APPEAL NO. 010592

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 28, 2001. The hearing officer found:

1. The appellant's (claimant's) compensable injury did not extend to or include an injury to the thoracic spine; and

2. The claimant did not have good cause for failure to attend the required medical examination (RME) appointment on December 29, 2000.

The claimant contended there was sufficient evidence to find his thoracic compression fracture to be related to his compensable injury; respondent (carrier) requested affirmance. As to the good cause issue, claimant urged there was sufficient evidence to find he did reschedule; carrier again asked affirmance.

DECISION

We affirm in part and reverse and remand in part.

APPEALED ISSUE NO. 1 AND DECISION

It was not error to find that the thoracic spine injury was not compensable. Extent of injury is a question of fact within the sound discretion of the hearing officer. We find the hearing officer's decision was not against the great weight and preponderance of the evidence.

APPEALED ISSUED NO. 2 AND DECISION

It was error to find the claimant did not have good cause for failing to attend the RME on the sole basis that pain is not good cause.

A brief summary of the evidence on this issue is necessary. Claimant testified that he awoke on the day of the examination in great pain; that he took medication as prescribed but it was ineffective for the pain; that he lay quietly until 11:00 a.m. for the 1:30 p.m. appointment before accepting that his pain level was not going to substantially lessen. There was evidence in the medical records that claimant was at that time suffering from an untreated compression fracture. Claimant testified that he called to request a reschedule, and was told he would receive a new date and time. The appointment was not rescheduled, however and temporary income benefits (TIBs) were terminated. Carrier presented evidence indicating that there was no record of such a call on that day.

The hearing officer made these remarks in the Statement of the Evidence:

> Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.6(h) (Rule 126.6(h)) states, '. . . a carrier may suspend TIBs if an employee fails to attend an RME, including a designated doctor examination, without good cause.' Being in pain is not good cause for failure to attend an RME. Whether Claimant called or not to reschedule the appointment is not an issue as good cause for failure to attend was not found."

Good cause is a question of fact for the hearing officer to resolve. Texas Workers' Compensation Commission Appeal No. 941656, decided January 26, 1995. The test for whether good cause exists is, as in other Texas Workers' Compensation Commission (Commission) rules, whether the claimant acted with that degree of diligence which an ordinary person would exercise in the same or similar circumstances. The ordinary prudent person standard is not a subjective one. Texas Workers' Compensation Commission Appeal No. 960060, decided February 20, 1996 (Unpublished). Whether or not pain was or is a reason for missing an RME can constitute good cause must be measured under the reasonable person standard; we know of no authority to support a blanket statement that pain is not good cause.

Mistake of fact could be good cause for missing an RME. If a reasonable and prudent person believes he has properly rescheduled an RME (for whatever reason), then he will not appear at the original appointment. Such a reason would be a credibility issue for the fact finder, along with such issues as whether the claimant did or did not understand the consequences of failing to appear.

In this case, the hearing officer apparently did not doubt claimant's account of his pain on the day of the RME; rather, he stated, "Being in pain is not good cause for failure to attend an RME."

As the law was misapplied, we will reverse and remand the issue of whether the claimant did have good cause for his failure to attend the RME appointment on December 29, 2000. The question must be considered and resolved by applying the reasonable and prudent person standard considering all the evidence.

The decision and order of the hearing officer as to the extent of injury is affirmed.

Findings of Fact No. 3 and Conclusion of Law No. 4,"Claimant did not show good cause for his failure to attend the RME appointment on December 29, 2000," and Finding of Fact No. 4, "Carrier was within the Act and Rules to suspend TIBs from December 29, 2000 through January 19, 2001" are reversed and remanded for reconsideration.

The Decision and Order relieving carrier for liability for TIBs from December 29, 2000, through January 19, 2001, is reversed and remanded. 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 a new request for review not later than 15 days after the date on which the new decision is received from the Commission's Division of Hearings pursuant to Section 410.202. *See* Texas Workers Compensation Commission Appeal No. 92642, decided January 20,1993.

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Thomas A. Knapp
Appeals Judge