

APPEAL NO. 93886

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 held on August 27, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole disputed issue was whether respondent (hearing officer) (claimant) was injured in the course and scope of his employment with respondent (employer). The hearing officer concluded that claimant was not injured in the course and scope of his employment and ordered that claimant take nothing as a result of his workers' compensation claim. Appellant (carrier) has filed a request for review which asserts, in essence, that the hearing officer's factual finding that claimant was not furthering the interests of employer at the time of his injury was not supported by sufficient evidence and thus must be reversed together with the aforementioned legal conclusion. The carrier asks the Appeals Panel to either reverse and render a decision that claimant was injured in the course and scope of his employment, "or in the alternative, that Claimant (sic) be reimbursed for indemnity and medical payments paid to the Claimant,. . . ." Carrier's certificate of service recites that service was made upon claimant and employer by certified mail; however, no responses were filed.

DECISION

In that the carrier was not a party to the contested case hearing below and thus lacks standing to appeal, carrier's request for review is dismissed.

According to the report of the Benefit Review Conference (BRC) held on June 30, 1993, the claimant was not present, the employer was represented by its owner, (Mr. N), and the carrier also had a representative present. At the BRC the carrier took the position that claimant was injured in the course and scope of his employment. The employer's position was that claimant was not an employee at the time of his injury on (date of injury), since he had been terminated before the incident occurred. The BRC report also indicated that the Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) was filed on September 3, 1992, that the Employer's First Report of Injury or Illness (TWCC-1) was filed on September 4, 1992, that claimant's period of disability was from (date) to November 3, 1992, and that claimant had been paid temporary income benefits (TIBS) for 26 weeks.

According to the Decision and Order (decision) of the hearing officer, which was styled as claimant against employer, the claimant did not appear, the employer was represented by Mr. N, and the carrier was represented by its attorney. The decision stated that "[t]he parties were unable to resolve their dispute at the BRC. . ." and the hearing was held to determine the disputed issue. The hearing officer stated that according to the carrier, claimant received TIBS checks for 26 weeks, such benefits ceased in January 1993 when the claimant reached maximum medical improvement with zero percent impairment, and the claimant moved to another state and was not heard from thereafter. The carrier asserted at the hearing that it "did not controvert this claim" and paid TIBS for 26 weeks "from (date) to 1/6/93." The carrier confirmed that it was the employer who contested the

claim. The record did not indicate when the employer contested the claim. While the hearing officer initially said he would take evidence from both the employer and the carrier, he later advised the carrier's attorney he realized that the carrier was "not a party in the case" and no evidence was offered by the carrier. When the employer's evidence was in, the hearing officer stated that before he wrote the decision in the case he would write to the claimant, advise him of the evidence, and provide him with an opportunity to respond.

According to the employer's evidence, which the hearing officer received pursuant to Section 409.011(b), claimant's right shoulder was injured on (date of injury), when claimant was struck by employer's van which was still moving on a public street when claimant attempted to enter it. In his discussion, the hearing officer commented that the carrier apparently paid the claim because the means of transportation was under employer's control, notwithstanding that the evidence indicated that the accident occurred prior to and not during transportation of the claimant and that there was no evidence that claimant was acting in furtherance of employer's business at the time of his injury. Based on several factual findings, including the one appealed by the carrier, the hearing officer reached his ultimate conclusion which the carrier also appeals.

In Texas Workers' Compensation Commission Appeal No. 93263, decided May 19, 1993, the carrier did not contest the compensability of the claimed injury and paid benefits under the 1989 Act while the employer did contest the claim. As in the case under consideration, the carrier's attorney in Appeal No. 93263 made clear at the hearing that the carrier had not contested the compensability of the claim while the employer had done so. The hearing officer found for the claimant and both the employer and the carrier filed appeals but no response was filed by the claimant. Determining that the carrier was not a party to the contested case hearing, the Appeals Panel found its request for review not properly before us and it was not considered, citing Article 8308-6.41 (now Section 410.202), Texas Workers' Compensation Commission Appeal No. 93133, decided May 6, 1993, and Texas Workers' Compensation Commission Appeal No. 92137, decided May 20, 1992. We would also note that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 140.1 (Rule 140.1) defines party to a proceeding as "[a] person entitled to take part in a proceeding because of a direct legal interest in the outcome."

Since the carrier was not a party to the contested case hearing below, it lacks standing to appeal and its request for review is dismissed.¹

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge

¹Even if the carrier had standing to appeal, its request for review would not have invoked the jurisdiction of the Appeals Panel since it was not timely filed. Carrier was deemed to have received the hearing officer's decision on September 18, 1993, and thus its 15 day period to file the appeal expired on October 4, 1993. Carrier's request for review was dated and mailed on October 6, 1993. See Texas Workers' Compensation Commission Appeal No. 93804, decided October 22, 1993.