, returned him to modified work. The claimant performed this duty for some period of time not otherwise clear from the record. Subsequently, the claimant went to a (Dr. W), who referred him to (Dr. R) with whom he treated until October. According to the claimant's testimony, Dr. R told him that he believed his pain was psychological and Dr. T said the same and stated that he thought the claimant was "trying to milk the company." Dr. R referred the claimant to Dr. K for neurological as well as

psychological evaluation. Dr. K took the claimant off work for several different periods because of his medication and for further treatment. Dr. T certified that the claimant reached maximum medical improvement (MMI) on September 4, 1992 with a "zero" percent impairment rating. (There is no evidence in the record that this impairment rating was disputed by the claimant within 90 days. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (TWCC Rule 130.5(e). *See* Texas Workers' Compensation Commission Appeal No. 92670, decided February 1, 1993. However, this issue is not before us on this appeal.)

The claimant testified that he was in the National Guard and that he did go to summer training in the summer of 1992 although he discounted the extent of his physical activity during the training. The carrier introduced two rather convincing video tapes of the claimant in various stages of activity taken in September and October 1992, to which the hearing officer could and apparently did give appropriate weight. While the videos show a degree of vigorous activity, including riding a bicycle for a significant distance and walking and otherwise moving deftly around and shopping, there is no sign of limping, a need for any aid in walking or of any apparent discomfort in carrying on daily activities. This is not to say the claimant may not have been experiencing any pain; rather, if such was the case, he did not appear to be significantly hampered by it. In this regard, we have stated that pain alone may not equate to a compensable injury (Texas Workers' Compensation Commission Appeal No. 92058, decided March 26, 1992, citing National Union Fire Insurance Company of Pittsburgh v. Janes, 687 S.W.2d 822 (Tex. Civ. App.-El Paso 1985, writ ref'd n.r.e.)), and that MMI does not necessarily mean that an injured worker will be completely free from pain. Texas Workers' Compensation Commission Appeal No. 93206, decided April 22, 1993; Texas Workers' Compensation Appeal No. 92394, decided September 17, 1992. We are satisfied that there was sufficient evidence of record to support the hearing officer's determination that the claimant did not continue to have disability from his injury.

With regard to the issue of whether Dr. K was the claimant's treating doctor, we also find that there is sufficient evidence to support the hearing officer's determination that Dr. K was not. Clearly, Dr. T became the claimant's first choice of treating doctor by operation of Texas Workers' Compensation Commission Rule 126.7(f), as the claimant continued treating with him for a period much greater than 60 days. There was no evidence in the record that the claimant notified the Commission that he desired to change his treating doctor and, while this alone may not preclude an injured employee from selecting a second treating doctor (*see* Texas Workers' Compensation Commission Appeal No. 92147, decided May 29, 1992) under the provision of the 1989 Act in effect at the time, if there was a second choice of treating doctors, it was Dr. W who the claimant elected to go to on his own or Dr. R to whom Dr. W referred the claimant after one visit. Any subsequent referral to Dr. K would not make Dr. K the claimant's treating doctor unless specifically requested and specifically approved by the carrier or Commission. Texas Workers' Compensation Commission Rule 126.7(i) and (k). There is nothing to indicate that was done in this case.

Although the issue has not reached us in this case, we note that it would be a better procedure for a hearing officer to resolve an issue of MMI and impairment rating before him or her before finalizing a case rather that "referring" that issue back to a disability determination officer. If because of an evidentiary problem, the issue is not ripe for resolution at the time of a hearing which specifically includes that issue, a continuance might be the more appropriate procedure to use.

The decision of the hearing officer on the continued disability and claimant's treating doctor issues is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge