

APPEAL NO. 94221

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* On December 30, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent (claimant) was injured (hernias) in the course and scope of employment on (date of injury), gave timely notice, but has not had disability therefrom. Her decision was distributed to the parties on February 9, 1994. Appellant (carrier) asserts that there is insufficient evidence to show the hernias were caused by claimant's work. Claimant replies that the decision of the hearing officer should be upheld except in regard to disability; his response was dated March 8, 1994, and was received March 11, 1994, so it is too late to qualify as an appeal itself. Therefore, claimant's request that the disability issue be reviewed is untimely and will not be considered. See Section 410. 202 and Texas Workers' Compensation Commission Appeal No. 92109, dated May 4, 1992.

DECISION

Finding that one of two audiotapes of the hearing is missing and has not been located as of the present time, we reverse and remand as described hereafter.

In this case, an audiotape reflects events at a prehearing conference in regard to a request for continuance to obtain a translator. The file contains another tape (for a total number of two tapes present at this time) that reflects events at the hearing. That tape is labeled as tape two of two; on side A it begins with a reference to something mentioned on another tape and then indicates the carrier is offering its Exhibit No. 12, an affidavit. We conclude that the first tape used at the hearing itself is missing.

Section 410.203 requires the Appeals Panel to consider the "record developed at the contested case hearing." *Also see* Texas Workers' Compensation Commission Appeal No. 91017, dated September 25, 1991. This panel cannot make a decision on the merits without a record so we must remand.

The decision and order are reversed and the case is remanded for reconstruction of the record. The record may be sufficient for review if another set of tapes from the hearing of December 30, 1993, is located; the parties may agree to a reconstruction of the evidence, motions, rulings, and other relevant information from the missing tape; or another hearing may be held. 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.

Joe Sebesta
Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Thomas A. Knapp
Appeals Judge