APPEAL NO. 950429

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 6, 1995, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. With respect to the issues before him, the hearing officer determined that appellant (claimant) has not reached maximum medical improvement (MMI) and an impairment rating (IR) is, therefore, premature. In addition, the hearing officer determined that claimant had disability as a result of his (date of injury), compensable left knee injury from (date of injury) to (date); however, he further determined that claimant did not have disability from July 20, 1994, through the date of the hearing, February 6, 1995. Claimant's appeal essentially challenges the sufficiency of the evidence in support of the hearing officer's determination that he did not have disability after (date). Respondent (carrier) urges affirmance, arguing that the hearing officer's decision is supported by sufficient evidence.

DECISION

We reverse and remand.

It is undisputed that claimant sustained a compensable injury on (date of injury), when in the course and scope of his employment as a diesel mechanic for (employer), he slipped and fell twisting his left knee. Claimant testified that about a week after the injury, he began treating with (Dr. P). On July 12, 1994, Dr. P certified that claimant reached MMI on that date with an IR of zero. In the narrative report accompanying his Report of Medical Evaluation (TWCC-69), Dr. P stated:

> This patient has been lost to followup [sic]. He missed his return followup [sic] appointment on June 22, 1994. His MRI scan was ordered, but he never showed up to have it done. He has apparently also missed his last two physical therapy appointments. I must assume that he is doing well. His noncompliance leads me to believe that a doctor-patient relationship cannot be established. I therefore feel he has reached maximal [sic] medical improvement.

In treatment notes dated (date), Dr. P provides that "MRI scan was unremarkable. Exam is within normal limits now. [Claimant] can be released for regular duty." In a letter dated September 7, 1994, Dr. P states:

> I am writing this letter to retract previous office note dictated 7/12/94. I received faulty information. The patient did show up for his MRI scan as scheduled. The therapy appointments he missed were hand therapy appointments.
>
> The patient was compliant and did follow-up as was asked by me. His maximum medical improvement date should be changed to [date].

Claimant testified that he attempted to return to work with his employer on August 5, 1994, after being released by Dr. P. Under the terms of his union contract, claimant was required to undergo a return to work evaluation at Occupational Health Centers (OHC). In a report on an OHC form dated August 5, 1994, there is a circle and an arrow on the line next to the notation "unable to work." The remarks section of the same report states "Pt. is to return to treating physician for release to regular duty or further evaluation and treatment." Claimant testified that when the doctors at OHC did not release him to full duty, his employer would not permit him to return to work. Claimant testified that some confusion arose concerning the language in the August 5th report and in response the center administrator for OHC drafted a letter stating:

> [Claimant] was seen here August 5, 1994 for a Return to Work Evaluation. At that time it was felt that he was not ready to return to regular duty, he was referred to his private doctor for continued care. We apologize for any confusion.

Claimant testified that he made three unsuccessful attempts to schedule an appointment with Dr. P after August 5th. Thereafter, he filed a request to change treating doctors, to (Dr. W), with the Texas Workers' Compensation Commission (Commission). Dr. W had previously treated claimant for an unrelated right knee injury, which required surgery. The Commission approved the change to Dr. W on August 19, 1994. On or about September 19, 1994, claimant had his first appointment scheduled with Dr. W. At that time, claimant was apprised that Dr. W would not treat him because he had an outstanding balance due related to the treatment of his right knee. The carrier scheduled a second appointment for claimant with Dr. W and claimant was again apprised that Dr. W would not treat him until he had received payment in full for the previous treatment. At that point, (Ms. W), carrier's adjuster responsible for claimant's claim, told him he could select another doctor who would treat his left knee injury at carrier expense. Claimant responded at that point and continued to insist at the hearing that he wanted to be treated by Dr. W and only Dr. W.

In response to claimant's dispute of Dr. P's zero IR, the Commission selected (Dr. S) as the designated doctor to determine MMI and IR. Claimant had an appointment with Dr. S on October 7, 1994. In a TWCC-69 of that date and an accompanying narrative report, Dr. S certified that claimant had not reached MMI. Specifically, Dr. S stated:

> [Claimant] has not reached Maximum Medical Improvement. Arthroscopic surgery of the left knee to remove any foreign bodies if present or to repair possible torn meniscus if necessary and desired on the part of the individual examined.

After Dr. S's report, carrier reinitiated temporary income benefits (TIBS) payments.

On December 12, 1994, a benefit review conference was held, where the benefit review officer (BRO) learned that Dr. W had refused to treat claimant and that claimant had not been to a doctor since August 1994. Therefore, the BRO scheduled an appointment

with (Dr. We). In addition, the BRO issued an interlocutory order to continue paying TIBS until the hearing. The BRO's letter to Dr. We, dated December 13, 1994, provides as follows:

> The purpose of the examination is to determine the diagnosis, prognosis, suggestions for treatment, and the claimant's ability to work and any physical restrictions he may have. Would the claimant have been able to work between July 26, 1994 and October 7, 1994? The claimant has been unable to obtain medical attention. Therefore, there is not much current medical information available and any information you are able to provide would be greatly appreciated.

In a report dated December 14, 1994, Dr. We diagnosed "subluxation laterally of the patella, left knee, with residual complaints in the left knee" and stated that claimant had not reached MMI. In a narrative report of the same date, Dr. We noted:

> We would recommend a short isometric quad and hamstring exercise program with a patellar knee brace, and if his symptoms improve, then return to work. If not, then one should consider a possible arthroscopic exam of the knee. Thus, at this point, the patient is not MMI. [Emphasis added.]

As previously noted, the hearing officer determined that claimant had not carried his burden of proving that he had disability from July 20, 1994, through the date of the hearing. Specifically in Finding of Fact No. 8, the hearing officer stated:

> From July 20, 1994, to the date this Benefit Contested Case Hearing was closed on February 6, 1995[1], the inability of Claimant to obtain and retain employment was [sic] wages equivalent to his preinjury wages is because of something other than his compensable injury.

In this instance, the undisputed evidence is that after Dr. P released claimant to full duty on (date), claimant was required to undergo a return to work examination at OHC and to be released to return to work by the OHC doctors before he would be permitted to return to work for employer. On August 5, 1994, claimant had that examination and was not released but was instead referred back to his treating doctor for additional treatment. In addition, it is undisputed that thereafter claimant was not allowed to return to work and had not returned as of the date of the hearing. Admittedly, claimant changed treating doctors to a doctor that refused to treat him on or about August 19, 1994, and refused to select another treating doctor thereafter. However, these unusual circumstances (and we do not hold that refusal to select a doctor who will treat the patient results in automatic continuation

[1] In the finding the date that the hearing closed was listed as February 6, 1994. It is apparent that the use of the 1994 date was a typographical error; therefore, we inserted the correct date in quoting the finding in our decision.

of income benefits) do not change the fact that when claimant went to OHC, the center from which he was required to obtain a release before he could actually return to work, it was determined that he was not able to return to full duty and his employer prohibited him from going back to work. When that information is considered with Dr. S's determination that claimant was not at MMI on October 7, 1994, and Dr. We's agreement on December 14, 1994, that claimant was not at MMI and that he could return to work only after his symptoms improve, we conclude that the hearing officer's determination that claimant did not have disability after (date), is so against the great weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). *See* Texas Workers' Compensation Commission Appeal No. 941691, decided February 2, 1995 and Texas Workers' Compensation Commission Appeal No. 94874, decided August 8, 1994, for two other examples of instances where disability determinations were reversed as against the great weight of the evidence.

Having determined that claimant's disability did not end on (date), we are unable to determine, on the record before us, whether disability ended at some point thereafter or if it continued. Accordingly, the decision and order are reversed and the case is remanded to the hearing officer for further consideration and development of the evidence relating to claimant's ability to work after (date), and consideration of the disability issue. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file the request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge