

APPEAL NO. 030916  
FILED JUNE 4, 2003

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 March 12, 2003. The hearing officer determined that: (1) the appellant (claimant) did not have disability after November 27, 2001; and (2) the claimant did not have good cause for failing to submit to the required medical examination (RME) on November 27, 2001. The claimant appealed these determinations on sufficiency of the evidence grounds. The claimant also contends that the carrier failed to give notice of its intent to withhold temporary income benefits (TIBs), as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.7(c) (Rule 126.7(c)), and, therefore, waived its right to suspend TIBs for failure to attend the RME. The carrier urges affirmance of the hearing officer's decision.

DECISION

Affirmed.

**DISABILITY**

The hearing officer did not err in determining that the claimant did not have disability after November 27, 2001. This was a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The hearing officer considered the evidence and found that the claimant could return to full-duty employment as of August 2001. In view of the evidence presented, we cannot conclude that the hearing officer's disability determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

**SUSPENSION OF TIBs**

The hearing officer did not err in determining that the claimant did not have good cause for failing to attend the RME on November 27, 2001. This case involves the application of Section 408.004(e) and Rule 126.6(h), which provide that a carrier may suspend TIBs, during and for a period in which the employee fails to submit to an RME, unless the Texas Workers' Compensation Commission (Commission) determines that the employee had good cause for the failure to submit to the examination. We have said that the test for existence of good cause is whether the claimant acted as a reasonably prudent person would have acted under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994, citing Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). The claimant testified that he could not attend the RME because he could barely walk, sit, or move and could not

drive. The hearing officer disbelieved the claimant's testimony and found that he did not have good cause for failing to attend the RME. We cannot conclude that the hearing officer abused her discretion in reaching this determination. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

As stated above, the claimant contends that the carrier failed to give notice of its intent to withhold TIBs, as required by Rule 126.7(c), and, therefore, waived its right to suspend TIBs for failure to attend the RME. The claimant did not make this argument at the hearing below and matter was not actually litigated. Accordingly, we will not address it for the first time on appeal. Additionally, given our affirmance of the hearing officer's disability determination, the claimant's argument that he is entitled to TIBs from November 27, 2001, is moot.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**LEO MALO  
ZURICH NORTH AMERICA  
12222 MERIT DRIVE, SUITE 700  
DALLAS, TEXAS 75251.**

---

Edward Vilano  
Appeals Judge

CONCUR:

---

Judy L. S. Barnes  
Appeals Judge

---

Margaret L. Turner  
Appeals Judge