APPEAL NO. 92051

On January 8, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. (hearing officer) determined that the employee, respondent herein, did not sustain a compensable injury on (date of injury), and ordered that no benefits be awarded. Appellant asserts that the credibility of the evidence against him, in effect, raises the issue that the decision is against the great weight and preponderance of the evidence. Respondent questions whether the appeal is timely and specific.

DECISION

Finding that the two audio tapes that represent the contested case hearing, including all testimony taken therein, are blank, we remand as described hereafter.

While respondent takes issue with the timeliness of appellant's Request for Review, we find it to be filed within the statutory time frame. The cover letter from the Division of Hearings and Review which forwarded the decision of the hearing officer is dated January 28, 1992. The appeal was received by the Commission in (city), Texas, on February 11, 1992. Thus the appeal was timely even without considering allowable mailing time under Rule 102.5 (Tex W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.5) and Rule 143.3. Failure by appellant to properly serve respondent does not affect timeliness of appeal but does delay the inception of the time allowed respondent to reply.

In this case, the two tapes received, along with the evidence and decision of the hearing officer, appear to have no audible recording. We understand that a duplicate set of tapes in the field office also has no sound. If a set of tapes is found that does adequately record the events of the hearing or if a transcript of the hearing was made, either would adequately serve to construct a record for review.

Article 8308-6.42 of the 1989 Act requires the Appeals Panel to consider the "record developed at the contested case hearing." *Also see* Texas Workers' Compensation Commission Appeal No. 91017 (Docket No. FW-00020-91-CC-l) decided September 25, 1991. This panel cannot make a decision on the merits without a record so we have no choice but to remand for another hearing. Having ordered a remand, we add that if a method is found, suitable to all parties and the hearing officer, to

We remand for another hearing or as stated above.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge