APPEAL NO. 92110

On January 8, 1992, a contested case hearing was convened with (hearing officer) presiding as hearing officer. The sole issue was whether or not the post-injury work provided by the employer to respondent after his back was injured met the work restrictions imposed by respondent's doctor. After taking some of the evidence, the hearing officer granted appellant a continuance to investigate an affidavit from a former coworker of respondent exchanged by respondent on January 6, 1992. The hearing was resumed and concluded on January 30, 1992, with the hearing officer making factual findings that the employer's post-injury employment offer was inconsistent with the restrictions imposed by respondent's doctor and that respondent was unable to obtain and retain employment because of his compensable back injury. The hearing officer then reached legal conclusions that no bona fide offer of employment was made to respondent and that he suffered a "disability" as defined by the Texas Workers' Compensation Act of 1989, TEX. REV. CIV. STAT. ANN. art. 8308-l.03(16)(1989 Act). Both appellant and the employer have filed requests for review asserting three errors by the hearing officer, namely, the exclusion of certain documents offered into evidence at the hearing first by appellant and then by the employer, the exclusion of the testimony of respondent's supervisor proffered first by appellant and then by the employer, and the factual sufficiency of the aforesaid findings and conclusions of the hearing officer.

DECISION

Finding no abuse of discretion by the hearing officer in his rulings excluding documentary and testimonial evidence offered by appellant and by the employer, and further finding sufficient evidence to support the challenged findings of fact and conclusions of law, we affirm.

(Employer) has filed a request for review in this matter which is nearly identical with that filed by appellant. Although respondent has not addressed in his response the Employer's attempt to appeal from the hearing officer's decision, we must nevertheless reject such appeal. Employer lacks standing to appeal because Employer did not become a party to the benefit contested case hearing. Article 8308-6.41 (1989 Act) provides for the appeal of the hearing officer's decision by a "party." Our reading of the 1989 Act and pertinent rules promulgated by the Texas Workers' Compensation Commission (Commission) persuades us that Employer did not become a party in this matter. Articles 8308-5.10(1), (2), and (4) of the 1989 Act (Employer bill of rights) permit an employer the rights to (1) "be present at all administrative proceedings relating to an employee's claim; (2) to present relevant evidence relating to an employee claim at any proceedings; [and] (4) to contest the compensability of any injury if the insurance carrier accepts liability for the payment of benefits; . . . " In our view, while the exercise of an employer's rights to be present and to present relevant evidence may involve such employer as a participant in a proceeding, an employer does not become a party to a proceeding unless an employer contests compensability when the insurance carrier accepts liability. Article 8308-5.10(4). We believe our view is buttressed by the observation of a number of distinctions between a

claimant, an insurance carrier, and an employer, and between a party and a participant in a proceeding, found in several provisions of the 1989 Act and the Commission's rules. Chapters B, C, D, and E of Article 6 (Adjudication of Disputes) of the 1989 Act contain numerous references to the "party" or "parties" in the provisions for benefit review conferences, arbitration conferences, contested case hearings, and appeals. For instance, Article 8308-6.04 provides for the representation of claimants and insurance carriers at benefit review conferences, contested case hearings, and arbitrations, but omits any reference to the representation of employers. Article 8308-6.12(e) provides for the Commission's sending written notice of the benefit review conference "to the parties to the claim and the employer" and further provides that "[a] party who fails to attend the [benefit review conference] without good cause . . . commits a Class D administrative violation. . . . " There are similar provisions for administrative penalties for parties who fail to attend arbitration conferences and contested case hearings. Articles 8308-6.24(d) and 8308-6.34(f). Under Article 8308-5.10(1) an employer's right to be present at all administrative hearings is obviously elective and an employer who failed to attend a benefit review or arbitration conference, or a contested case hearing, would not be subject to the administrative penalties provided for failure to attend such proceedings unless the employer had become a party by contesting compensability where its carrier had accepted liability. It may also be instructive to observe that Article 8308-10.07 details a variety of "wrongful acts" which may be committed by representatives of employees or legal beneficiaries, by insurance carriers, and by health care providers. However, that article contains no similar list of wrongful acts for employers. The "wrongful acts" which may be committed by an employee's representative and by an insurance carrier include the failure to attend a dispute resolution proceeding.

Turning to the Commission's rules, we note that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 140.1 (TWCC Rule) defines a "[p]arty to a proceeding" as a "person entitled to take part in a proceeding because of a direct legal interest in the outcome." (Emphasis supplied.) TWCC Rule 140.3 provides, *inter alia*, for expedited benefit review conferences and benefit contested case hearings for the resolution of disputes involving compensability and goes on to state that a dispute involves compensability "when the carrier or the employer contests the compensability of any injury, as provided by the Act, 5.10(4) or 5.21." TWCC Rule 140.4(b) addresses the conduct and decorum of "[p]arties and participants in a proceeding . . . " TWCC Rule 141.5(a) defines "participant" to mean "an individual entitled or permitted to attend and take part in a benefit review conference. Participants include: 1) the parties; 2) the parties' representatives; 3) the employer exercising the right to present evidence relevant to the disputed issue or issues; and 4) any other individual, at the discretion of the benefit review officer." TWCC Rule 141.1(a) provides that "[a] request for a benefit review conference may be made by a claimant, a subclaimant, a carrier, or an employer who has contested compensability." (Emphasis supplied.) The several TWCC Rules pertaining to benefit contested case hearings and to appeals prescribe procedures and requirements addressed for the most part to the "parties." Of interest is the fact that TWCC Rule 142.13 relating to permissible discovery in

benefit contested case hearings provides that interrogatories may be used "to elicit information from claimants and insurance carriers" and TWCC Rule 142.19 contains form interrogatories adopted by the Commission for the claimant and the carrier. These rules do not similarly provide for interrogatories to be sent to or from employers. TWCC Rule 142.17 contains provisions for the obtaining of contested case hearing transcripts and audiotapes by "[a] party or the employer." TWCC Rule 143.1 defines an "appellant" as "[a] party to a benefit contested case hearing who is dissatisfied with the decision of the hearing officer, and files a request for review of that decision by the appeals panel" and TWCC Rule 143.3(a) provides that "[a] party to a benefit contested case hearing who is dissatisfied with the decision of the hearing officer may request the appeals panel to review that decision. . . . " We conclude that Employer lacked standing to appeal from the hearing below in that Employer was not a party to that hearing.

At the January 8th hearing, respondent's counsel contended that respondent's entitlement to temporary income benefits (TIBs) turned on the sole disputed issue of whether the post-injury work provided respondent by Employer was within the work restrictions imposed by the doctor. Respondent's theory seemed to be that he still had the "disability" required by the 1989 Act for his entitlement to TIBs because he could not retain his employment due to his compensable injury. In summary, respondent's contentions were that when he returned to his employment one week after his back injury on _____, the work he was given was too heavy; that he couldn't do the work and complained to doctors about his back continuing to hurt from such heavy work; that he was diagnosed as having a herniated disc at L5 which was consistent with his being unable to do the work; that he was dismissed from employment on August 21, 1991, because he couldn't do the heavy work; and, that he was entitled to TIBs from appellant from August 28th to the present time because there was no "light duty" available from employer.

At that first session, the hearing officer admitted certain exhibits from both parties without objection. Respondent was present and testified and appellant indicated it had one witness present, PK, Employer's safety supervisor. Respondent introduced an affidavit from one of respondent's former coworkers, CB, which was signed on January 3, 1991, and provided to appellant on January 6th, and which corroborated respondent's testimony regarding the "heavy" nature of his post-injury "light" duties. Appellant objected on the grounds that the affidavit had not been timely exchanged. Appellant asserted that the affidavit had not been previously provided by respondent, either in the exchange required of the parties not later than 15 days after the benefit review conference by Article 8308-6.33(d) and TWCC Rule 142.13(c), or in respondent's answers to appellant's interrogatories. Appellant also objected that Mr. B had not been previously identified as a witness. Appellant argued that "we are entitled to know who the witnesses are to prevent trial by ambush," and said admission of the affidavit would "surprise" and "prejudice" appellant. Respondent's attorney stated she had asked respondent to provide witnesses with knowledge of the nature of his post-injury duties; that neither respondent nor Mr. B still worked for Employer; that respondent only recently happened upon Mr. B by chance; that it

took Mr. B a few days to get off work to come to respondent's attorney's office; and, that Mr. B's affidavit was prepared on Friday, January 3rd, and provided to appellant the following Monday by electronic transmission. The hearing officer determined that respondent had shown the "good cause" for the untimely exchange of the affidavit required by TWCC Rule 142.13(c)(3). He then indicated he would grant appellant a continuance, if requested, "to give time to talk to this witness or to ensure they are fairly treated." Appellant then requested a continuance "for time to depose or discuss the matter with C.E. B" and the hearing was continued to January 30th.

Before reviewing the evidence on the disputed issue it may be useful to review pertinent provisions of the 1989 Act and the Commission's rules pertinent to the disputed issue. Article 8308-3.01 provides that "[a]n insurance carrier is liable for compensation for an employee's injury without regard to fault or negligence if . . . the injury arises out of and in the course and scope of employment." There was no dispute that respondent did have a compensable injury. Article 8308-1.03(11) defines "compensation" as the "payment of medical benefits, income benefits, death benefits, or burial benefits." The parties' counsel informed the hearing officer that while respondent's medical expenses had been paid all along, no TIBs had been paid. Articles 8308-4.23(a) and (b) provide that an employee who has "disability" and who had not attained "maximum medical improvement" is entitled to temporary income benefits; that such benefits accrue beginning on the eighth day of "disability" and shall be paid weekly; and, that such benefits continue until the employee has reached maximum medical improvement. There was no dispute that respondent had not yet attained maximum medical improvement. *See* Article 8308-1.03(32). "Disability" means "the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury." Article 8308-1.03(16). Generally, temporary income benefits are payable at the rate of 70% of the difference between the average weekly wage and the post-injury weekly earnings of the injured employee. Article 8308-4.23(c). For purposes of calculating the amount of such income benefits, the 1989 Act provides that "if the employee is offered a bona fide position of employment that the employee is reasonably capable of performing, given the physical condition of the employee . . . the employee's weekly earnings after the injury are equivalent to the weekly wage for the position offered to the employee." Article 8308-4.23(f). TWCC Rule 129.5 (Bona Fide Offers of Employment) provides that in determining whether an offer of employment is bona fide, the Commission shall consider, *inter alia*, "the physical requirements and accommodations of the position compared to the employee's physical capabilities; . . ." This rule goes on to provide that "[i]f the offer of employment was not made in writing, the insurance carrier shall be required to provide clear and convincing evidence that a bona fide offer was made." There was no evidence that Employer's post-injury offer of employment to respondent was made in writing.

Respondent testified at both sessions of the hearing, and at both sessions the parties iterated that the issue was whether Employer had offered respondent "light duty" within the doctor's work restrictions. Respondent said that he was 41 years of age and had

been employed as a maintenance man performing repair and service duties in one of Employer's plants until his employment was involuntarily terminated on August 21, 1991. He was injured on _____, when he was seated on a bench removing a heavy part from the bottom of a gas compressor. According to a medical record the part was a valve weighing approximately 60 pounds. When the heavy part dropped into his hand he had to pull it out from underneath the compressor and across his legs while seated and in so doing he "felt something push out in my back." He put the part down and couldn't straighten up. He notified his supervisor, WG, who in turn notified Mr. K, Employer's safety supervisor. Mr. K then took respondent to Dr. JJ, the doctor to whom Employer took injured employees. Dr. JJ took an x-ray of his back and told respondent he thought he had a herniated disc. The medical action record Dr. JJ completed for Employer on _____ stated that respondent could not work for seven days and that respondent had "lumbosacral strain possible herniated disc L5, S1." On respondent's June 17th visit, Dr. JJ released him for work with the restrictions of no climbing, no stooping or bending and no lifting over 10 pounds. According to Dr. JJ's records, the same restrictions were continued after respondent's June 28th visit. On July 9th, the climbing, stooping and bending restrictions were discontinued and the lifting restriction was increased to 20 pounds. On July 19th, Dr. JJ increased the weight restriction to 25 pounds and on August lst released respondent for return to work with no restrictions. Respondent testified he had asked Dr. JJ to let him try to work with no restrictions so he could get a work evaluation because he was due an evaluation and could not get one while on "light duty." According to Dr. JJ's medical records, respondent still had some pain off and on as of August 1st. On August 16th, Dr. JJ reinstated a 20 pound lifting restriction because respondent's back pain had returned as bad as if it were a "fresh injury" and said he would refer respondent to Dr. H. Respondent testified he told Dr. JJ on August 16th that he couldn't perform full duty work because he was hurting. He said he also told Dr. JJ on August 20th that he couldn't do the work. An appointment was made with Dr. H for August 28th but respondent called Dr. JJ on August 20th saying he couldn't wait until August 28th because his pain was so severe. Dr. JJ's office tried several other orthopedists but could not get respondent an appointment until September so respondent was advised he could see anyone he wished if he made his own appointment. Dr. JJ's records reflect that on August 22nd, the day after his employment was terminated, respondent called again to complain of severe pain and obtain more medication for pain.

Respondent testified to the nature of the post-injury duties he was assigned. He said that Employer had him emptying trash cans, sweeping, and cleaning the metal tables in the maintenance shop and that such work exceeded Dr. JJ's work restrictions. He said the trash cans in the maintenance shop were large, some of them being 50 gallon drums, and contained scrap metal and bolts. He had to take these cans to a dumpster and lift them up to about his own height to empty them. The duty of cleaning off tables in the shop required him to remove all types of metal including heavy items such as shafts and pump parts weighing approximately 60 pounds. Respondent had to discontinue riding a bicycle to get around the plant which employees customarily did, because of his back pain. He

also had to stop driving the road sweeper because the bouncing caused him pain. Respondent said that even employees who aren't hurt and perform those duties every day need help taking out the trash cans and cleaning off the tables. In respondent's view, his assigned tasks exceeded Dr. JJ's restrictions. He said he was expected to exceed the weight restrictions and that Employer knew he was exceeding those limits. Respondent acknowledged he had been told to tell his supervisor when he was hurt. He complained once to WG, his supervisor, about his hands and shoulders hurting. He talked to Mr. K about the strenuousness of his work and also complained of his back pain. According to respondent Mr. K told him the problem might be in respondent's head and to just try to think pleasant thoughts. He said Mr. K didn't monitor respondent's work and didn't know what respondent was doing. Respondent said he told (Mr. K) he wanted (Mr. K) to check on him more often. Dr. JJ's records contain a notation for the June 28th visit that respondent "apparently has done more lifting than prescribed and mentions lifting an "83 valve at 50 lbs." Respondent said he had been telling Dr. JJ just how strenuous his work actually was. The entry for respondent's July 19th visit to Dr. JJ stated that respondent "has been dragging 25 lb bucket at work [illegible] lifting restrictions."

Respondent testified to attending a meeting with his supervisor and Mr. K where he was told he wasn't keeping Employer informed about his visits to Dr. JJ as was required by company policy and that Employer was learning of his calls to Dr. JJ from the latter's nurse. Respondent said he continued to try to work after that meeting but could not do so because of his pain so he went home. Respondent denied being aware of Employer's rules requiring him to report or get prior authorization for his doctor's visits. The evidence established that the meeting respondent had with his supervisor and Mr. K occurred on August 20th, that respondent's employment was terminated on August 21st, and that respondent had not since worked.

Respondent said he had begun to doubt the effectiveness of Dr. JJ's treatment because his back continued to hurt. He became frustrated with Dr. JJ because every time he called for information he was told Dr. JJ couldn't answer until the doctor first spoke with Mr. K. Dr. JJ had referred respondent on July 15th for a physical therapy and back education program from which he was discharged upon the expiration of the referral on July 26th "with goals partially achieved." The records of his physical therapist indicate that respondent continued to have pain. Respondent testified that he told Dr. JJ on August 16th and 20th that he couldn't do full duty work and was hurting.

On August 26th Respondent was seen by Dr. k, an orthopedic surgeon, who diagnosed "lumbosacral strain, transitional vertebra, and Kienbocks, right hand." According to the Initial Medical Report (TWCC 61) prepared by Dr. k on August 26th, respondent hurt his lumbosacral area at work taking a compressor loose and had no prior history of back injury or wrist or hand injury. This report stated that respondent could "return to limited type of work" on August 26th and that Dr. K anticipated "maximum medical improvement" and " return to full-time work" on December 26, 1991. In a letter to

Dr. J dated October 1st, Dr. k advised he suspected respondent had a cervical sprain and possibly some nerve root irritation without any nerve root damage and also believed respondent had a lumbar sprain as well. On October 11, 1991, Dr. K wrote a letter to the Commission stating that respondent "is unable to perform duties under the job description offered at his place of employment." Respondent testified that Dr. K told him he couldn't do the work offered by Employer. He also said that Employer never sent the job description to Dr. K but that he described his duties to Dr. K and how it hurt him to perform them.

Respondent was also seen by Dr. H, on August 28th who, in his Initial Medical Report (TWCC-61), stated that respondent could "return to limited type of work" that date and diagnosed lumbar strain or sprain, neck pain and wrist pain. According to Dr. H's report, respondent had pain in his low back and neck, numbness and tingling in both hands, and pain in his thumbs. His pain all began on _____ when he was pulling valves at work.

On December 18th, upon the referral of Dr. k, respondent was seen by Dr. GK, an orthopedic surgeon, with complaints of low back pain, painful neck, weakness of arms, and numbness in hands. Dr. GK's report cited the _____ injury while pulling a 60 pound valve out from under a compressor with immediate back pain and subsequent trouble with his right wrist and shoulders. This report also noted a non-contributory past medical history. At appellant's request, respondent was seen on December 23rd by Dr. MB, a neurologist, who opined that respondent's problems are strain and maybe a carpal tunnel syndrome. Dr. MB obtained imaging studies which revealed prominent midline and right-sided posterior disc herniation of L5-S1 and mild midline posterior bulge of the L4-5 disc. Respondent stated that Dr. K is considering surgery.

The affidavit of Mr. B stated, essentially, that he worked in the same maintenance building as the respondent; injured his back in July 1991; was given "light duty" similar to that given respondent; and that such duties were very strenuous because the trash cans, which contained scrap iron and welding rods, weighed 30 to 40 pounds and had to be lifted to shoulder height to empty into the dumpster. He also stated that the blower shafts, pump parts and housing he and respondent had to clean off of tables were often large and heavy. Mr. B often saw respondent struggling with these tasks.

Prior to presenting its evidence appellant asserted that Employer had in fact "accommodated" the work restrictions of the doctor, that respondent's employment was terminated for good cause for violating Employer's policies concerning the reporting of doctor's visits for job related problems, and that respondent had no "disability" entitling him to TIBs because Employer had made a bona fide offer of "light duty" to respondent who basically failed to accept such offer by his non-performance.

Mr. K testified that as Employer's safety training supervisor he monitors personnel

with disabilities but only indirectly supervised respondent. He wasn't present even 20% of the time respondent did his restricted work. He took respondent to Dr. JJ, a doctor selected by Employer, on the date of respondent's injury and Dr. JJ diagnosed a probable herniated disc. When Dr. JJ released respondent for "light duty" effective June 18th, Mr. K reviewed Dr. JJ's work restrictions with respondent and his supervisor. Although respondent was to perform his restricted work in the maintenance shop in the same building where he had worked before being injured, Mr. K understood that respondent would only be doing some paperwork behind a desk, some light sweeping with a broom, remedial light tasks, and driving a street sweeper. Mr. K later conceded that he agreed with appellant's interrogatory answer that respondent's actual restricted duties included sweeping, emptying trash cans, and cleaning off the tables. He said he thought trash cans referred to small office trash cans but conceded that janitorial personnel emptied those cans. As for cleaning off the tables, Mr. K said respondent was to clean off articles such as nuts, bolts, and gaskets but wasn't expected to clean off the heavy items such as blower shafts, pump parts, and housings. He said respondent was told to let his supervisor know if any tasks were a problem and "they would stop it." Mr. K stated he told respondent to contact him if respondent was directed to perform some heavy task but that respondent never did so. Respondent was removed from his street sweeper driving duty by his supervisor, WG, after complaining to Mr. K about it during his first week of restricted work. Six or seven weeks into his restricted work, respondent also complained to Mr. K about the latter's only infrequent contacts with him about his condition in contrast to the frequency with which Mr. K checked on other injured employees. These two complaints were the only ones respondent made to Mr. K. He said respondent didn't indicate he was having problems with his tasks. Mr. K said he had also asked respondent's supervisor how respondent was doing. Whatever respondent may have said to WG wasn't passed on to Mr. K. He confronted and discussed respondent's duties with him once when he saw respondent riding a bicycle and again when he saw respondent climbing out of a trash container. On that occasion respondent told (Mr. K) he was recovering some brass from the container. The containers were about six feet in height and open at the top. Respondent told Mr. K he wouldn't go into a container again. However, on July 22nd, Mr. K again saw respondent enter a trash container. Respondent said he had done so to retrieve a trash drum that had fallen in. Mr. K conceded that Dr. JJ did not have restrictions on climbing in effect on July 22nd. On August 16th, respondent told Mr. K his back was hurting and that he wanted "light duty" again. On that date Mr. K arranged two appointments for respondent with Dr. JJ, one for his "work-related" back problem and the other for his "personal" neck and shoulder problems. However, Mr. K also testified that respondent saw the doctor on August 19th without his prior knowledge. On August 20th, Mr. K, WG, and a manager met with respondent to counsel and warn him about Employer's policy that respondent first advise Mr. K's office when he needed to see a doctor for job related problems. Mr. K said that on four occasions respondent had made or kept doctor's appointments without first checking in with Mr. K's office. According to Mr. K, this policy was first orally explained to respondent on August 20th. However, he said it was contained in a handbook of project work rules a copy of which respondent signed for in

May 1991. Mr. K testified that after the August 20th meeting, respondent left work late in the afternoon without "informing the office," and he learned of it the following day. Respondent had, however, told his supervisor. On August 21st, respondent's employment was terminated when respondent called in to say he couldn't do the work, wasn't coming in, and had already been to the doctor. Mr. K stated as the reasons for respondent's termination his failure to communicate with Employer about his need to see the doctor and his failure to show up and perform his restricted duties.

The transcript of a telephone interview of Mr. B by appellant on January 24, 1992, offered into evidence by appellant, indicated Mr. B worked with respondent as a millwright helper and saw him regularly when they were both on "light duty" with injured backs. He said the duties included lifting trash cans weighing 30 to 40 pounds containing welding rods and trash steel. Sometimes a forklift was available but at other times not and the barrels had to be lifted chest high and emptied. The restricted duties also required cleaning metal parts off tables including blower shafts weighing from 20 to 40 pounds. These pieces should have been moved by two people but he had no helper. He said he quit his job because he didn't like the way the company was run and didn't like his foreman, CA. Appellant also adduced the affidavit of CA which said that when CB was on "light duty" after a back injury on July 15, 1991, he had a problem with Burns' failing to work within the doctor's restrictions because he was proud of his strength and didn't like light duty. This affidavit did not mention respondent.

During the hearing on January 30th, appellant offered the following documents into evidence: an undated statement from WG, an undated statement from Mr. K, two "Employee Disciplinary Reports" dated August 20th and 21st, 1991, which referenced the events of those days involving respondent, and a copy of Employer's "Project Work Rules," together with respondent's acknowledgment of receipt of a copy of the rules on May 24, 1991. Respondent provided the hearing officer with a written "Motion to Strike Documents Exchanged and Witness Statements" to which were attached copies of these exhibits. While respondent's written motion with exhibits was not designated a hearing officer exhibit, we regard it as a part of the record developed at the hearing since it was provided to the hearing officer and argued at the hearing. In arguing for the exclusion of these exhibits from evidence based on an untimely exchange, respondent stated that the exhibits were first provided to respondent by electronic transmission on January 27th, during the continuance of the hearing, and that appellant either had or should have had them all along. Respondent asserted that appellant first should have exchanged them not later than 15 days after the benefit review conference held on November 13, 1991, and, failing that, should have attached them to appellant's answers to respondent's interrogatories forwarded to respondent on December 19, 1991. Respondent argued that such timely exchange was required by Article 8308-6.33(e) and by TWCC Rule 142.13(c)(1) and that appellant had not shown "good cause" for its failure to timely exchange the documents.

Respondent said he was not objecting to two other exhibits obtained by appellant

during the continuance, namely, the appellant's recorded telephone interview of CB on January 24th, and an undated statement of CA, because those statements met respondent's affidavit from Mr. B which was the purpose for which the continuance was granted. Appellant's response to respondent's motion to strike and objections was that the documents had only recently been obtained by its attorney; that the statement of Mr. K had been available at the January 8th session of the hearing but was not then exchanged since Mr. K was present to testify; and, that the statement of WG was just obtained during the continuance period. The hearing officer excluded the challenged documents. Appellant's counsel then requested the admission of the documents "on behalf of the Employer who is a party to these procedures," after first obtaining the authorization of Mr. K who was in attendance for Employer. The hearing officer again refused to admit the documents.

Later in the January 30th session, appellant called WG to testify and respondent objected on the grounds that WG had not been identified by appellant in its answers to respondent's interrogatories as a witness who would be providing testimony. Respondent asserted that while appellant had included WG on a list of names of individuals with knowledge of relevant facts in response to respondent's Interrogatory No. 10(a), appellant had not, in answering Interrogatory No. 10(b), identified WG as an individual from whom appellant planned to submit testimony in its behalf. Appellant had only listed Mr. K in answering Interrogatory No. 10(b). Respondent also pointed out that appellant never supplemented its answer to Interrogatory No. 10(b) forwarded on December 19, 1991, to add WG's name. TWCC Rule 142.19 provides form interrogatories for both insurance carriers and claimants to send each other should they choose to do so. Interrogatory No. 10(a) asked for the identification of "each individual whom [the carrier] knows to have knowledge of the relevant facts related to the issue(s) in dispute" while Interrogatory No. 10(b) asked for the identification of "each individual from whom [carrier] plans to submit testimony in its behalf." Respondent further argued that the discovery provisions in Article 8308-6.33 and TWCC Rule 142.13 require the identification of "witnesses" before hearings.

Appellant responded that WG was in the nature of a rebuttal witness because at the January 8th session respondent had testified he had made complaints to WG; and, that appellant subsequently obtained the statement from WG and exchanged it on January 27th before the hearing resumed on January 30th. The hearing officer then sustained respondent's objections to WG's testifying for appellant and for Employer.

Article 8308-6.33(d) provides that "[w]ithin a time to be prescribed by commission rule, the parties shall exchange . . . (3) any witness statements; (4) the identity and location of any witness known to the parties to have knowledge of relevant facts; and (5) all photographs or other 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, including any witness statements and the identity and location of any witness known to have knowledge of relevant facts, no later than 15 days after the benefit review conference and, thereafter, as it becomes available. Documentary evidence not previously exchanged will be brought to the hearing where "[t]he hearing officer shall make a determination whether good cause exists for a party not having previously exchanged such information or documents to introduce such evidence at the hearing." The standard for our review of the hearing officer's ruling excluding the documents and testimony offered by appellant is one of abuse of discretion. Morrow v. HEB, Inc., 714 S.W.2d 297 (Tex. 1969); Yeldell v. Holiday Hills Retirement and Nursery 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.

Appellant argued that respondent was not surprised or prejudiced by its not earlier exchanging the evidence. We have previously said that "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. Appellant did not state how respondent was "not prejudiced" by such evidence notwithstanding that such documents concerned the nature of respondent's post-injury work and the events leading to his termination. In refusing to admit appellant's documents the hearing officer apparently determined that appellant failed to show good cause. While the hearing officer did not specifically articulate that he found an absence of good cause, we are persuaded such was the basis for his rulings. He specifically made a finding that good cause existed to admit Mr. B' affidavit at the first session and the parties' contentions for and against the admission of the appellant's documents were founded on the good cause requirement. In Texas Workers' Compensation Commission Appeal No. 91009 decided September 4, 1991, we described good cause as "that degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances" and observed that "[t]he determination of good cause is a decision best left to the discretion of the hearing officer . . ." Appellant's reasons for not earlier exchanging the excluded exhibits were that those exhibits possessed by Employer since May and August 1991 did not reach appellant's attorney until sometime after the continuance was granted on January 8, 1992. The attorney said he sent them to respondent as soon as he received them. He offered no explanation as to why those documents were not earlier obtained from Employer. While such documents may not have been in appellant's possession or custody 15 days after the benefit review conference, they were certainly within appellant's control. The undated statement of WG was not obtained until sometime after January 8, 1992, although he was identified in appellant's answer to respondent's Interrogatory No. 10(a) on December 19, 1991. The undated statement of Mr. K was apparently obtained sometime prior to the

January 8th session of the hearing and yet not exchanged until January 27th. Under these circumstances we do not find that the hearing officer abused his discretion in excluding the documents. *See* Texas Workers' Compensation Commission Appeal No. 91076, *supra*; and, Texas Workers' Compensation Commission Appeal No. 91064 decided December 12, 1991.

With regard to the hearing officer's refusal to allow WG to testify we again do not find abuse of his discretion. WG was known to Employer as respondent's supervisor for his post-injury work and participated in the August 20th meeting with Mr. K, respondent, and a manager. While he was identified as an individual with knowledge of relevant facts in appellant's answer to respondent's Interrogatory No. 10(a), sent to appellant on December 19, 1991, he was not identified as an individual who would provide testimony in the answer to Interrogatory No. 10(b) and was apparently not even contacted by appellant for a statement until after the hearing was continued on January 8th. At the hearing on January 8th appellant had only identified Mr. K as a witness who would provide testimony and apparently did not later supplement its answer to Interrogatory No. 10(b) after December 19, 1991, to add WG. Under these circumstances, the hearing officer did not abuse his discretion in determining that appellant failed to establish good cause for its failure to earlier identify WG as a witness who would provide testimony. In Farah Manufacturing Company, Inc. v. Alvarado, 763 S.W.2d 529 (Tex. App.-El Paso 1988, aff'd, 34 Tex. S.Ct.J. 107 (Tex. November 21, 1990)), the decision of the trial court to allow testimony from a previously undisclosed rebuttal witness was found to be error. The court recognized that "[a]lthough in some instances it may be impossible for a party to know in advance who has knowledge of facts relevant to rebut his opponent's evidence, no such claims can be made here." The court noted that prior to trial the undisclosed witness was both a "potential witness" and "a person having knowledge of the occurrences made the basis of this suit." The relevant interrogatories, as here, had sought the identity of both potential witnesses who may be used in trial as well as persons having knowledge of the occurrences. The court stated the rules that the party offering the evidence has the burden of showing good cause; that the determination of good cause is relegated to the discretion of the trial judge which will only be disturbed for abuse of discretion; and, that in determining whether there was an abuse of discretion, it must be ascertained whether the trial court acted without reference to any guiding rules and principles. Considering the guidance in the provisions of Article 8308-6.33, TWCC Rule 142.13, the prior decisions of the Commission's Appeals Panel considering the issue of good cause in discovery matters, and the evidence and representations presented to the hearing officer, we are persuaded that the hearing officer acted in conformity with "guiding rules and principles" in determining that appellant failed to meet its burden to make a positive showing of good cause for having failed to timely identify WG as a "witness."

We find sufficient evidence to support the hearing officer's findings that Employer's offer of employment was inconsistent with the doctor's work restriction and thus was not a bona fide offer of employment pursuant to TWCC Rule 129.5 (Bona Fide Offers of

Employment). TWCC Rule 129.5 provides that in determining whether an offer of employment is bona fide, the commission shall consider, *inter alia*, "the physical requirements and accommodations of the position compared to the employee's physical capabilities. . . ." This rule further provides that "[i]f the offer of employment was not made in writing, the insurance carrier shall be required to provide clear and convincing evidence that a bona fide offer was made." The hearing officer, as the sole judge of the weight and credibility of the evidence (Article 8308-6.34(e)), was entitled to accept the testimony of respondent, corroborated by the affidavit of CB, that the job tasks assigned to him when he returned to work on June 18, 1991, were inconsistent with the limitations imposed by Dr. J. Appellant cited us to Texas Workers' Compensation Commission Appeal No. 91027 decided October 24, 1991, which concerned an issue of the existence of a bona fide offer of employment in the context of an injured employee who was later dismissed for cause. In that case, the injured employee had been provided post-injury employment consistent with the work limitations attributable to her compensable injury. *Instanter*, the hearing officer concluded that respondent's post-injury employment duties did not meet the limitations imposed by the doctor. We will not substitute our judgment for that of the hearing officer when, as here, the challenged findings are supported by some evidence of probative value. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana, 1989, no writ). The hearing officer's findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge