

APPEAL NO. 191978
FILED DECEMBER 18, 2019

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 October 3, 2019, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issue by deciding that the appellant (claimant) did not have good cause for failing to submit to the designated doctor's examination on June 27, 2019; the claimant is not entitled to temporary income benefits (TIBs) from July 2 through August 20, 2019; and the claimant is entitled to TIBs for August 21, 2019. The claimant appealed, disputing the ALJ's determinations of good cause for failing to attend the designated doctor's examination on June 27, 2019, and that the claimant is not entitled to TIBs from July 2 through August 20, 2019. The respondent (carrier) responded, urging affirmance of the determinations disputed by the claimant. That portion of the ALJ's determination that the claimant is entitled to TIBs on August 21, 2019, was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

The parties stipulated, in part, that the claimant sustained a compensable injury on (date of injury). The evidence reflected that the claimant was injured when a truck he was driving overturned. The claimant was scheduled to attend a designated doctor's appointment with (Dr. S) on June 27, 2019. The claimant testified that beginning 2 days before the scheduled appointment with Dr. S he had a sore throat and migraine headaches. The claimant testified that on June 26, 2019, he called his attorney's office to inform them he was ill and would not be able to attend the designated doctor's appointment scheduled for the next day, June 27, 2019. In evidence is a letter from Dr. S dated July 12, 2019, acknowledging that a representative from the claimant's attorney's office called on June 26, 2019, to reschedule the designated doctor's appointment due to the claimant's illness. Additionally, in evidence is a phone report dated June 26, 2019, that documents a legal assistant with the claimant's attorney's office called the office of Dr. S, as well as ExamWorks, Dr. S's scheduling company, on that day to inform them of the claimant's illness and his inability to attend the appointment for June 27, 2019. The note further documented that Dr. S would not be able to reschedule an appointment within 21 days. A new designated doctor was appointed and the claimant attended the examination with the subsequently appointed designated doctor on August 21, 2019.

28 TEX. ADMIN. CODE § 127.25(a) (Rule 127.25(a)) provides that an insurance carrier may suspend TIBs if an injured employee, without good cause, fails to attend a

designated doctor examination. Rule 127.25(b) provides that in the absence of a finding by the Texas Department of Insurance, Division of Workers' Compensation (Division) to the contrary, an insurance carrier may presume that the injured employee did not have good cause to fail to attend the examination if by the day the examination was originally scheduled to occur the injured employee has both: (1) failed to submit to the examination; and (2) failed to contact the designated doctor's office to reschedule the examination. Rule 127.25(c) provides that if the injured employee contacts the designated doctor within 21 days of the scheduled date of the missed examination to reschedule the examination, the designated doctor shall schedule the examination to occur as soon as possible, but not later than the 21st day after the injured employee contacted the doctor.

We review good cause determinations under an abuse-of-discretion standard. Appeals Panel Decision (APD) 002251, decided November 8, 2000. The ALJ's determination will not be set aside unless the ALJ acted without reference to any guiding rules or principles. See *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986). The 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. APD 051193, decided July 13, 2005.

The ALJ stated on the record that he believed the claimant was ill on June 26, 2019. In his discussion, the ALJ stated that the manner in which the claimant attempted to reschedule the examination was not consistent with the Division rules. The ALJ stated Rule 127.25(c) requires "[the] [c]laimant himself should contact the designated doctor . . . , not his attorney. [The] [c]laimant did not attempt himself to contact the designated doctor. Moreover, it was a legal assistant (not even [the] [c]laimant's attorney) who contacted the designated doctor and ExamWorks on [the] [c]laimant's behalf."

Section 401.011(37) defines representative, in part, as a person, including an attorney, authorized by the commissioner to assist or represent an employee in a matter arising under the 1989 Act that relates to the payment of compensation. We cannot conclude that, when the claimant has a representative, he or she is required to personally contact the designated doctor to reschedule an appointment before good cause can be found. Accordingly, we reverse the ALJ's determination that the claimant did not have good cause for failing to submit to the designated doctor's examination on June 27, 2019, and we render a new decision that the claimant did have good cause for failing to submit to the designated doctor's examination on June 27, 2019. Since a new decision has been rendered that the claimant had good cause for failing to submit to the designated doctor's examination on June 27, 2019, we also reverse the ALJ's determination that the claimant is not entitled to TIBs from July 2 through August 20,

2019, and render a new decision that the claimant is entitled to TIBs from July 2 through August 20, 2019.

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

**RICHARD J. GERGASKO
2200 ALDRICH STREET
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Cristina Beceiro
Appeals Judge

Carisa Space-Beam
Appeals Judge