

APPEAL NO. 92700

This appeal arises under the Texas Workers' Compensation Commission Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1992). On October 30, 1992, a contested case hearing was begun and was continued on appellant's (carrier herein) motion for a continuance to obtain a doctor's answers to interrogatories. The hearing reconvened on November 13, 1992, also in (city), Texas with (hearing officer) presiding. He determined that respondent, claimant herein, was injured in the course and scope of employment on (date of injury), and such accident was timely reported. Appellant asserts that the finding of an injury in the course and scope of employment is not supported by sufficient evidence as to causation. Respondent states that the evidence of causation is adequate since this case does not involve occupational disease.

DECISION

Finding that the testimony of one witness listed in the decision is not recorded and that a large part of the cross-examination of the claimant may not be recorded on the tapes provided as part of the appellate record, we reverse and remand as described hereafter.

In this case two tapes were received; there was no transcript. One additional tape was received as part of claimant's evidence. Claimant's tape did not include any testimony but was restricted to what it represented itself to be--a recording of one person's attempt to make a telephone call. The tape of the hearing marked "tape 1" is a good recording. It takes the hearing through its October 30th segment and through the testimony of (Mr. A) and direct testimony of the claimant on November 13, 1992. Tape 1 just begins cross-examination of the claimant, with approximately one-sixth of side "B" of tape 1 devoted thereto, when it ends. Tape 2, side "A" begins with the hearing officer identifying the tape and side thereof and stating, to the effect, that the witness may be cross-examined. When cross-examination is complete, and the witness is through, the hearing officer dismisses not the claimant, but (Mr. Q). Thereafter on side "A" of tape 2, (OD) testifies, claimant rests, (Ms. G) and (Mr. K) testify for the carrier, closing arguments are waived, and the hearing officer closes the hearing. Tape 2 side "A" ended with approximately 22 blank "counts" left on the tape. On tape 2 side "B" the hearing officer identifies the tape at "count" 15 and says to the effect, that the witness is on direct examination, who can be identified later as (EA). Thereafter (Mr. P) testified and (Mr. Q) was called and completed direct examination. Cross-examination of (Mr. Q) just began when side "B" ended. There are no other tapes and no testimony of (RM), listed as a witness, is heard. The relatively short amount of cross-examination of claimant on tape 1, side "B" probably indicates also that part of claimant's testimony is not available on the tapes before us on appeal.

If the set of tapes before us was in some manner improperly duplicated from complete tapes of the hearing, the complete set of tapes 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". *A/so see Texas Workers'*

Compensation Commission Appeal No. 91017, dated September 25, 1991. This panel cannot make a decision on the record before us, so we must remand for construction of the record. Having ordered a remand, if a complete set of tapes is not found, the missing testimony may be constructed by any method suitable to all parties and the hearing officer. The hearing officer may order another hearing for the limited purpose of developing and considering the evidence. Reconsideration and additional or different findings may be appropriate within the judgment of the hearing officer. Pending resolution of the remand, a final decision has not been made in this case. The decision is reversed and remanded.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge