On December 12, 1991, a contested case hearing was held in (city), Texas, to determine whether respondent (claimant at the hearing) was injured in the course and scope of his employment with appellant, (employer). (hearing officer) presided as the hearing officer. Carrier contested the compensability of the claimed injury pursuant to TEX. REV. CIV. STAT. ANN. art. 8308-5.10(4) (Vernon Supp. 1992) after its workers' compensation insurance carrier, (carrier), accepted liability for payment of workers' compensation benefits. Both parties were represented by counsel, appeared at the hearing, presented evidence through testimony and documents, and rested their respective cases.

On or about December 17, 1991, carrier filed its Motion to Reopen Record requesting the hearing officer to reopen the hearing record to include in the record three exhibits that had not been offered at the hearing. By written order dated December 31, 1991, the hearing officer denied carrier's motion on the ground that there did not appear to be good cause to reopen the record.

On January 7, 1992, the Commission sent the hearing officer's Decision and Order to the parties. The hearing officer decided that claimant was injured in the course and scope of his employment with carrier and that claimant is entitled to all medical benefits and weekly income benefits allowable under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). He ordered carrier's carrier to continue medical benefits and pay weekly income benefits, if and when they accrue, to claimant consistent with his decision and the 1989 Act.

Carrier's timely filed Request for Review by the Appeals Panel requests review of Findings of Fact Nos. 5 and 6, Conclusion of Law No. 3, the decision on the merits, and the hearing officer's decision to deny its motion to reopen the hearing record. Carrier further requests that we reverse the decision of the hearing officer and render a new decision that claimant take nothing, or, in the alternative, reverse and remand for a second hearing.

On or about January 27, 1992, carrier filed a Motion to Reconsider requesting the hearing officer to reconsider his ruling denying carrier's motion to reopen the record. The hearing officer denied this motion by written order dated February 6, 1992.

Claimant's timely filed Response to Carrier's Request for Review requests that we affirm the hearing officer's decision on the merits and affirm his order denying carrier's motion to reopen.

On February 28, 1992, carrier filed a Supplemental Request for Review by the Appeals Panel requesting that, in addition to all relief requested in its original request for review, the appeals panel reverse the hearing officer's order denying its motion to reconsider and render a decision that the record be reopened and render a decision based on the facts of the case, including carrier's additional exhibits or, in the alternative, reverse the order denying its motion to reconsider and remand the matter for a second hearing.

DECISION

We affirm the hearing officer's decision and order.

Claimant, who is 61 years of age, has worked for carrier for about 16 years. On Thursday, (date of injury), he was at work operating a machine which packs eight, three pound coffee cans into a cardboard tray. The coffee cans come down a line and into a bin

on the machine. According to claimant, the operator of the machine holds the cardboard tray in a vertical position in front of him and up against the machine and then hits a switch or trigger with his foot causing the eight cans to be "kicked out" into the tray. Claimant testified that during the afternoon of that day, a tray "busted" when the cans were "kicked out" of the machine thereby scattering the cans everywhere with some of them falling across his legs and feet. Claimant said that this had happened to him several times before. He said he did not report his accident to his supervisor the day it occurred because, at that time, he did not think he had a serious injury. He continued working the remaining two hours of his shift. He also said he told a coworker, (RV), that afternoon about his accident when RV asked why he was limping. Claimant testified that two other coworkers, (SB) and (RL), were in positions where they could see his accident. He said SB was closest to him at about a distance of six to 12 feet.

Claimant said he felt slight pain and had a slight limp while at work the afternoon of the accident, but that the pain got worse and his foot started to swell when he went home that evening. He said he soaked his foot in warm water and epsom salt and later that evening had his son take him to the emergency room at (hospital).

Claimant stated that he was not scheduled to work the next day, Friday, (date), and that he called his supervisor and reported his injury on Monday, (date), which was the next scheduled workday. He said he saw the company doctor on April 16th, and then began seeing his own doctor. He also said he had been off work since the date of his accident until he returned to work in August 1991. Claimant acknowledged that he reported eight prior accidents over the past five years to his employer on the days that the accidents happened. But he also stated that he had not reported all accidents that have happened and that he did not report this one immediately because he didn't think it was serious. He also testified that he was not injured at home or away from work.

RV and RL testified for claimant. RV, who was worked for carrier for 15 years, testified that claimant appeared to be in good health the morning of (date of injury); that around 3:00 or 3:30 he noticed claimant limping and asked what was wrong; and that claimant told him he had just hurt his foot by dropping cans on it. He also testified that the cardboard trays the coffee cans are packed in are thin and flimsy; that 40 to 50 pounds of air pressure kicks the cans out of the packing machine real hard; and that a lot of times the cans catch the edge of the tray causing the cans to go all over the place. RL, who has worked for carrier for 16 years, testified that on (date of injury) she saw cans fall on claimant several times; that she did not talk to claimant about those incidents because they happen to everyone; that there is a lot of noise in the work area so that if cans are kicked out it would not be heard; that she had been injured working the packing machine; and that most of the packers that work the machine get bruises. She also said she was 50 to 60 feet away from claimant on (date of injury), but that as the scale operator, she had to scan the work area all the time.

(MV), carrier's Human Resources Coordinator, testified that carrier's administrative staff worked on Friday, (date), the day after the accident, so that it would have been possible for claimant to report his accident that day by calling in to the office. However, she did not know if claimant's immediate supervisor worked on (date). Carrier also introduced into evidence claimant's deposition and the sworn statement of SB. SB stated that "I was in the area of [claimant] the day of his accident. I did not see nor did I hear anything about his accident." Claimant's deposition testimony was generally consistent with his testimony at the hearing.

Medical reports and records introduced into evidence by claimant reveal that he was initially treated at the emergency room of (hospital) the evening of (date of injury), and was subsequently treated by several doctors. The hospital report of (date of injury) reflects that claimant told the emergency room doctor, (Dr. S), that a three pound can dropped on the top of his right foot at about 2:30; that x-rays disclosed no fracture; that an examination disclosed the metatarsal phalangeal joints of the right foot slightly swollen and tender to palpation; and that the doctor's diagnosis was "acute soft tissue injury of the right foot." Claimant was then examined by (Dr. W) on April 16th for complaints of right foot swelling. Dr. W's report reflects that claimant told him that two or three cans of coffee fell out of a box and onto his foot; that a physical examination disclosed swelling at the metacarpal phalangeal joint of the great toe on the right foot; that the doctor diagnosed "contusion right foot;" and that the doctor's plan was to return claimant to light duty work with instructions (job sitting down with foot elevated, etc.). Claimant next saw (Dr. G) who gave a diagnosis of "concussion foot" and a prognosis of "guarded at this time -- no work." In a report dated July 15, 1991, (Dr. T) stated that he thought claimant could return to work in a restricted capacity. In a Report of Medical Evaluation (TWCC-69) dated August 7, 1991, (Dr. W), who had previously diagnosed a contusion to the right foot on July 26th, stated that he thought claimant should be working; indicated that claimant reached maximum medical improvement on August 5, 1991, and gave a whole body impairment rating of "0PPD%."

The contested findings of fact and conclusions of law are:

FINDINGS OF FACT

5.The claimant's injury was caused by coffee cans which dropped to the top of his foot.

6.The incident which brought about the injury to the claimant's foot occurred during working hours as the claimant was performing his assigned responsibilities in furtherance of the business interests of the named employer.

CONCLUSION OF LAW

3.The greater weight and preponderance of evidence establishes that the claimant was injured in the course and scope of his employment with (carrier) pursuant to Art. 8308-3.01.

Under the 1989 Act, a "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act," and an "injury" means "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." Article 8308-1.03(10) and (27). The hearing officer is the trier of fact in a contested case hearing, and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). Having reviewed all the evidence of record developed at the hearing, we find that the complained of findings, conclusion, and decision are supported by sufficient evidence, and that they are not so against the great weight and preponderance of the evidence as to be manifestly unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Although maximum medical improvement was not an issue at the hearing, in light of the hearing officer's decision that claimant is entitled to weekly income benefits allowable under the 1989 Act and his order to pay weekly income benefits, if and when they accrue, consistent with the 1989 Act, we feel compelled to mention that:

(1)Under Article 8308-4.23(a) an employee who has disability and who has not attained maximum medical improvement is entitled to temporary income benefits, and that

(2)There is evidence of record, although not conclusive, that claimant reached maximum medical improvement on August 5, 1991.

Carrier's Motion to Reopen Record requested the hearing officer to reopen the record of the hearing to include carrier's exhibits A, B, and C which had not been offered at the hearing. These exhibits are a time card, a payroll register report, and an employee calendar, and all pertain to one of claimant's two corroborating witnesses, RV. They tend to reflect that RV was on vacation and not at work on (date of injury), the day of claimant's accident. (The hearing officer's decision on the merits notes that carrier filed its Motion to Reopen subsequent to the close of the hearing; that the motion was denied under separate decision; and lists carrier's exhibits A, B, and C, with the notation "Not Admitted.") It appears from the face of the exhibits that the portions of the exhibits relating to RV's whereabouts on (date of injury) were in existence and available to carrier at least seven months before the date of the hearing. It also appears that a continuance of the hearing from November 4, 1991, to December 12, 1991, was granted at the request of carrier. Carrier did not assert at the hearing, nor does it assert on appeal, that RV was an undisclosed witness. From the absence of any indication on carrier's part that this witness was not timely disclosed, it would appear that claimant did exchange the identity of this witness prior to the hearing and in accordance with Commission discovery rules. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §142.13. Thus, carrier apparently had the opportunity prior to the hearing to investigate MV's whereabouts on (date of injury), find the aforementioned documents which were in existence and available to carrier, and prepare its case for impeachment of this witness, which of course would also reflect on claimant's credibility under the evidence presented at hearing. Carrier did not do this, but instead waited until after the close of the hearing to offer its exhibits. As previously noted, the hearing officer did not find good cause to reopen the record.

Although the provisions of the 1989 Act pertaining to contested case hearings [Article 8308-6.31 through Article 8308-6.34] and the Commission's rules implementing those provisions [Rules 142.1 - 142.19] do not specifically address the authority of the hearing officer to reopen a hearing to receive additional evidence at the request of a party after the hearing is closed, we believe that he or she has implied authority to do so given the nature of the hearing officer's duties as set forth in Article 8308-6.34(b) to ensure the preservation of the rights of the parties and the full development of facts required for the determinations to be made. Furthermore, Rule 142.2(14) authorizes the hearing officer to "take any other action as authorized by law, or as may facilitate the orderly conduct and disposition of the hearing."

In determining whether the hearing officer erred in denying carrier's motion to reopen the hearing for the purpose of introducing additional evidence, we are guided by several principles developed by our appellate courts. The decision of whether or not to reopen a case is within the trial courts' discretion and such discretion should be liberally exercised in

the interest of permitting both sides to fully develop their case in the interest of justice. Lifestyle Mobile Homes v. Ricks, 653 S.W.2d 602, 603 (Tex. App.-Beaumont 1983, writ ref'd n.r.e.). The trial court has broad discretion in determining whether or not to reopen proceedings to allow presentation of additional testimony, and the trial court's discretion in that regard will not be disturbed by the appellate court unless it appears that a clear abuse of such discretion has occurred. Galbraith v. Galbraith, 619 S.W.2d 238 (Tex. App.-Texarkana 1981, no writ). In deciding whether to reopen the evidence, the court may consider any lack of diligence on the part of the movant, as well as lack of diligence in failing to offer such evidence at the hearing. Matador Pipelines Inc. v. Thomas, 650 S.W.2d 945 (Tex. App.-Houston [14 Dist.] 1983, writ ref'd n.r.e.). Refusing to allow a party to reopen to offer evidence on a collateral matter is not an abuse of discretion. Smart v. Missouri-Kansas-Texas Railroad Company, 560 S.W.2d 216 (Tex. Civ. App.-Tyler 1978, writ ref'd n.r.e.). In considering the feasibility of reopening a case for additional testimony, the trial judge must consider the question in its entirety, that is, the rights of both parties when the case is reopened. Papco, Inc. v. Eaton, 522 S.W.2d 538 (Tex. Civ. App.-Texarkana 1975, writ dism'd by agr.). In Texas and Pacific Railway Company v. Salazar, 458 S.W.2d 116 (Tex. Civ. App-El Paso 1970, writ ref'd n.r.e.), the court held that the trial court did not err in refusing to allow the defendant to reopen the case to offer additional testimony concerning whether a witness had been at the scene of the accident, which appeared to the court to be a collateral issue, especially where it appeared that the defendant had had opportunity to develop that matter before close of the case. The defendant's additional evidence was for the purpose of bolstering the position of the witness.

We also find guidance in some principles relating to the granting of new trials. It is a well settled rule that a new trial will not be granted on the ground of newly discovered evidence where it appears that the new evidence can have no other effect than to impeach or contradict a witness who has testified at the original trial. 54 TEX. JUR. 3d *New Trial* § 80 (1987). Also, to constitute sufficient ground for a new trial, newly discovered evidence must not only be material and otherwise relevant to the principal issues in the case, but must be of such character as will probably change the result if produced on another trial. 54 TEX. JUR. 3d *New Trial* § 79 (1987).

In the case before us, carrier's motion to reopen came several days after the close of the hearing, the additional evidence was available to carrier prior to and during the hearing, the additional evidence relates primarily to impeachment of a witness, the record indicates that carrier was not surprised by the calling of the witness it seeks to impeach, and the record supports a conclusion that carrier had the opportunity to offer the additional evidence prior to the close of hearing, but lacked diligence in failing to offer the evidence. We find that the hearing officer did not abuse his discretion in denying carrier's motion to reopen. We note that in his Order On Motion to Reconsider, the hearing officer found, among other things, that the evidence requested to be added to the record "even if interpreted in a manner most favorable to the Employer, would not affect the outcome of the hearing given the weight and preponderance of other credible evidence." From this finding, it can reasonably be concluded that the hearing officer did not consider the evidence to be of such character as would probably change the result of his decision if it were added to the record.

Finding that the hearing officer's findings, conclusion, and decision are supported by sufficient evidence, and that they are not so against the great weight and preponderance of the evidence as to be manifestly unjust, and further finding no abuse of discretion on the part of the hearing officer in denying carrier's motion to reopen and motion to reconsider, we

affirm his decision and order.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge