APPEAL NO. 000815

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 March 10, 2000. The hearing officer determined that the respondent/cross-appellant (claimant) was entitled to reimbursement of travel expenses for medical treatment provided by Dr. M, Dr. A, Dr. K, Dr. S, and Dr. R, at the current travel rate for state employees. The appellant/cross-respondent (self-insured) appealed, contending that the hearing officer misplaced the burden of proof and that the decision is otherwise against the great weight and preponderance of the evidence. The claimant replies that the decision is correct. The claimant also appears to appeal the failure of the hearing officer to address a question of reimbursement of medical expenses. To the extent that this is an appeal, we find it untimely based on a deemed date of receipt of the decision and order on April 10, 2000, and the mailing of the purported appeal on May 4, 2000. We also note that the claimant did not assert error in the hearing officer's limitation of the disputed issue to reimbursement for mileage for medical treatment. The determination that the claimant was not entitled to reimbursement for mileage to Dr. B has not been appealed and has become final. Section 410.169.

DECISION

Affirmed in part; reversed and remanded in part; and reversed and rendered in part.

The claimant sustained a compensable injury on _____. Dr. M at all times relevant to this decision was her treating doctor. Section 408.021 provides that an "employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 134.6 (Rule 134.6) states in pertinent part:

> (a) When it becomes reasonably necessary for an injured employee to travel in order to obtain appropriate and necessary medical care for the injured employee's compensable injury, the reasonable cost shall be paid by the insurance carrier. The reimbursement shall be based on the following guidelines:
>
> (1) the mileage shall be greater than 20 miles, one way, to entitle the injured employee to travel reimbursement;
>
> (2) reimbursement shall also be paid based upon the current travel rate for state employees. The shortest route between two points shall be used; and
>
> * * * *

(c) An injured employee seeking reimbursement for travel expenses shall submit to the self-insured a written request itemizing the mileage traveled and the expenses incurred. All receipts pertinent to the travel shall be attached to the request.

We address the mileage claim for each doctor individually:

Dr. M. The claimant apparently lived on unpaved County Road ___, which ran parallel to FM ___, (city 1), Texas. Dr. M's office was located on (address) (city 2), Texas. The claimant testified that she drove from her residence to (address); then west on FM ___ to an unnamed highway which she took south to U.S. Highway _____ and Dr. M's office. She said she measured the mileage on her odometer as 22 miles[1]. She did not record this figure anywhere. The self-insured presented evidence that the shorter route was to go south on FM ___; then west on state highway ___ and north on U.S. Highway ____ to Dr. M's office. It submitted into evidence an investigative report which purported to show that this distance was 19.8 miles. A third route used unpaved county roads directly west of the claimant's residence. This route intersected Highway ___ and a point closer to city 2 than the self-insured's measured route and, from the available evidence, this was clearly the shortest route in terms of mileage of all three routes discussed at the CCH.

The claimant said she preferred her route because it was "safer," less traveled by trucks, involved fewer turns, and if she broke down she could obtain help more readily. She said she did not like the unpaved road because she did not have air conditioning in her car and had to keep the windows down. She also said it was bumpy.

The hearing officer found that the claimant's mileage figures demonstrated the shortest route of travel to Dr. M's office. Finding of Fact No. 3. In support of this determination, the hearing officer commented in the decision and order that the self-insured failed to establish a distance of 19.8 miles for the alternative route because the investigator's report which contains this calculation begins from the residence at (address), and the actual residence address is "_____." The self-insured pointed out that in the introduction to this report the investigator used the correct address and that the wrong address in the body of the report was simply a typographical error in the nature of a transposition of the numbers. The hearing officer rejected this argument and concluded the report was in error.

The second reason for the hearing officer's determination of the "shortest" route was that the claimant's route was the "shortest reasonable" route. This determination was presumably based on the claimant's testimony and the hearing officer's conclusion that the chosen route was safer "for her as a woman traveling alone" and preferable. In reaching this determination, the hearing officer apparently relied on Texas Workers' Compensation

[1]We note that the claimant used a similar method in her calculation of the mileage to all the doctors' offices and in each case she claimed an even mileage figure, not broken down into tenths of a mile as is traditional in mileage calculations.

Commission Appeal No. 990125, decided March 5, 1999, for the proposition that the "shortest route" under Rule 134.6(a)(2) is the "shortest reasonable route." Judge Kelley, the author of Appeal No. 990125 recently wrote in Texas Workers' Compensation Commission Appeal No. 000730, decided May 22, 2000, that Appeal No. 990125, *supra*, did not hold that "shortest route" in Rule 134.6(a)(2) means "shortest reasonable" route, but under the facts of that case the so-called shortest route "did not constitute the shortest route because many of the streets did not hook up to each other in actual practice, although they appeared to intersect on a computer map tendered by the self-insured." Judge Kelley further explained:

> It is important to emphasize that Rule 134.6 sets out the parameters under which additional payment for trips to and from healthcare providers will be provided. It does not require that certain routes be used if an injured worker prefers to take another route. However, the measure by which the right to obtain payment for travel is the "shortest route" . . . . This is an objective standard which may be applied to workers across the state. To alter the plain language of the rule as the claimant suggests to "shortest reasonable route" injects subjectivity into the rule which would essentially vary the right to reimbursement depending upon what the individual determined was "reasonable." Taken to its logical conclusion, a "reasonable" route could be that which would allow an injured worker to accomplish errands other than his/her doctor's appointment. Reimbursement for such a trip would clearly be beyond what the Texas Workers' Compensation Commission [Commission] intended. Voluntarily taking a longer route does not trigger a right to reimbursement.

In the case we now consider, the hearing officer allowed mileage reimbursement to Dr. M's office on the basis of the claimant's preferred route, not the shortest route. The claimant had the burden of proving entitlement and that included the burden of proving the shortest route. This case is somewhat confused by the hearing officer's rejecting of the "typographical error" explanation of the investigator's report. Nonetheless, from the claimant's map in evidence, it is impossible to tell if the claimant's preferred route (marked in blue) and the self-insured's measured route (marked in red) is shorter, but it clearly appears that the unpaved county road route is the shortest of all. The hearing officer, according to her discussion of the evidence, rejected this route as unreasonable for calculating mileage because it is "unsafe." Presumably it is unsafe because it is unpaved. We cannot agree that unpaved equates to either unsafe or unreasonable or that there was any evidence to support the conclusion that it was unsafe. The claimant testified that she drove the road sometimes and her main objection seemingly was that she had to keep her windows open because she did not have air conditioning. There was no evidence that air conditioning was a factor for travel from October 23, 1998, through June 15, 1999, at least for all dates. Nor was there apparent consideration by the hearing officer, at least none expressed in the decision and order, of the distance on the unpaved road as a relatively small portion of the total trip. Under these circumstances, the claimant failed to meet her burden of proving her preferred route of 22 miles was the shortest route to Dr. M's office.

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 find that the decision of the hearing officer that this route was the shortest route and that the claimant was entitled to mileage reimbursement based on this route is against the great weight and preponderance of the evidence. We reverse those determinations and render a decision that the claimant was not entitled to mileage reimbursement for travel to Dr. M's office.

Dr. A and Dr. K. Dr. A was a Commission-ordered required medical examination doctor appointed to determining the causes of the claimant's head pain. He apparently referred the claimant to Dr. K. Their office or offices were on the west side of city 2, but no evidence specified the location other than that it was further north on U.S. Highway ____ from Dr. M's office. Nothing in evidence contains even an address of these doctors. The claimant testified that the round-trip distance to Dr. A's office was 42 miles (she made two trips) and the round-trip distance to Dr. K's office was 44 miles (she made one trip). The hearing officer accepted these figures with the observation that "[t]here was no evidence to suggest that Claimant's mileage calculations for these trips was in error." The self-insured appeals this determination, but in its appeal only groups them as part of the "[city 2] doctors" and asserts the claimant did not prove the mileage. We are sympathetic to this argument and caution that a claimant acts at the peril of an adverse decision by failing to even provide evidence of the address of the doctor for purposes of proving mileage. We are unwilling to conclude, however, in this case, that the claimant's testimony of the mileage found credible by the hearing officer was insufficient to support this claim. We therefore affirm that part of the decision and order which found entitlement for 128 miles of travel to Dr. A and Dr. K.

Dr. S. The claimant was referred to Dr. S for determination of the cause of an aneurysm discovered in the course of her treatment of the head injury. On October 20, 1998, Dr. S determined that the aneurysm was not part of the compensable injury. The self-insured paid mileage for visits up to this date and denied payment for mileage for the four visits claimed after this date. At the benefit review conference (BRC) on December 2, 1999, the parties completed a Benefit Dispute Agreement (TWCC-24) in which they agreed that the compensable injury was not a cause of the aneurysm. As noted above, Rule 134.6 limits travel expense reimbursement to treatment of the compensable injury. *See also* Texas Workers' Compensation Commission Appeal No. 951378, decided September 29, 1995. The hearing officer found the claimant was entitled to reimbursement for mileage for the trips to Dr. S after October 20, 1998, because they "were reasonable and necessary in obtaining a diagnosis." Nowhere does the hearing officer address the self-insured's contention that the diagnosis that the aneurysm was not part of the compensable injury was made on October 20, 1998. The self-insured speculates in its appeal that she reached this decision based on the date of the BRC agreement. Again, the self-insured paid for visits through October 20, 1998. The evidence established that treatment by Dr. S after this date was not for the compensable injury. The decision of the hearing officer finding entitlement for mileage for these later treatments is contrary to the 1989 Act and cited rule. For this

reason, we reverse that determination and render a decision that the claimant is not entitled reimbursement for mileage for the travel to Dr. S.

Dr. R. The claimant sought reimbursement for the trips to Dr. R's office in (city 3), Texas. She claimed round-trip mileage of 423 miles. The document submitted by the claimant to establish this was apparently the same document submitted to the self-insured for reimbursement. It indicated that the self-insured determined that the round-trip mileage was 356 miles. The self-insured asserts that this was the correct mileage. The claimant testified that she would pick up either her son or mother-in-law to accompany her on this trip and that she went out of the way to do this. She estimated the trip to her mother-in-law's house was about seven miles out of the way. She gave no estimate on the extra miles to her son's house, nor did she specify which trips also included the side trip to which of these houses. Rather, she claimed the same rate for all trips. The self-insured asked at the CCH, and again on appeal, "Where did the extra 67 miles come from?" The hearing officer provides no discussion of this question or explain how she arrived at the figure of 423 miles despite the claimant's testimony that she went out of her way in making these trips. For this reason, we reverse this determination awarding mileage for trips to Dr. R's office and remand for further consideration and development of the evidence to establish with some reasonable degree of specificity the mileage for the shortest route between the claimant's house and Dr. R's office.

For the foregoing reasons, we reverse the award of mileage reimbursement for travel to Dr. M's office and render a decision that the claimant was not entitled to this mileage reimbursement. We affirm the award of mileage for travel to Dr. A's and Dr. K's offices. We reverse the award of mileage reimbursement for travel to Dr. S's office and render and decision that the claimant was not entitled to this mileage reimbursement. We reverse the award of mileage reimbursement for travel to Dr. R's office and remand this issue for further findings on the mileage for the shortest route between the claimant's resident and Dr. R's office without regard to side trips.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

Section 410.165(a) provides that the 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. We have stated numerous times that 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). I think matters involving the number of miles from one place to another is peculiarly factual and I find the majority opinion unusually intrusive into the fact-finding authority of the hearing officer. I would leave the resolution of conflicts in the evidence to the hearing officer and would affirm the decision of the hearing officer as being sufficiently supported by the evidence.

Gary L. Kilgore
Appeals Judge