APPEAL NO. 000556

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 February 28, 2000. The issues at the CCH were whether the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the second quarter, from January 3 through April 2, 2000; and whether the claimant is entitled to reimbursement of travel expenses for medical treatment at the direction of Dr. W. The hearing officer determined that the claimant was entitled to SIBs for the second quarter. The hearing officer also determined that claimant was unable to perform any work in any capacity; that the narratives of two doctors specifically explained how the injury causes a total inability to work; that no other records show that claimant is able to work; and that the claimant is entitled to reimbursement of travel expenses for medical treatment at the direction of Dr. W. The appellant (self-insured) appeals, contending that the hearing officer erroneously admitted exhibits which had not timely been exchanged; that claimant was not entitled to SIBs because the medical records suggest some ability to work; and that claimant is not entitled to travel expenses for medical care because claimant lived less than 20 miles from Dr. W's office. The self-insured requested that we reverse the hearing officer=s decision and render a decision in its favor. The claimant responds, urging affirmance.

DECISION

Affirmed.

Claimant had been employed as a highway "maintenance technician" for the self-insured and, on _____, while shoveling asphalt, had sustained a low back injury. The parties stipulated that claimant had sustained a compensable low back injury on that date; that the qualifying period for the second compensable quarter was from September 21 to December 20, 1999; and that Dr. W was claimant's treating doctor. Claimant's impairment rating (IR) is still in dispute as claimant had spinal surgery in February 1999, apparently had additional surgery on May 6, 1999, and is being considered for additional spinal surgery for the removal of hardware and a "spinal fluid leak." In October 1999, a designated doctor had assessed a 15% IR but that rating did not include range of motion because claimant had "bending and twisting prohibitions." The hearing officer states that "Section 408.143(a) does not require an [IR] of at least 15%." While that may be, Section 408.142 does require an IR of 15% or more as a basis for entitlement. However, it appears that claimant will meet that threshold requirement. Section 408.143(a) provides that after the Texas Workers' Compensation Commission's initial determination of SIBs, that employee must file quarterly statements with the carrier (or self-insured in this case) that show that earnings less than 80 percent of the employee's average weekly wage were a direct result of the employee's impairment and "that the employee has in good faith sought employment commensurate with the employee's ability to work." It is undisputed that claimant had no earnings during the qualifying period and the hearing officer found that claimant "did not attempt to obtain any employment." The hearing officer also found that claimant's unemployment was "a direct result

of the impairment from his compensable injury." We will infer that impairment income benefits were not commuted. Regarding the issue of SIBs, the key question was claimant's total inability to work. Carrier referenced Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ' 130.102(d)(4) (Rule 130.102(d)(4)) but also cited pre-1999 Appeals Panel decisions regarding what amounts to a good faith effort. The standard of what constitutes a good faith effort to obtain employment in cases of a total inability to work was substantially tightened and was specifically addressed after January 31, 1999, in Rule 130.102(d). Rule 130.102(d)(3) (the version then in effect[1]) requires the employee (claimant) to prove three elements, namely (1) that he is unable to perform any type of work in any capacity; (2) that a narrative from a doctor specifically explains how the injury causes a total inability to work; and (3) that "no other records show that the injured employee is able to return to work." The hearing officer does not specifically address Rule 130.102(d)(3), but makes the following finding:

FINDING OF FACT

> 6. During the qualifying period for the [SIBs] second quarter, the Claimant was unable to perform any work in any capacity as a direct result of the impairment from his compensable injury. The narratives from two doctors specifically explained how the injury caused a total inability to work. No other records show that the Claimant is able to return to work.

The two doctors to whom the hearing officer refers are Dr. W and Dr. S, claimant's treating surgeon. In a report dated December 17, 1999, Dr. W comments that claimant "was ambulating poorly with the assistance of a walker and lumbosacral corset"; that claimant "cannot bend forwards or backwards, right or left"; that claimant "is in rigid spasms"; and concludes that claimant is not capable "of any productive work of any kind" and that if claimant "does return to work, he is at risk for a severe aggravation at the least with the possibility of a paralytic event." Dr. S, in a report dated January 11, 2000, emphasizes the medication claimant is taking, that claimant is unable to drive and that "even light duty could possibly cause an aggravation to his condition." Dr. S references claimant's use of a walker, pending a third surgery, and comments that claimant is not capable of gainful activity at this time; also, "the type and amount of medication that [claimant] requires subjects him to the possibility of further injury." Regarding the medication claimant was taking, the hearing officer commented:

> The side effects precluded the Claimant from driving, and would fairly well keep the Claimant's job search to the small town where he lives. The side effects of the Claimant's medications were noted in the PDR [Physician's Desk

[1]Rule 130.102(d) was amended, effective November 28, 1999, by the addition of a subsection and, consequently, Rule 130.102(d)(3) was renumbered as Rule 130.102(d)(4) after November 28, 1999.

> Reference], with the first three all having the side effect of being lightheaded, dizzy, drowsy, somnolent, and sedated. The Neurontin side effects increase when the medication is taken with the other medications. The total effect of his medication would probably stun a horse. The medical evidence presented by the Claimant met the evidentiary requirement to prove he had no ability to work. [Texas Workers' Compensation Commission] Appeal No. 970834 [decided June 23, 1997].

There was essentially no medical evidence or records to the contrary. The self-insured relies on the doctors' use of terms such as "productive work," "strenuous or repetitive . . . activity," and "gainful activity" as showing some ability to work. The hearing officer, and to some extent the self-insured, at the CCH, cite pre-1999 Appeals Panel decisions. We would note that most of those cases have been superceded and overcome by the implementation of Rule 130.102 in general and, in the case of a total inability to work, Rule 130.102(d)(3) in particular. As previously noted, Rule 130.102(d)(3) has three elements and the Appeals Panel has stated that all three elements of Rule 130.102(d)(3) must be satisfied. *See* Texas Workers' Compensation Commission Appeal No. 992197, decided November 18, 1999; Texas Workers' Compensation Commission Appeal No. 992413, decided December 13, 1999 (Unpublished); and Texas Workers' Compensation Commission Appeal No. 992717, decided January 20, 2000. The Appeals Panel has also encouraged hearing officers to make specific findings of fact addressing each of the three elements of Rule 130.102(d)(3) when that rule is applicable. *See* Texas Workers' Compensation Commission Appeal No. 991973, decided October 25, 1999. While the hearing officer did not expressly reference Rule 130.102(d)(3), he did make findings of fact addressing each of the elements of Rule 130.102(d)(3) in his Finding of Fact No. 6. We hold that the hearing officer's decision and Finding of Fact No. 6 are sufficiently supported by the evidence.

At the CCH, the self-insured objected to several of claimant's exhibits as not being timely exchanged pursuant to Section 410.160, Section 410.161 and Rule 142.13, which provide that an exchange of documentary evidence shall take place no later than 15 days after the benefit review conference (BRC) unless there is good cause or if there was an expedited hearing, which the parties appear to agree this was. The BRC was held on January 27, 2000; and claimant represented that notice of the expedited hearing was received on February 16, 2000, for a February 28, 2000, CCH. Claimant represented that he had requested the medical records at issue timely after the BRC and had exchanged them as soon as they were received on February 21 and 23, 2000. The self-insured contends that since some of the records were dated September through December 1999, and February 2, 2000, claimant should have requested the records earlier. Claimant responds that it "would be ludicrous" to require claimant to begin collecting medical records "at significant expense" prior to mediation efforts at a BRC where the disputed issues may be resolved. In any event, the hearing officer found good cause (ruling verbally at the CCH) for not exchanging the records earlier and that claimant had exercised due diligence in obtaining and exchanging the records. Our standard of review regarding the hearing officer's evidentiary rulings is one of abuse of discretion.

Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). In determining whether there has been an abuse of discretion, the Appeals Panel looks to see whether the hearing officer acted without reference to any guiding rules or principles. Texas Workers' Compensation Commission Appeal No. 951943, decided January 2, 1996; Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986). We do not find any prejudicial error in the admission of the objected-to exhibits and documents.

The self-insured also appeals the hearing officer's decision that claimant is entitled to travel expenses incurred by claimant in going to see Dr. W. Rule 134.6(a) provides in pertinent part that when it becomes reasonably necessary for an injured employee to travel in order to obtain appropriate and necessary medical care for the compensable injury, reasonable costs shall be paid by the "insurance carrier" (or self-insured in this case). The guidelines in Rule 134.6(a)(1) provide that the mileage must be greater than 20 miles one way to entitle claimant to travel reimbursement. It is undisputed that the mileage from Dr. W's office to claimant's home was slightly shorter than the other way around because both the doctor's office and claimant's residence were on the northeast side and close to a major highway. Claimant testified that he had measured the distance in five different vehicles at different times with the mileage being between 20.1 and 20.4 miles one way. The self-insured presented testimony from a witness who measures distances professionally for the self-insured. This witness used two vehicles (on different days) and various digital "distance measuring devices" including a personal "ground positioning satellite" (GPS). The various mileages this witness came up with was a one-way shortest distance of 18.35 miles and the longest of 19.85 miles. Two distances measured by the GPS were 19.602 miles and 19.345 miles. The witness testified that differences in mileage could be due to the size of the tires, inflation of tire pressure, or wear of the tires. Also in evidence (admitted over the self-insured's objection) was a videotape prepared by claimant's attorney showing an automobile digital odometer reading beginning at Dr. W's office and running continuously to claimant's residence, showing 20.4 miles. The hearing officer comments:

> Interestingly enough, no one came up with the same mileage. The Claimant testified that the distance was 20.1 miles, according to the odometers of the vehicles of five different people who drove him regularly to and from [Dr. W's] office. The State's "expert" testified that he measured the distance on two different dates in two different vehicles, using several different methods to measure the mileage, and ended up with so many different figures that it was difficult to figure out which one was measured by what on which day. While trying to sort through all the evidence on mileage, this Hearing Office [sic]

> determined that he had just one piece of hard evidence -- a continuous, uninterrupted videotape of the Claimant's attorney driving from [Dr. W's] office to the Claimant's trailer. The trip meter in his vehicle clearly read 20.4 miles.

The hearing officer determined that the shortest distance between Dr. W's office and claimant's residence was 20.4 miles and that claimant was entitled to reimbursement for travel expenses. The self-insured emphasized the testimony of its expert using the various measuring devices. We will reverse a factual determination of a hearing officer only if that determination is 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); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion regarding the mileage for that of the hearing officer.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge