

## APPEAL NO. 93809

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). A contested case hearing was convened in (city), Texas, on April 23, 1993, by (hearing officer), hearing officer, and closed on July 13, 1993. The disputed issues were whether the appellant (claimant) sustained "a compensable injury in the course and scope of his employment," whether he timely reported such injury to his employer, and whether he has disability therefrom and for what periods. The hearing officer made a number of factual findings and legal conclusions and determined that while claimant was injured in the course and scope of his employment, he did not timely report any allegedly work-related injury to his employer and his injury was not compensable. The hearing officer further determined that although claimant was unable to obtain and retain employment due to bronchitis from May 5 through May 9, 1992, he did not have disability (Section 401.011(16)) during that period because his injury was not compensable. The claimant's request for review asserts that the hearing officer gave the appearance of a more friendly relationship with the counsel for the respondent (carrier) than she displayed towards him; that the hearing officer incorrectly identified claimant (rather than the carrier) as having requested the April 23rd continuance of the hearing which claimant had, in fact, resisted; that the hearing officer misstated some of claimant's evidence in the Decision and Order; that the recorded testimony of claimant's witness "has been altered and does not record the majority of his testimony" nor reflect carrier's counsel's aggressive cross-examination of his witness; and that, generally, claimant's evidence showed that his siphoning gasoline on the job over a period of months caused his "bronchopneumonia" which in turn aggravated a heart condition he was unaware of and led first to his carotid artery surgery and subsequently to his coronary bypass surgery. In its response, the carrier contends that the evidence sufficiently supports the hearing officer's determinations.

## DECISION

Because a complete record of the contested case hearing is not available for our review, and because additional findings appear necessary, we reverse and remand.

On tape 1 of the tape-recorded record of the proceedings below, the statements by the person who provided the English-Spanish translations on April 23, 1993, are essentially inaudible making it virtually impossible for the Appeals Panel to decipher testimony that is essential to a full and proper review of the record. In addition, approximately one-half of side 4, tape 2, is blank and apparently did not record the balance of the examination of claimant's witness, (CP), as well as some of the ombudsman's closing argument. We cannot know whether claimant provided additional testimony during the unrecorded portion of the hearing nor whether any evidentiary or other rulings were made. Section 410.203(a)(1) requires the Appeals Panel to consider "the record developed at the contested case hearing." See Texas Workers' Compensation Commission Appeal No. 91017, decided September 25, 1991; Texas Workers' Compensation Commission Appeal No. 92115, decided May 4, 1992; and Texas Workers' Compensation Commission Appeal

No. 92131, decided May 15, 1992. Though an April 13, 1993, letter from the carrier accompanying the record requested the hearing officer's permission to have the hearing reported by a court reporter, the hearing officer's decision does not indicate that the hearing was in fact so reported and no court reporter's transcript accompanied the tape-recorded record. We do not know whether there was a court reporter present who may have also tape-recorded the proceedings. The hearing officer may be able to avoid having to recall witnesses for additional testimony if an audible tape recording can be located or those being returned with this record can be sufficiently enhanced to be understood or else transcribed. In any event, it is necessary upon remand that the record be reconstructed sufficiently so that this panel can fully review all of the testimonial evidence, statements of counsel, and rulings of the hearing officer.

Since this case is being remanded, we note that the actual injury found by the hearing officer in her decision to have occurred in the course and scope of claimant's employment is not directly stated in the findings through it would appear to be bronchitis. Further, we note that although the hearing officer concluded that the claimant did not timely report his work-related injury, no findings are made respecting the date of injury, the date it was reported, and whether good cause existed for claimant's failure to timely report his injury, a subsumed issue. The hearing officer should make such additional findings and conclusions as are appropriate and consistent with this decision.

We reverse and remand for appropriate reconstruction of the record and for such additional findings and conclusions as are appropriate.

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. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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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