

APPEAL NO. 991504

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 8, 1999. She (hearing officer) determined that the employer tendered a bona fide offer of employment to the appellant (claimant) on December 8, 1998. The claimant appeals this determination, contending that it is against the great weight and preponderance of the evidence and is the product of "bias, prejudice, and passion" on the part of the hearing officer who improperly failed to recuse herself. The respondent (carrier) replies that the decision has ample evidentiary support and that the claim of bias is "frivolous."

DECISION

Reversed and remanded to a new hearing officer.

While working as a general warehouseman on _____, the claimant suffered a deep laceration to his right hand from the thumb to the palm with possible nerve damage. He had surgery on October 16, 1998. We will not discuss the evidence on the substantive issue of a bona fide offer of employment because we remand on the procedural due process question of whether the decision in this case was the product of bias or prejudice against the claimant or his attorney.

Section 410.163(b) provides that a hearing officer "shall ensure the preservation of the rights of the parties and the full development of facts required for the determination to be made." A hearing officer must not depart from the role of an unbiased and impartial fact finder. Texas Workers' Compensation Commission Appeal No. 972163, decided December 8, 1997. A review of the record of the proceedings reflects the level of frustration experienced, with some justification, by the hearing officer over the way the claimant's counsel presented his case. For example, during his examination of his legal assistant, counsel asked her to read or summarize certain documents in evidence. The hearing officer advised him not to do this because she would read the exhibits. She then advised counsel that he could either introduce the documents into evidence or prove the contents of the documents through testimony, but not both. The claimant's counsel then moved the hearing officer to recuse herself on the basis of bias. The hearing officer declined. Later, while the claimant was testifying, his counsel asked him to show his injured and "obviously swollen" right hand to the hearing officer. The hearing officer asked counsel not to do this and said that the issue was bona fide offer of employment, and that the swollen condition of the hand was not "relevant." Counsel then asked if he could explain the relevancy. The hearing officer responded, "[y]ou can try, but I can tell you it's not. Go ahead." She then commented "I am not biased. . . . You are paranoid." Shortly thereafter, the hearing officer said to counsel, "I'm waiting for you to muddle through your deal, now go ahead" to which counsel responded that the use of the words "muddle through" reflected her "obvious bias." Counsel then said, "you may think it's funny." The hearing officer said, "I don't" and counsel commented, "[l]et the record reflect that you're laughing and making fun and at this point you're biased. Hopefully the Appeals Panel will not think that it is funny."

The hearing officer continued: "Alright, let the record reflect your paranoia." Later on, counsel accused the hearing officer of "making faces" and raised a question of whether the hearing officer improperly made ex parte communications with his own office. When testimony ended, the hearing officer announced that each side had one minute for closing. The carrier, who bore the burden of proof on the disputed issue, proceeded first. The claimant then began closing argument and was interrupted by the hearing officer's comment, "I'm going to give you ten more seconds." The claimant's counsel asserted that the hearing officer gave more time to the carrier for closing. The hearing officer denied this and gave the claimant's counsel 15 more seconds. Counsel then said, "[l]et the record reflect that I'm being pressed by the Hearing Officer when the closing counsel was given more time to give a closing argument." The Hearing Officer responded, "Okay. Yes, you are. Go ahead." The claimant's counsel then finished his closing argument in a matter of seconds.

Regardless of the provocation, the hearing officer, we believe, engaged in argument and personal comments about the claimant's counsel which, at a minimum, compromised the appearance of impartiality required of all hearing officers. Texas Workers' Compensation Commission Appeal No. 941146, decided October 7, 1994. This antagonism may have produced bias on her part against the claimant's counsel and may have been reflected in her decision on the merits. To insure a fair and impartial hearing for the claimant, we reverse the decision of the hearing officer and remand this case for a new hearing conducted by a new hearing officer.¹ See Texas Workers' Compensation Commission Appeal No. 961375, decided August 29, 1996. In doing so, we stress the responsibility of all the parties to conduct themselves professionally and with decorum and courtesy.² The 1989 Act permits only one remand. Section 410.203(c).

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.

¹The new hearing officer should not be the one who earlier recused himself.

²We also note that side two of tape one of the proceedings is blank for approximately the first 165 counts on the meter. This consisted, presumably, of cross-examination of a carrier witness by the claimant's attorney. Also, tabbing of the 22 documents in Claimant's Exhibit H will greatly enhance efficient adjudication.

For the foregoing reasons, we reverse the decision of the hearing officer and remand for a new hearing conducted by a new hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge