APPEAL NO. 022390
FILED NOVEMBER 4, 2002

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 August 26, 2002. The hearing officer determined on the single issue before her that the claimed knee injury did not result from horseplay. The appellant (carrier) has appealed and also argues it was error for the hearing officer not to allow its two witnesses to testify. The respondent (claimant) responds that the decision should be affirmed.

DECISION

Reversed and remanded.

We address the matter regarding exclusion of the only tendered witness of the carrier, Ms. F. (The other witness referred to in the appeal was never proferred as a witness at the CCH and consequently not excluded by the hearing officer.) When the carrier called Ms. F, whose witness statements were already in evidence, the claimant's attorney objected, contending that she had not been disclosed as a witness. The claimant's attorney did comment that no exchange had been made although Ms. F may have been mentioned as a witness at the benefit review conference. The carrier produced a copy of its cover letter timely disclosing Ms. F; a copy is not in the record, however. The hearing officer stated that she "needed" to see further proof in the way of a certified green card that this had been received by the claimant; the attorney for the carrier said it was mailed regular mail.

Proof of a certified mailing is not required to substantiate proper exchange, and the hearing officer could have evaluated the statements made by the attorney for the carrier without the necessity of a green card. Of more importance, however, is that it is clear that the witness statements, included in the record, were exchanged timely. These statements clearly and reasonably identify both Ms. F and her location (the employers location). The statements make clear what her "relevant facts" are. We cannot read Section 410.160 to require a redundant disclosure of information already imparted under one of the other provisions of that statute. The hearing officer therefore erred by not allowing Ms. F to testify.

While it is true that what Ms. F had to say would likely have paralleled her written statements, the hearing officer had the opportunity to personally observe the claimant's denial that she said this. While relaxed evidentiary rules may allow statements to be accepted in lieu of live testimony, demeanor cannot be observed in a written statement and where the witness is available and willing to offer live testimony on the matter of an admission against interest, we cannot say that refusal to allow Ms. F to testify amounts to harmless error. We therefore remand to allow Ms. F's testimony to be offered live.

Pending remand and a potential change in outcome, we will decline to address the weight of the evidence on the substantive issue.

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 Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **THE TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Robert W. Potts
Appeals Judge

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Margaret L. Turner
Appeals Judge