APPEAL NO. 020108-s
FILED MARCH 7, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 21, 2001. The sole issue unresolved by the benefit review conference (BRC) was restated by the hearing officer to read:

> Did the [respondent (claimant)] have good cause for failing to attend the required medical examination [RME] of September 12, 2001, with [Dr. G], and if so, may the [appellant (carrier)] suspend temporary income benefits [TIBs] for what period of time?

Both the claimant and the carrier agreed to this restatement of the issue. The hearing officer determined that the claimant did not have good cause for failing to attend the RME with Dr. G on September 12, 2001, but that the carrier was not entitled to suspend TIBs for the period of September 12 through October 15, 2001, because the carrier failed to give the claimant the 10-day notice of the examination, which the hearing officer found to be required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.6(b) (Rule 126.6(b)). The carrier appeals, asserting that the hearing officer decided an issue that was not properly raised or listed in the benefit review officer's report, namely, whether the carrier complied with the 10-day notice requirement. The claimant responds, urging that notice was raised during the hearing and that the issue at the CCH necessarily requires a determination as to the carrier's compliance with the rules pertaining to setting up the examination.

DECISION

Reversed and rendered.

As the hearing officer noted in his decision and order, the primary issue in this case was whether the claimant had good cause for failing to attend the RME. He determined that she did not, and that determination has not been appealed. The portion of his decision which has drawn an appeal from the carrier is the hearing officer's statement that he also needed to determine if the carrier had complied with the requirements of Rule 126.6, before the carrier would be entitled to suspend the claimant's TIBs for the period between the missed, rescheduled RME and when the claimant finally did attend an RME. The carrier takes the position that the hearing officer decided an issue that was not properly before him, as it had not been raised at the BRC, properly added as an issue, or tried by consent of the parties at the CCH. We disagree with the carrier's position, and agree with the claimant that the question of timely notice to the claimant was properly before the hearing officer, as necessarily included in the determination of whether there was good cause for failure to attend the RME. The carrier needs to provide sufficient information that it has complied with the requirements for having the claimant participate in the RME before the sanction of suspending TIBs can be imposed on the claimant. The hearing officer has done nothing more than hold the carrier to its burden of showing that

it had the right, under the 1989 Act and the rules, to suspend TIBs. We reject the carrier's assertion that the hearing officer could not properly decide that question.

The claimant testified that she went to Dr. G's office for the RME that was originally scheduled for August 23, 2001, but that the doctor would not see her that day, apparently because there was no translator available. She also testified that she did not attend the rescheduled RME on September 12, 2001, because of transportation problems encountered on the day of the rescheduled RME. The hearing officer heard the facts as developed at the CCH and determined that the claimant had not shown that she had good cause for failing to attend the RME on September 12. As mentioned above, that determination has not been appealed. The hearing officer went on to determine that the carrier failed to give the claimant the 10-day notice of the examination, as he found was required by Rule 126.6(b),[1] and that the carrier was therefore not entitled to suspend TIBs. The hearing officer has misinterpreted Rule 126.6(b). There is a requirement for a 10-day notice to the employee and the employee's representative when the RME is initially scheduled. The rule goes on, however, to discuss rescheduling of an RME at the request of the employee, and specifically notes that "the 10 day notice requirement does not apply to a rescheduled examination." While this case differs from the scenario presented by the rule in that the doctor was the one to reschedule the RME rather than the claimant, we find no reason to apply a 10-day notice requirement to a rescheduling done at the request of the doctor. We note that the rule contemplates that a rescheduled RME will be rescheduled for a time within seven days of the date the RME was originally scheduled to occur, and does not contemplate a new 10-day notice period. We hold that the hearing officer erred in concluding that there was a 10-day notice requirement for the rescheduled RME.

Even though there was not a requirement for a 10-day notice, it was necessary that the claimant know of the rescheduled RME. The hearing officer made a finding that the claimant received the letter providing notice that the RME had been rescheduled for September 12, 2001, no earlier than September 4, 2001. The record is clear, however, that the claimant had sufficient notice of the RME to have transportation arrangements made, at some time prior to September 12, 2001, to take her to the rescheduled RME on September 12. Under the circumstances, we conclude that there was sufficient evidence in the record that the hearing officer, had he not misinterpreted the law, would have determined that the carrier provided ample notice of the rescheduled RME. With the notice requirement satisfied, the carrier was entitled to suspend TIBs for the period of September 12, 2001, the date of the missed examination, through October 15, 2001, the day prior to the date when the claimant submitted to the RME.

[1] We note that Rule 126.6 was recently amended, with an effective date of January 2, 2002. At issue in this case is the prior version of Rule 126.6, which became effective December 26, 1999.

We reverse the hearing officer's decision that the carrier was not entitled to suspend TIBs for the period of September 12, 2001, through October 15, 2001, and render a decision that the carrier was so entitled.

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

CORPORATION SERVICES COMPANY
801 BRAZOS
AUSTIN, TEXAS 78701.

Michael B. McShane
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Robert W. Potts
Appeals Judge