APPEAL NO. 950185

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act.) On December 14, 1994, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding, to consider the single issue of respondent's (claimant) average weekly wage (AWW). The hearing officer determined that claimant's AWW is $320.00 in accordance with an agreement reached by the parties. Appellant's (carrier) appeal challenges the sufficiency of the evidence in support of the hearing officer's determination that claimant's AWW was $320.00. Claimant's response urges affirmance. Carrier filed an untimely amended appeal, *see* Section 410.202, to which is attached a copy of what purports to be an agreement between the parties that claimant's AWW is $256.37.

DECISION

We reverse and remand.

Claimant was compensably injured on (date of injury), when he fell from a scaffold. As noted above, the only issue at the hearing was AWW. A hearing was initially convened on August 24, 1994, but was continued so that the carrier could obtain payroll records from the employer. The hearing reconvened on December 14, 1994. The payroll records were apparently not produced by the carrier until the morning of December 14th and no explanation was given for the delay in producing them. At the outset of the hearing the parties represented that they believed they would be able to reach an agreement as to the AWW issue. Therefore, after claimant testified and the carrier presented its evidence, the hearing was closed and the record was held open until December 21, 1994, at which time the parties were to apprise the hearing officer whether the issue had been resolved or whether the hearing needed to be reopened. In her decision the hearing officer states that the parties reached an agreement and provided the particulars of the agreement to her on January 6, 1995. The hearing officer attached and incorporated by reference a copy of the written agreement into her decision and order. However, that document bears the signature of the claimant and of claimant's attorney only and is not signed by carrier's representative. In his response to the appeal, claimant's attorney acknowledges that carrier's representative did not sign the agreement referenced in the hearing officer's decision; however, he maintains that the carrier agreed to its terms.

In its initial and timely appeal, received on February 7, 1995, carrier argues that there is no evidence or insufficient evidence to support the hearing officer's determination that the $320.00 AWW figure is the figure to which the parties agreed. However, carrier did not specify an alternative AWW figure. Carrier attached an exhibit to its untimely amended appeal, received on March 1, 1995, which purports to be an agreement signed by claimant and his attorney on February 17, 1995, and by carrier's representative on February 24, 1995, providing that the agreed AWW is $256.37. While we note that the document was executed after the initial appeal was filed and was attached to an untimely appeal and accordingly, would not generally be considered in making our decision, the existence of that document,

particularly in light of the fact that the document upon which the hearing officer bases her decision was not signed by the carrier, casts doubt upon the validity of the agreement used by the hearing officer in reaching her decision. For that reason, and because carrier has not sought to withdraw its original appeal, a remand is necessary in this instance to determine whether a valid agreement as to AWW has been executed by the parties and, if so, the terms of that agreement. A remand at this stage is certainly unfortunate, given that claimant was injured in (month year) and the fact that the issue of AWW has been pending at the CCH stage since August of 1994. However, on the state of the record before us, we are simply unable to resolve the AWW question. All efforts should be made on remand to expedite resolution of this issue.

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 the 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.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge