APPEAL NO. 010828

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 21, 2001. The hearing officer determined that the appellant (claimant) did not have good cause for failing to attend required medical examination (RME) appointments, that the respondent (carrier) is not liable for temporary income benefits (TIBs) for the period during which the claimant failed to submit to the examination, and that the claimant had disability from December 9, 2000 (all dates are 2000 unless otherwise specified), through January 26, 2001. The hearing officer's decision on the disability issue has not been appealed and has become final pursuant to Section 410.169.

The claimant appeals and argues that he did have good cause for failing to attend two RME appointments and that he exercised ordinary prudence in attempting to attend the RMEs. The carrier responds, urging affirmance.

DECISION

Affirmed.

This case involves the application of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.6(h) (Rule 126.6(h)), effective December 26, 1999. Rule 126.6(h)(1) provides that a carrier may suspend TIBs if an employee fails to attend an RME without good cause. A "carrier may presume that the employee did not have good cause to fail to attend the examination" if:

> (A) by the day the examination was originally scheduled to occur the employee has both:
>
> > (i) failed to submit to the examination; and
> >
> > (ii) failed to reschedule the examination to occur no later than the latter of the seventh day after the originally scheduled examination date or the doctor's first available appointment date; or
>
> (B) after rescheduling the examination as provided in subsection (h)(1)(A)(ii) of this section, the employee failed to submit to the rescheduled examination.

The rest of the rule deals with how TIBs may be reinitiated.

The claimant in this case is 33 years old, has an 11th grade education in Mexico, does not drive or have a vehicle, has been in the United States three years, and has lived in (city1) one year and nine months. The carrier received approval for an RME on August 24, and by letter dated October 6, scheduled an appointment for the claimant to see Dr.

P on Saturday, October 21. It is undisputed that Dr. P is a "traveling doctor" who has an office in (city 2) but apparently is scheduled out of (city1). The unrebutted testimony was that the telephone number on the notice either was not a working number or was a (city 3) number. The claimant testified that he called the listed number to ask for directions on how to get to the doctor's office and, failing at that, called Ms. C in his attorney's office for assistance (Ms. C is bilingual). Ms. C's affidavit states that on October 19 her efforts to obtain directions also met without success. Nonetheless, the claimant was able to eventually find the doctor's office and went in on Monday (October 23), but the doctor was unable to see him.

The RME with Dr. P was rescheduled for December 9 at, apparently, another address in (city 1). The claimant was given notice of the rescheduled appointment on November 20. The claimant testified that he arranged for a friend to take him to the rescheduled appointment on December 9 but that en route the friend received a call that his father, who was in a coma, was dying or had died, and that the friend could not find the doctor's office before aborting the trip to go to his father in the hospital. The hearing officer commented that he "was not persuaded by this story."

The RME was again rescheduled and Ms. C, by letter dated January 5, 2001, to the carrier, requested transportation for the claimant. Ms. C stated "Claimant is now requesting transportation be provided . . . ." (Whether Ms. C requested transportation for the claimant for one of the earlier RMEs is in dispute.) The carrier provided the requested transportation. The claimant contends that the two missed appointments were due to the treating doctor using different addresses which were difficult to locate. The hearing officer found that the claimant did not have good cause for failing to attend the scheduled October 21 and December 9 appointments and that the carrier properly suspended TIBs for the period of December 9 (2000) through January 26, 2001, when the claimant was seen for the third scheduled RME.

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 determines that the employee had good cause for the failure to submit to the examination. Whether good cause exists is a matter left up to the discretion of the hearing officer, and the determination will not be set aside unless the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 002816, decided January 17, 2001, citing Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We have held that the appropriate test for good cause is that of ordinary prudence; that is, the degree of diligence an ordinarily prudent person would have exercised under the same or similar circumstances. Texas Workers' Compensation Commission Appeal No. 94244, decided April 15, 1994.

Our review of the record does not indicate that the hearing officer acted without reference to any guiding rules or principles (abused his discretion) in determining that the claimant did not have good cause for missing the RME appointments scheduled with Dr. P.

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Robert W. Potts
Appeals Judge