

APPEAL NO. 020675  
FILED APRIL 24, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 13, 2002. The hearing officer determined that the respondent (claimant) sustained a compensable low back injury on \_\_\_\_\_, and had disability from August 29, 2001, through the date of the CCH.

The appellant (carrier) appeals on three grounds:

- (1) the record of the CCH is inaudible and therefore is unavailable for review;
- (2) the claimant had not sustained a compensable injury because he had long-standing degenerative back problems; and
- (3) the claimant did not have disability because the employer had made an offer of light duty which the claimant had accepted and the claimant's present unemployment is because of a termination due to the claimant's failure to call in while incarcerated.

The file does not contain a response from the claimant.

DECISION

Affirmed in part and reversed and remanded in part.

Regarding audibility of the audiotape, our review of the audiotape indicates that when played on the "standard" speed, the audiotape was indeed unintelligible, however, when played at the "low" speed, it was clear and audible. There was no malfunction of the tape recorder and the hearing officer apparently recorded the proceeding on the alternate speed instead of the standard speed. The carrier should have attempted to listen at the low or slow speed or used one of the Texas Workers' Compensation Commission (Commission) tape players to review the audiotape. We find no reason to remand the case on this point.

On the merits, the claimant, an oilfield worker, testified that he injured his low back at work on \_\_\_\_\_, while working with some pipes. While testimony regarding the date of injury is vague and subject to differing interpretations, the hearing officer found that the claimant had sustained an injury, as defined in Section 401.011(26), on \_\_\_\_\_; and that a subsequent event of the claimant pulling on his boots "aggravated Claimant's already injured back." The hearing officer's determinations on this issue are sufficiently supported by the evidence. The hearing officer could believe all, part,

or none of the testimony of the witnesses. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ).

The claimant first sought medical attention on August 16, 2001, from Dr. S, who noted complaints of back pain for two weeks. Dr. S released the claimant to regular duty at that time. The claimant saw Dr. S again on August 20, 2001, and the doctor noted that he was "concerned that this is more than routine low back strain" and released the claimant to light duty. The claimant and the employer worked out a light-duty position which the claimant worked until he was arrested and incarcerated a few days later. Because the claimant did not call in to the employer while he was incarcerated, the employer terminated the claimant's employment for having "quit." The claimant was released from jail and the employer refused to reemploy the claimant at light duty because the claimant had been terminated. The carrier asserts that the claimant's inability to work was the claimant's failure to inform the employer that he was in jail and that had the claimant called in, he "would still be working for Employer." While the employer had originally offered the claimant a light-duty position, the employer subsequently terminated the claimant for cause because he had not called in. The issue then becomes whether, upon the claimant's release from jail, the claimant had the ability to obtain and retain employment at his preinjury wage because of the compensable injury. (See definition of disability Section 401.011(16).) The testimony of the employer's safety manager was that the claimant had asked the employer for his light-duty job back upon being released from jail and had been refused because the claimant had been terminated.

We only have some pause about the hearing officer's determination of disability beginning August 29, 2001, in that the claimant returned to work at light-duty on August 20; worked "about a week" until he was arrested and incarcerated; and was in jail about eight days before he was released. The claimant obviously did not have disability while he was incarcerated. The employer terminated the claimant for not calling in on August 28, 2001, and the hearing officer began disability on the next day, August 29, 2001. However, the evidence establishes that the claimant began his light duty on August 20, worked "about a week" until he was arrested and incarcerated for about eight days. Consequently, it would appear that the claimant was still in jail on August 29, 2001.

We remand for the sole specific purpose for the hearing officer to determine the start date of disability which would be the day after the claimant was released from jail. We affirm the hearing officer's decision that the claimant sustained a compensable injury on \_\_\_\_\_, and that the claimant has disability for some period of time to the date of the CCH.

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 Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in

Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION** for **Petrosurance Casualty Company, an impaired carrier**, and the name and address of its registered agent for service of process is

**MARVIN KELLY**  
**TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY ASSOCIATION**  
**9120 BURNET ROAD**  
**AUSTIN, TEXAS 78758.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge