

APPEAL NO. 061295  
FILED AUGUST 23, 2006

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 May 23, 2006. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) sustained a compensable injury on \_\_\_\_\_; that the claimant timely notified her employer of an injury; that the claimant did not have disability as a result of the injury of \_\_\_\_\_; and that the claimant timely filed her claim for compensation with the Texas Department of Insurance, Division of Workers' Compensation (Division). The claimant appealed, disputing the disability determination. The respondent/cross-appellant (carrier) responded, urging affirmance of the disability determination. The carrier also appealed, disputing the injury, notice, and timely filing determinations. The carrier also objects to the admission of hearing officer's Exhibit No. 3, a Dispute Resolution Information System (DRIS) note because it was admitted after the close of the record, and without opportunity for objection, comment or response by the parties. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed in part and reversed and remanded in part.

The claimant testified that she twisted her ankle while getting out of a van she drove for the employer on \_\_\_\_\_. Whether the claimant sustained a compensable injury on \_\_\_\_\_; had disability as a result of the claimed injury; and whether she timely notified her employer were all at issue at the CCH. Further, the parties agreed at the CCH to add the issue of whether the carrier is relieved of liability because of the claimant's failure to timely file a claim with the Division within one year of the injury.

The evidence supports the hearing officer's decision that the claimant timely notified her employer of her injury.

Regarding the issue of timely filing a claim for compensation with the Division, in Krueger v. Atascosa County, 155 S.W.3d 614, (Tex. App.-San Antonio 2004, no pet.), the court held that when the injured employee did not file her claim within one year, and did not have good cause to excuse the delay, she did not have a compensable injury, and without a compensable injury, there cannot be disability. In the present case, the hearing officer correctly noted in the Background Information portion of her decision that an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (DWC-41) is in evidence dated December 2, 2003. However, the DWC-41 does not contain a date stamp indicating receipt by the Division. After the record closed, and without notice to the parties, the hearing officer admitted a DRIS entry which indicates a

DWC-41 was filed on December 5, 2003. The hearing officer then relied on this DRIS entry to determine whether or not the claimant timely filed her claim with the Division.

In Appeals Panel Decision (APD) 030295, decided March 27, 2003, the Appeals Panel stated that it had required that a hearing officer take official notice of essential Division forms where timely filing requirements are in issue, and in that decision approved a hearing officer's action in taking official notice of a Notice of Injury (CS-11) form. In APD 002287, decided November 13, 2000, the Appeals Panel determined that a hearing officer acted within his authority in reviewing the Division file and admitting into evidence a document that reflected when the dispute was filed, noting that the hearing officer was permitted to develop the record to include information essential to the resolution of the issue before him. In APD 010696, decided April 26, 2001, the Appeals Panel held that the hearing officer did not err in making the date-stamped copy of the carrier's Payment of Compensation or Notice of Refused/Disputed Claim (DWC-21), which the hearing officer obtained from the claim file, a hearing officer's exhibit. The DWC-21 in evidence in that case did not contain a date stamp indicating when the Division received the form. However, in that case, after the parties had rested, but before closing arguments, the hearing officer informed the parties that he was going to check the Division records to determine whether the DWC-21 had been filed and, after doing so, he informed the parties that the claim file contained the carrier's DWC-21 with a Division date-received stamp of November 22, 2000, and allowed the parties to examine that document and to make objections. We have previously held it is error for a hearing officer to make a determination that was based in part on new evidence as to which the parties had no notice or opportunity to comment. APD 93323, decided June 9, 1993.

Our standard of review regarding the hearing officer's evidentiary matters is one of abuse of discretion. APD 92165, decided June 5, 1992. To obtain a reversal of a judgment based upon the hearing officer's abuse of discretion in admitting evidence, an appellant must first show that the admission was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. See Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). The hearing officer based her decision of the timely filing issue in part on the DRIS note she took official notice of.

In numerous cases we have pointed out that 28 TEX. ADMIN. CODE § 142.2(11) (Rule 142.2(11)) provides that the hearing officer may "take official notice of the law of Texas and other jurisdictions, Texas city and county ordinances, the contents of the Texas Register, the rule of state agencies, facts that are judicially cognizable, and generally recognized facts within the Commission's [now Division's] specialized knowledge." When a document is filed with the Division is such a fact. See APD 981114, decided July 9, 1998.

However, no mention was made on the record during the CCH, that a DRIS entry would be admitted into evidence or considered in making a determination about timely filing in this case. The record does not indicate that the parties were given an

opportunity to object, comment, or respond to the admission of such DRIS entry. It was error for the hearing officer to admit the DRIS entry without notice to the parties and without allowing the parties an opportunity to object or comment. For this reason, we reverse the hearing officer's determinations that the claimant timely filed her claim for compensation and sustained a compensable injury, and we remand the case back to the hearing officer to allow the parties an opportunity to object and or comment or respond to the DRIS entry, which evidences the date a DWC-41 was filed with the Division in this case. After such opportunity is afforded to the parties, the hearing officer is then to rule on objections made, if any, and consider comments, responses and rebuttal evidence, if any, made by the parties regarding the DRIS entry. The hearing officer shall then issue a determination on the disputed issues of timely filing of a claim for compensation with the Division within one year of the injury, compensable injury, and disability. A determination on the timely claim filing issue is necessary before a determination can be made on the issues of compensable injury and disability. The hearing officer's determination regarding the claimant's timely reporting of an injury to her employer is affirmed.

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 Division, 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.

The true corporate name of the insurance carrier is **AMERICAN PROTECTION INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY  
800 BRAZOS, COMMODORE 1, SUITE 750  
AUSTIN, TEXAS 78701.**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge