

APPEAL NO. 040451
FILED APRIL 7, 2004

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 9, 2004. The hearing officer determined that the appellant's (claimant) compensable left shoulder injury of _____, does not include an injury to the cervical spine, bilateral carpal tunnel syndrome or bilateral cubital tunnel syndrome, and that the claimant did not have good cause for failing to submit to the designated doctor examination on May 1, 2003.

The claimant appealed the adverse determinations. On the extent-of-injury issue the claimant emphasizes medical reports, which support his position. On the good cause for failing to attend a medical appointment issue the claimant emphasizes that he misread the time of the doctor's appointment and that this was "an honest mistake." The respondent (carrier) responds, urging affirmance.

DECISION

Affirmed.

The claimant, a custodian, testified how on _____, he was using a floor buffer when it "tilted" or jumped, pulling his left arm. The carrier accepted a compensable left shoulder injury. The claimant saw a doctor who diagnosed left shoulder rotator cuff tendonitis on March 18, 2002. The claimant changed doctors and had left shoulder surgery for a rotator cuff tear on June 11, 2002. The claimant had a second left shoulder surgery on August 11, 2002. The treating surgeon, Dr. H, notes right upper extremity numbness in March 2003. The claimant was examined by the designated doctor, Dr. M, on June 4, 2003, and in a report of that date, Dr. M stated that he believed the claimant sustained a traction injury to the brachial plexus including the C5-6 roots (i.e. the primary injury is to the cervical spine rather than the left shoulder). There was conflicting medical evidence including reports from the claimant's original treating doctor, the carrier's required medical examination doctor, and contradicting reports from Dr. H.

There is also conflicting evidence whether the two left shoulder surgeries may have caused the claimed additional injuries. Under the circumstances where there is conflicting evidence on the disputed issue of whether the compensable left shoulder injury includes the claimed additional injuries, the hearing officer, who is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's decision in favor of the carrier on the disputed issue is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Regarding the issue whether the claimant had good cause for failing to submit to the designated doctor's examination on May 1, 2003, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(c) (Rule 130.6(c)) provides that a carrier may suspend temporary income benefits if an employee, without good cause, fails to attend a designated doctor examination. The claimant acknowledged that he received notice of the scheduled designated doctor's examination but contends that due to his poor vision he misread the time of the appointment and that he arrived at 1:00 p.m. for his 9:00 a.m. appointment. The hearing officer points out that Rule 130.6(c)(1)(A)(ii) provides an exception if the claimant reschedules the examination to occur no later than the 14th day after the originally scheduled examination date. The hearing officer found that the claimant did not call the designated doctor's office until May 15, 2003, and the examination was rescheduled for June 4, 2003. The hearing officer found that the claimant did not have good cause for failing to submit to the designated doctor's examination on May 1, 2003. Whether good cause exists is a determination within the discretion of the hearing officer and we will review that finding on an abuse of discretion standard. Whether the hearing officer abused her discretion is determined by whether the hearing officer acted without reference to guiding rules or principles. Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). In that the rescheduled examination was more than 14 days after the original appointment date, we conclude that the hearing officer did not abuse her discretion.

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

We affirm the hearing officer's decision and order.

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

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Edward Vilano
Appeals Judge