APPEAL NO. 931042

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). This case is before us again following our remand in Texas Workers' Compensation Commission Appeal No. 93441, decided July 16, 1993. The remand was predicated on our holding that where the respondent/cross-appellant (carrier herein) had authorized treatment for the appellant/cross-respondent (claimant herein) by a doctor more that 20 miles from claimant's residence it was liable for travel expenses pursuant to Tex. W.C. Comm'n 28 TEX. ADMIN. CODE § 134.6 (Rule 134.6). We remanded the case for further development of the evidence regarding what portion of the claimant's request for mileage reimbursement was due to his visits with a doctor the carrier had authorized him to see and whether the claimant's travel to the doctor required meal expenses.

A contested case hearing (CCH) on remand with (hearing officer) presiding as hearing officer was originally opened on September 20, 1993, and then continued until October 8, 1993, when testimony was heard. The record of the CCH on remand was closed on October 15, 1993. In her decision on remand the hearing officer determined that the claimant was entitled to $1,717.91 for mileage reimbursement and $285.73 for meal reimbursement or a total medical travel expense reimbursement of $2,003.64.

Both the claimant and the carrier appeal the hearing officer's decision and each responds to the other's request for review. The claimant appeals claiming the hearing officer used inadmissible evidence in reaching her decision, allowed the carrier to relitigate the entire case rather than just the remanded issues, erred in continuing the hearing from the original September 20, 1993, date until October 8, 1993, and erred in not awarding him interest, reasonable and necessary costs of suit including the expense and time expended in pursuit of the claim as well as penalty. The claimant alleges that these alleged errors constituted abuse of discretion and official misconduct and implies that they were motivated by bias on the part of the hearing officer. The carrier replies that a number of the assertions of the claimant are unworthy of response, but that in regard to those that are, its position is that jurisdiction over medical travel reimbursement is not in the Texas Workers' Compensation Commission's (Commission) division of hearings (and thus not in the Appeals Panel) under the 1989 Act, that while disagreeing with the original decision of the Appeals Panel to remand the case, the hearing officer properly made findings of fact and conclusions of law regarding the entitlement to travel reimbursement pursuant to the reversal and remand by the Appeals Panel, and that the hearing officer properly continued the CCH from September 20, 1993, to October 8, 1993. The carrier in its own request for review appeals the decision of the hearing officer contending that the hearing officer erred in concluding that the Commission's division of hearings has jurisdiction to resolve a dispute over medical expenses including medical travel, in making findings of fact and conclusions of law regarding travel expenses when the medical treatment was disputed by the carrier as being unnecessary over-utilization, in concluding that the claimant was entitled to travel expenses when such travel was not reasonably necessary, and in awarding reimbursement for mileage and meals when there was insufficient probative evidence to support such findings. The claimant responds that the carrier waived the jurisdiction issue by not raising

it until after the case was remanded and argues the carrier is attempting to relitigate the case on remand and is violating its duty of good faith and fair dealing.

DECISION

Finding no reversible error in the record and the decision of the hearing officer supported by sufficient evidence, we affirm.

The facts of this case are summarized in our earlier decision in Appeal No. 93441, *supra*, and we will not repeat them here. For context, suffice it to say that the claimant contended that it was reasonably necessary for him to treat his compensable injury with his family doctor who was in a nearby city and whose office was more than 20 miles from the claimant's residence. We held that when the carrier authorizes medical treatment more that 20 miles from the claimant's residence it is liable for travel expenses pursuant to Rule 134.6(a) and remanded the case to determine the proper amount of mileage reimbursement for travel to the doctor's office as opposed to travel to a pharmacy (which we held was not travel for medical care as contemplated by Rule 134.6) and for further development of the evidence concerning meal expenses.

On remand the claimant presented evidence of the mileage for travel to his doctor as opposed to the pharmacy and also evidence of additional mileage for travel to his doctor since the original hearing. The carrier called the handling adjuster who testified that there was no mechanism for her to contest the claimant's first choice of treating doctor under the 1989 Act.

The claimant contends that the hearing officer relied on inadmissible evidence in making her decision. The only specific evidence to which the claimant points is evidence the carrier had introduced at the first CCH in April 1993 concerning bills which the claimant's doctor had submitted to the carrier. The carrier argued that these bills, which included dates of service, constituted a more accurate reflection of the dates that the claimant treated with his doctor than summaries provided by the claimant. The claimant testified that he relied on contemporaneous notes to prepare his summaries of medical visits, but on cross-examination admitted that he had to rely on his recollection, along with information provided him by his doctor's office, in reconstructing a record of the dates he traveled to the doctor. The hearing officer in deciding the dates of medical mileage for which the claimant should be reimbursed relied upon both the claimant's summary and the medical bills introduced by the carrier granting mileage reimbursement only for the dates of treatment that appeared both in the claimant's summary and the medical billing records.

We do not find that these billing records were inadmissible. First it is not clear that the claimant actually objected to their admission. Ordinarily, evidence which is admitted without objection cannot be complained of on appeal. Texas Workers' Compensation Commission Appeal No. 92009, decided January 21, 1992; Texas Workers Compensation Commission Appeal No. 92047, decided March 25, 1992. When the

carrier proffered these records claimant's main concern was whether the bills had been paid by the carrier.[1] During a discussion of this the claimant mentioned that he had never received a copy of these records. The hearing officer then questioned the carrier's counsel as to when the documents had been exchanged. Carrier's counsel stated he had only received these documents from the carrier on April 15th and had mailed them to claimant the same day. The claimant stated that he had not received the documents and there was a discussion that they might not have yet reached the claimant as the hearing date was April 20th. The hearing officer then decided to admit the documents. Even assuming that the claimant actually objected to the admission of these documents as not being timely exchanged under Rule 142.13(c) (which is not at all clear under the record), a hearing officer had the authority to admit records not timely exchanged for good cause. *See* Section 142.13(c)(3) and Texas Workers' Compensation Commission Appeal No. 92225, decided July 15, 1992.

What the claimant really appears to be complaining of is the reliance of the hearing officer on these records in determining the dates he treated with his doctor, and thus the number of trips for which he is entitled to medical mileage reimbursement. There is obviously a conflict in the claimant's summaries and these records. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

While it certainly can be argued that the billing records might not be complete, the claimant testified that the carrier had all the billing records and the carrier's handling adjuster

[1]The carrier's handling adjuster, who was testifying at the time these records were proffered, told the hearing officer that all these bills had been paid to her knowledge.

testified that the billing records introduced were the all the billing records the carrier had received after numerous requests to the claimant's treating doctor. The claimant testified that his summaries were based in part on information provided him by his treating doctor's office, but was unable to produce any documentation from his treating doctor and his own summaries had entries which raised questions concerning their accuracy. For instance, they showed treatment dates on Saturdays and Sundays (when the claimant testified that the doctor's office was only opened on weekdays) as well as February 31st. This created a factual conflict in which the hearing officer decided to accept only those doctor visits as reimbursable which were confirmed by both the claimant's summaries and the doctor's billing records. Applying the proper standard of appellate review, we should not substitute our judgment for hers on this factual determination.

The claimant's argument that the hearing officer allowed the carrier to relitigate the entire case in contradiction of our remand is based on a misunderstanding of that remand. When we discussed the "uncontroverted testimony" of the claimant at the first hearing, we were stating that the carrier did not contest that his treating doctor's office was more than 20 miles from his residence, not that the hearing officer in further developing and considering evidence could not consider evidence and argument concerning the accuracy of the claimant's mileage claims or that the hearing officer was required to accept all of the claimant's testimony as true.

Nor do we find merit in the claimant's contention that the hearing officer erred in continuing the hearing from September 20, 1993, to October 8, 1993. Aside from establishing legal harm (as opposed to the alleged mental anguish this delay caused), this delay was for the claimant's benefit. The claimant sought at the September 20th hearing to introduce as an exhibit, mileage summaries which he had prepared the night before and had not been exchanged with the carrier. The hearing officer determined that such exhibits would be crucial "to obtain clarification sought by the Appeals Panel for remand." The hearing officer continued the case to allow the carrier to review this material. Clearly the alternative would have been to have proceeded with the hearing and denied admission of the claimant's exhibit as not being timely exchanged.[2] *See* Section 410.161. By continuing the hearing, the hearing officer gave the claimant an opportunity to present his evidence and was carrying out her duty to fully develop the record under Section 410.163.

In fact, the painstaking efforts the hearing officer took to make certain the record was fully developed and the obvious efforts that went into the detailed decision in this case are indicators of the consideration the hearing officer gave to all the evidence in this case. This

[2]The claimant did not assert that there was good cause for his failure to exchange other than to state that he had provided the carrier the underlying information which his exhibit summarized prior to or at the CCH in April 1993. Closer examination by the hearing officer revealed that the exhibit included summary of information (trips to his treating doctor) which had taken place since the earlier CCH.

shows a lack of bias on the part of the hearing officer, who had she made any prejudgments in the case, need not have made the effort to develop the evidence which she did. The claimant is plainly unhappy with the outcome. His allegations of bias are utterly unsupported and unfounded.

Claimant's request for costs, expenses, time in preparation of his case, interest, penalty and relief for breach of the carrier's duty of good faith are matters beyond our jurisdiction. Claimant's apparent basis for his belief that he is entitled to these types of damages is his reading of TEX. INS. CODE ANN. art. 21.21 (1981). Construction of this provision is the province of a court of general jurisdiction. Since neither the hearing officer nor we have authority to rule on the validity or invalidity of any such claims, the hearing officer correctly refused to hear these matters.

Turning to the carrier's points of error, we first examine the question of jurisdiction. Generally a question of jurisdiction cannot be waived. *See* 16 TEX. JUR. 3d, *Courts* § 35 (1981). Thus carrier's failure to raise this issue earlier is not fatal. However, we find the carrier's jurisdictional argument flawed. The basic argument is that Section 413.031 (formerly Article 8308-8.26) provides that disputes over medical expenses be determined in the medical dispute resolution process and heard under the Administrative Procedures and Texas Register Act (APTRA) (now Administrative Procedures Act (APA)). The carrier then claims that the Appeals Panel had so interpreted the 1989 Act in earlier decisions. The carrier further argues that the amendment to Rule 134.6 giving the division of hearings authority to hear cases involving reimbursement for medical travel is in contradiction of the statute and that this case must be referred to the Commission's medical review division.

Section 413.031 provides:

(a)A party, including a health care provider, is entitled to a review of a medical service provided or for which authorization of payment is sought if a health care provider is:

(1)denied payment or paid a reduced amount for the medical service rendered;
(2)denied authorization for the payment for the services requested or performed if authorization is required by the medical policies of the commission; or
(3)ordered by the division to refund a payment received for a medical service rendered.

(b)A health care provider who submits a charge in excess of the fee guidelines or treatment policies is entitled to a review of the medical service to determine if reasonable medical justification exists for the deviation.

(c)A review of a medical service under this section shall be provided by a health care provider professional review organization if frequented by the health

care practitioner or if ordered by the commission.

(d)A party to a medical dispute that remains unresolved after a review of the medical service under this section is entitled to a hearing. The hearing shall be conducted in the manner provided for a contested case under the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes).

In Texas Workers' Compensation Commission Appeal No. 92024, decided March 9, 1992, we held that the determination of reimbursement of medical travel expenses should be handled through the medical dispute resolution process under Section 413.031 (then Article 8308-8.26). Our decision was not grounded on interpreting the statute, but on applying the statute in light of the then existing rules of the Commission. As we stated in Appeal No. 92024:

The 1989 Act does not expressly address the reimbursement of an injured employee's travel expenses incurred in obtaining such health care. However, Article 8308-2.09 does require the Commission to "adopt rules as necessary for the implementation and enforcement of this Act, . . .

We went on to determine, applying then existing Rule 134.6 and Rule 133.305, that medical mileage disputes should be submitted to the medical review division for APTRA (now APA) hearings. Part of our analysis in determining this was to attempt to discern the intent of the Commissioners by analyzing the placement of then existing Rule 134.6. As we stated, "Rule 134.6 is found in Chapter 134, entitled "Guidelines For Medical Services, Charges, and Payments." Appeals No. 92024.

The Commissioners explicitly amended Rule 134.6 effective December 1, 1992, and added 134.6(e) to the Rule. Rule 134.6(e) reads as follows:

Disputes relating to the expense of travel for medical care shall be resolved through benefit review conferences, benefit contested case hearings, appeals to the appeals panel and arbitration.

This amendment obviously expressed the clear intent of the Commissioners that medical travel reimbursement disputes be heard by the division of hearings. As we recognized in Appeal No. 92024, there is no statutory provision dealing specifically with reimbursement of a claimant's travel expenses and the promulgation of rules concerning the same is the Commissioners' prerogative under Article 8308-2.09 (now Section 402.061 of the codified statute). We have recognized the validity of the Commissioner's action in deciding numerous cases involving medical travel reimbursement since the amendment of Rule 134.6. *See e.g.* Texas Workers' Compensation Commission Appeal No. 93239, decided May 14, 1993; Texas Workers' Compensation Commission Appeal No. 93264, decided May 7, 1993; Texas Workers' Compensation Commission Appeal No. 93361, decided June 23,

1993. We hold that the amended Rule 134.6(e) provides a sufficient basis for our and the hearing officer's jurisdiction in the present case.

The carrier next argues that if the Commission's division of hearings does have jurisdiction to determine medical travel reimbursement disputes then it must, when, as here, the reasonableness of medical charges are in dispute, wait until medical review has determined whether the medical treatment requiring the medical travel is necessary. The carrier cites us to no authority for this proposition nor are we aware of any.

As far as the carrier's contention that the hearing officer erred in concluding the claimant is entitled to travel expenses, as such travel was not reasonably necessary, here the carrier is trying to relitigate the issue we decided in this case originally. We refer the carrier to our original decision in Appeal No. 93441, *supra*. Further, we are adverse to relitigating the same issue once a case comes back on remand for the same reasons we have held that we will generally deny a request for reconsideration. *See* Texas Workers' Compensation Commission Appeal No. 93835(A), decided November 23, 1993.

Finally the carrier attacks the sufficiency of the evidence to support the findings of the hearing officer. We stated *supra* the standard of review for a sufficiency of the evidence point. Applying that standard, there is sufficient evidence to support the decision of the hearing officer.

The nature of the evidence in this case required the hearing officer to make numerous mathematical computations. None of these are challenged on appeal. In Finding of Fact No. 34 there appears to be a typographical error. We reform this finding to read "$1,717.91" where it says "$1,663.74." Having found all the assignments of error of both the claimant and the carrier without merit, we affirm the decision of the hearing officer as reformed.

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Gary L. Kilgore
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

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Thomas A. Knapp
Appeals Judge