APPEAL NO. 92165

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. arts. 3808-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). On March 25, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The two disputed issues unresolved at the prior Benefit Review Conference (BRC) were (1) whether appellant (claimant) has been certified as having reached Maximum Medical Improvement (MMI) based upon (Dr. C) reports (TWCC-69s); and (2) whether appellant "suffered disability" on September 3, 1991 and thereafter and is entitled to payment of Temporary Income Benefits (TIBS). The hearing officer, based on certain factual findings, concluded that MMI had not been properly certified in accordance with the 1989 Act and implementing rules of the Texas Workers' Compensation Commission (Commission). The hearing officer further concluded that appellant failed to meet his burden of proof to show that he "suffered a disability" on September 3, 1991 and thereafter as a result of his compensable injury of (date of injury) and was not, therefore, entitled to TIBS. Appellant's documentary evidence, including medical records from his present treating physician, was excluded from evidence for his failure to exchange such evidence prior to the hearing. Appellant's request for review challenges one of the hearing officer's factual findings relating to the exclusion of his medical records as well as the conclusion that appellant failed to meet his burden of proving he had a disability on and after September 3, 1991. The entirety of the appeal focuses on the hearing officer's exclusion of appellant's documentary evidence.

DECISION

Having considered the request for review, the response to that request, and the record developed at the contested case hearing, we reverse the decision of the hearing officer and remand this case for further consideration and development of evidence as discussed below.

On the morning of Wednesday, (date of injury), appellant, and two coworkers, (Mr. G) and (Mr. O), lifted a bundle of steel rods weighing approximately 200 pounds onto a fork lift in the performance of their duties for (Employer). Appellant hurt his back in the process and mentioned it to (Mr. O). After lunch, appellant also mentioned his back pain to (Mr. G) and was driven by (Mr. G) to The (Center) where he was seen and treated by (Dr. C). His complaint was of lower back pain and (Dr. C's) record of that visit indicated that (Dr. C) diagnosed "low back strain." (Dr. C's) treatment plan included "light duty" for two days and medications. On the following Monday, appellant was to return for a follow-up visit and to return to "full duty." The parties stipulated that appellant sustained a compensable injury on (date of injury).

Appellant testified that after visiting (Dr. C) he returned to work and performed light duties for the rest of that week. On the following Monday, appellant resumed working his regular duties. He said he didn't return for his follow-up visit to (Dr. C) because "they" didn't send him again and because no one took him. He didn't ask anyone to take him because "they would get angry" when an employee wanted to go to the doctor. Appellant testified

he worked his normal duties until his employment was terminated on May 8, 1991. He said he was capable of working his regular duties on May 8th but worked in pain because he didn't want to leave the job. Appellant's testimony was translated from Spanish and the context suggested he was stating he feared the loss of his job if he returned to the doctor. After he was terminated, appellant never sought further employment because he felt an employer wouldn't hire him if he was "sick." Appellant has not worked since May 8th. He was not involved in any accident after his termination which would have affected his back. He did not seek further medical attention for his back because he had no money. Sometime in September 1991, his attorney sent him to (Dr. M). He said he has had numerous visits to (Dr. M) who has helped him a little.

After appellant's testimony, appellant's attorney said "I would like to offer documents into evidence." He said the documents were "from different medical care providers" and were numbered Exhibits 1 through 20. The hearing officer then asked appellant to offer them individually so she could log them in and appellant first offered Claimant's Exhibit 1. This document was a medical report from Mapleridge Physical Medicine Associates, (Dr. J), M.D., Medical Director, dated October 24, 1991. It indicated that (Dr. M) was the "referring physician," stated the results of appellant's physical examination including "pain on palpation to the lumbar paraspinal muscles," provided the "Impression: lumbar sprain," and stated that an EMG and nerve conduction study of the lumbar area would be accomplished "to rule out any radiculopathy." When appellant offered the exhibit respondent objected to its admission stating "I've never seen this before and it was not exchanged." Appellant acknowledged he had not exchanged it but said his documents had come from the packet of documents sent to appellant by respondent. The hearing officer then asked appellant if he had exchanged any medical records in preparation for the hearing to which appellant responded he had not. He said "I was sent a whole packet of information from the Carrier." The hearing officer again asked if appellant had sent a copy of the document to respondent. Appellant responded by inquiring as to whether respondent had any of appellant's "medicals" in its file. Respondent's counsel responded with "I have a few pages" and "I don't know." Appellant then stated he "would present all of the medical records the Carrier has, if we're going to get into this problem." Respondent protested that appellant could not do that but rather had to exchange the documents through respondent. Appellant advised the hearing officer he had not, pursuant to the Commission's rules, exchanged any of his medical records with respondent in preparation for the hearing because "[w]e didn't have that problem in previous contested case hearings." When the hearing officer told appellant that a rule required him to exchange documents and that respondent's objection was based upon the failure to exchange, appellant responded, prior to a ruling on respondent's objection, that "[w]e will not introduce any documents, okay? . . ." We note, however, that appellant did not withdraw the proffered exhibit.

The hearing officer asked respondent: "Did you provide those documents--a copy of Claimant's No. 1 to him?" to which respondent replied: "It appears that we did." Respondent conceded that, while it was not "surprised" by the existence of the document or its content because it was in respondent's file and had been read, respondent was nevertheless "surprised" in the sense that it didn't know appellant was relying on that

document.

Appellant's attorney acknowledged that he had represented appellant at the BRC on January 28, 1992. When asked what "good cause" showing he could make for not exchanging the documents with respondent within the time limits established by the Commission's rules, appellant stated that he was notified by the Commission's March 10th notice of the hearing on March 25th and questioned whether that was sufficient time to do everything under the rules. He further stated that "I don't know what rules we're really working under because the rules of the Commission don't really stick you into the civil rules. As a matter of fact, I think a lot of people are a quandry (sic) as to what rules exactly one is supposed to follow as to time limits, date limits, *et cetera*." Appellant conceded he was aware of the Commission's Chapter 142 rules requiring the exchange of documents after the BRC and that he nonetheless failed to exchange the documents he intended to rely on to resolve the disputed issues. The hearing officer then sustained respondent's objection whereupon appellant said "I'm through" and rested his case.

Respondent called (Mr. G) who testified that shortly after appellant's injury on (date of injury) and before his termination, he became the shop foreman and as such became a supervisor of appellant. According to (Mr. G), he advised appellant his employment was terminated on May 8, 1991, after a meeting with Employer's president and vice-president because of appellant's unsatisfactory job performance and work problems. These problems involved the initiation of "horseplay," abuse of privileges, and frequent failure to wear safety goggles and weightlifting belt. In fact, appellant had not worn his safety belt at the time of his injury because it made him feel hot. (Mr. G) assigned appellant light duties for the two days following his injury. The following week, (Mr. G) asked appellant several times about his return visit to (Dr. C) and whether he was ready to return to his normal duties to which appellant responded he was ready and resumed his normal duties. Appellant never later complained of pain to (Mr. G), missed no work, and worked in a "full duty capacity" until his termination. (Mr. G) had no indication appellant was not physically capable of performing his work.

(Mr. O) testified appellant complained to him of pain for two weeks and that he saw appellant take pills for two weeks which he assumed were for pain.

Notwithstanding that appellant visited (Dr. C) only once on the day of his injury, respondent later obtained and introduced two undated documents entitled "Report of Medical Evaluation" (TWCC-69) in support of its contention that appellant had been certified as having reached MMI. Respondent also introduced a one-page medical record from (Dr. C) which pertained to appellant's office visit on (date of injury), and an x-ray report of that same date. Neither TWCC-69 bore a signature in block 12 (Doctor's Signature). What purports to be the signature "Cox" appears at the bottom of these forms though there was no evidence that such signatures were those of (Dr. C). We previously determined that the absence of the signature of a doctor purporting to "certify" that an employee had reached MMI resulted in an insufficiency of the evidence to support a determination that MMI had indeed been "certified" as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. Code §130.1

(TWCC Rules). *See* Texas Workers' Compensation Commission Decision No. 92027 (Docket No. BU/91086969/01-CC-BU31) decided March 27, 1992. One of the TWCC-69 exhibits, possibly the first prepared, contained the following response to the question in block 14 asking whether employee reached MMI: "can not determine because patient did not follow up as directed." It stated appellant's diagnosis as "mild lower lumbar strain-5% impairment." Respondent averred in argument that it sought a second TWCC-69 for "clarification." The second TWCC-69 responded to the MMI question in Block 14: "Reportedly, patient has returned to work full duty on her (sic) own and is not having any difficulties. She (sic) did not return to my office for reexamination, therefore it is impossible to determine if she (sic) has reached maximum medical improvement. I can only assume that she (sic) has." No date for MMI nor whole body impairment rating was stated. The respondent took the position that the TWCC-69 forms were admittedly incomplete but submitted they nevertheless could stand on their own, together with (Dr. C)'s one-page record, as being in "substantial compliance" with the Commission's rules for the certification of MMI. The hearing officer decided the first disputed issue adversely to respondent by concluding that "[t]here is no evidence that MMI has been properly certified in accordance with the Texas Workers' Compensation Act and implementing Rules." Respondent did not appeal from this adverse determination and we are thus not required to review its correctness. Article 8308-6.41 (1989 Act). However, we have provided guidance in past decisions concerning the requirements for the certification of MMI. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 92127 (Docket No. VT/91-144915/01-CC-CC41) decided May 15, 1992; Texas Workers' Compensation Commission Appeal No. 92027, *supra*; Texas Workers' Compensation Commission Appeal No. 91083 (Docket No. HO-00103-91-CC-1) decided January 6, 1992; Texas Workers' Compensation Commission Appeal No. 91045 (AU-00055-91-CC-1) decided November 21, 1991; and, Texas Workers' Compensation Commission Appeal No. 91014 (Docket No. FW-00008-91-CC-3) decided September 20, 1991.

In his request for review appellant objects to the following finding and conclusion of the hearing officer:

FINDINGS OF FACT

7.In approximately September, 1991, the Claimant began treatment with (Dr. M), and continues to be treated by (Dr. M). No medical records by (Dr. M) were admitted into evidence which might have illuminated upon his impressions of the Claimant's condition.

CONCLUSIONS OF LAW

5.The burden of proof was upon the Claimant at the hearing to show by a preponderance of the credible evidence that he suffered a disability on September 3, 1991 and thereafter as a result of his compensable injury of (date of injury). The Claimant failed to meet his burden and did not show that he suffered any disability because of his compensable injury

> of (date of injury) on and after September 3, 1991. Under these circumstances, the Claimant is not entitled to Temporary Income Benefits for the period of September 3, 1991 through March 25, 1992, the date of the Contested Case Hearing.

Appellant's objection to Finding of Fact No. 7 is grounded on the hearing officer's exclusion of appellant's 20 exhibits from evidence for his failure to exchange the exhibits with respondent in accordance with the Commission's rules. Appellant contends that respondent wasn't permitted to present his evidence consisting of 20 exhibits because the hearing officer ruled that if he didn't present good cause for failure to exchange the documents pursuant to the Commission's rules they would not be admitted. Appellant argues that respondent could not have been surprised "since the documents had been sent to Claimant's legal counsel in an earlier mailing in preparation for that day's Contested Case Hearing." Appellant further urges that the documents were not solely in his possession, custody, or control and that the intent of the Article 8308-6.33(e) provision limiting the admission of unexchanged documents, absent a showing of good cause, is to bar documents possessed by the proponent but not by the objecting party. Appellant observed that he merely made copies of documents sent to him by respondent and attempted to introduce them in support of his claim. Appellant urges that respondent chose not to introduce the documents since they did not support respondent's positions; that a reexchange of documents is not required and thus "good cause" is self-evident; and that "[t]o bar evidence which is at the heart of the dispute when it is readily available, when it has previously been possessed and controlled by an opposing party, does not advance the cause of justice, . . . " Had the documents been admitted, posits appellant, they would have "illuminated upon . . . Claimant's condition that he had a medical disability which kept him from the work pool from September 3, 1991 to the day of the Contested Case Hearing."

Appellant noted that all the documents he received from respondent bore the stamp: "Received (the date) Key Office 265." During respondent's summation at the hearing, respondent advised the hearing officer in a colloquy about the absence of information as to the dates the TWCC-69s were prepared that the words "Key Office 265" which appeared under a date stamp on one of the TWCC-69 forms referred to an office of the carrier and thus such date stamp was that of the carrier. Appellant attached to his request for review copies of the 20 exhibits excluded by the hearing officer marked by the court reporter at the hearing. Of these 20 documents, all but four pages bore respondent's stamp showing various dates of receipt. These 20 exhibits, which appellant contends he attempted to introduce, included the two TWCC-69 forms, (Dr. C)'s one-page record, an x-ray report of (date of injury), an "Employer's Supplemental Report of Injury," and a letter from respondent to appellant's attorney, dated September 23, 1991, regarding the status of his claim. These documents were admitted as Carrier Exhibits A, B, K, J, D, and C, respectively. Another of appellant's exhibits was an "Employer's Wage Statement" containing wage information on appellant. Of the remaining 13 exhibits, two were duplicate copies of Claimant's Exhibit 1. All of appellant's exhibits bore respondent's date stamp except one of the TWCC-69 forms (Carrier's Exhibit B) and three pages (Claimant's Exhibits 10-12) appearing to be a report of EMG and/or nerve conduction studies of appellant. These three pages, however, follow

Claimant's Exhibit 9, a report on the letterhead of Mapleridge Physical Medicine Associates, (Dr. J), M.D., Medical Director, dated 10-24-91, which addresses appellant's back pain, his physical examination results, and which indicates that EMG and nerve conduction studies will be accomplished. That 10-24-91 report of (Dr. J) does bear respondent's date stamp with what appears to be a received date of November 11 and is a duplicate of Claimant's Exhibit 1, the exhibit specifically excluded by the hearing officer's ruling.

Before discussing the merits of the hearing officer's exclusion of Claimant's Exhibit 1, we should comment on appellant's having attached his 20 exhibits to his request for review. We have previously noted that our review is limited to the record developed at the hearing (Article 8308-6.42(a)) and we have refused to consider evidence first tendered on appeal. *See, e.g.*, Texas Workers' Compensation Commission Appeal No. 92156 (Docket No. HO-92059648-01-CC-HO41) decided June 1, 1992; Texas Workers' Compensation Commission Appeal No. 92154 (Docket No. DA-91-146584-01-CC-DA41) decided June 4, 1992; Texas Workers' Compensation Commission Appeal No. 92092 (Docket No. HO-91-136258-01-CC-BC41) decided April 27, 1992; Texas Workers' Compensation Commission Appeal No. 91132 (Docket No. HO-A086992-01-CC-HO42) decided February 14, 1992; and, Texas Workers' Compensation Commission Appeal No. 91121 (Docket No. HO-X074667-01-CC-HO42) decided February 3, 1992. In these cases we were confronted with evidence not made a part of the record developed at the respective contested case hearings. In the case *sub judice*, however, appellant first attempted to offer his 20 exhibits and the hearing officer then required, appropriately, that he submit them one at a time so she could log them in. After extensive argument by the parties over the admission of appellant's first exhibit, which said argument at times referred to all of appellant's documents and the grounds of which obviously applied to them all, respondent's objection was sustained. Appellant did not then tender the remaining exhibits for identification, offer them individually into evidence, and obtain a ruling. It is apparent from the record that appellant perceived that the same objection would be made and sustained as to the remaining documents on the ground that none of them had been exchanged pursuant to the Commission's rules. Appellant made no formal or informal bill of exception or offer of proof, as such, to preserve for our review his complaint on the evidentiary ruling though he did state that the documents were appellant's medical records from different doctors in support of his contentions on the disputed issue of disability. However, Article 8308-6.34(e) provides that conformance to the legal rules of evidence is not necessary at contested case hearings and the 1989 Act contains no specific provision addressing the formalities of preserving complaint of an evidentiary ruling for our review. *See generally*, Texas Rules of Appellate Procedure, Rule 52 (Preservation of appellate complaints); 4 Tex. Jur. 3d *Appellate Review* §§125-126 (1980). While we do not consider and weigh the content of appellant's exhibits in reviewing the evidentiary sufficiency of the challenged factual finding and legal conclusion, we do note in reviewing the appealed issue regarding the evidentiary ruling that the medical records of Drs. Montes and Jain are relevant to and raise a factual issue for the hearing officer concerning whether or not appellant had a "disability" on and after September 3, 1991. *See* Article 8308-1.03(16).

Article 8308-6.33(d) provides that within a time to be prescribed by Commission rule

the parties shall exchange, *inter alia*, all documents which a party intends to offer into evidence at the hearing. Article 8308-6.33(e) provides that "[a] party who fails to disclose information known to that party or documents which are in existence and in the possession, custody, or control of that party at the time when disclosure is required by this section may not introduce such evidence at any subsequent proceeding before the commission, or in court on the claim unless good cause is shown for not having disclosed such information or documents under this section." TWCC Rule 142.13(b) (Sequence of discovery) requires the parties to exchange documentary evidence in their possession not previously exchanged before requesting additional discovery by interrogatory or deposition. TWCC Rule 142.13(c) requires the parties to exchange documentary evidence not later than 15 days after the benefit review conference and, thereafter, as it becomes available. Documentary evidence not previously exchanged is to be brought to the hearing where the hearing officer shall make a determination whether "good cause" exists for a party to introduce such evidence at the hearing when such evidence was not previously exchanged. Our standard for review of the hearing officer's ruling excluding Claimant's Exhibit 1 is one of abuse of discretion. Morrow v. HEB, Inc., 714 S.W.2d 297 (Tex. 1969); Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985); Texas Workers' Compensation Commission Appeal No. 91076 (Docket No. CC-91-105730-01-CC-CC41) decided December 31, 1991; Texas Workers' Compensation Commission Appeal No. 92110 (Docket No. GA-91140095-01-CC) decided May 11, 1992. We have previously determined that a "lack of surprise is not a basis, in and of itself, to excuse, nor does it equate to good cause for failing to comply with exchange requirements" (Texas Workers' Compensation Commission Appeal No. 91058 (Docket No. SA-00021-91-CC-1) decided December 6, 1991) and we have described good cause as "that degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances" (Texas Workers' Compensation Commission Appeal No. 91009 (Docket No. AM-00005-91-CC-1) decided September 4, 1991).

Our observations in Texas Workers' Compensation Commission Appeal No. 91088 (Docket No. AU-A122067-02-BR-AU41) decided January 15, 1992 are very much applicable *instanter*. In that case one of the appealed issues concerned an evidentiary ruling admitting the claimant's medical reports and claim for compensation when those documents had not been exchanged by the claimant in accordance with Article 8308-6.33(d) and TWCC Rule 142.13. Those documents had previously been provided to the claimant by the carrier. In that decision we discussed the purpose and interaction of the pertinent provisions of the 1989 Act and the Commission's discovery rule and we commented as follows:

> "Rule 142.13 which implements this statute must be read reasonably insofar as it mandates the means by which disclosure is made. The rule was not intended to require a reverse exchange of documents obtained as part of the opposing party's `disclosure.' (If it were, Section 142.13(d), which requires exchange of additional documentary evidence as it becomes available, would trigger a perpetual shuttle of documents between the parties.) This is consistent with the purpose of the contested case hearing, which is to resolve

compensability issues without the time and expense of a court proceeding. Appellant argues that the exchange requirement exists independently of the content of documents involved, but it is our opinion that the sanction noted under Article 8308-6.33(e) is clearly to assure full development of facts prior to the hearing. Such development is not at issue when the evidence offered is documents that were possessed and disclosed initially by the complaining party."

We are satisfied under the circumstances of this case that the hearing officer committed prejudicial error in refusing to admit Claimant's Exhibit 1. We are similarly satisfied that such error probably caused the hearing officer's determination of an improper finding and conclusion regarding the disputed issue of appellant's disability. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182, 185 (Tex. Civ. App.-San Antonio 1983, writ ref'd n.r.e.).

The decision of the hearing officer is reversed and the case is remanded for the expedited development of appropriate evidence, if any, and reconsideration not inconsistent with this opinion. Pending resolution of the remand, a final decision is not rendered in this case.

_____
Philip F. O'Neill
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge