

APPEAL NO. 120578  
FILED MAY 23, 2012

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 March 5, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. With regard to the disputed issues before him, the hearing officer determined that: (1) the appellant/cross-respondent (claimant) was in the course and scope of her employment when involved in a motor vehicle accident (MVA) on [date of injury] (issue resolved by the parties stipulation at the CCH); (2) the claimant is barred from pursuing Texas workers' compensation benefits because of an election to receive benefits under a group health insurance policy; (3) the respondent/cross-appellant (self-insured) is not relieved of liability under Section 409.004 because of the claimant's failure to timely file a claim for compensation with the Texas Department of Insurance, Division of Workers' Compensation (Division) within one year of the injury as required by Section 409.003 (issue added at the request of the self-insured and upon a finding of good cause); and (4) the self-insured's second Notice of Denial of Compensability/Liability and Refusal to Pay Benefits (PLN-1), filed with the Division on February 13, 2012, was based on newly discovered evidence that could not reasonably have been discovered at an earlier date, but the self-insured failed to exercise due diligence in asserting that defense and the self-insured's defense on compensability is limited to the election of remedies defense listed on the first PLN-1 that was filed with the Division on December 1, 2009 (issue added by the hearing officer). We note that Issue 4, which was added by the hearing officer, refers to an Amended PLN-1 filed on February 13, 2012; however, the Amended PLN-1 in evidence is date-stamped February 6, 2012.

The claimant appealed the hearing officer's determination on election of remedies, contending that she did not make an informed and voluntary choice to use her group health insurance policy for the injuries sustained in the [date of injury], MVA. The claimant also contends that the Amended PLN-1 filed on February 6, 2012 (which asserted late filing of a claim and election of remedies defenses) replaced and superseded the December 1, 2009, PLN-1 (which only asserted election of remedies defense). Because the hearing officer found that the Amended PLN-1 filed on February 6, 2012, was not filed after the exercise of due diligence, the claimant asserts then the self-insured also waived the defense of election of remedies included in the February 6, 2012, Amended PLN-1. The self-insured responded to the claimant's appeal, urging affirmance of the election of remedies determination and objecting to the raising for the first time on appeal, the argument that the self-insured waived the defense of election of remedies by filing the Amended PLN-1.

The self-insured cross-appealed the hearing officer's finding that the self-insured did not exercise due diligence in asserting the defense of late filing of a claim within one year and the hearing officer's determinations that the carrier is not relieved of liability because of the claimant's failure to timely file a claim with the Division within one year and that the self-insured's defense on compensability is limited to the election of remedies defense listed on the December 1, 2009, PLN-1. The claimant responded to the self-insured's cross-appeal, urging affirmance of the adverse determinations to the self-insured.

## DECISION

Reversed and remanded for reconstruction of the record.

Section 410.203(a)(1) requires the Appeals Panel to consider the record developed at the CCH. The appeal file in this case indicates there is only one compact disc (CD) for the CCH and the appeal file does contain one CD. However, the CD in the appeal file does not contain a complete recording of the CCH. The CD recording was stopped during the claimant's testimony when the hearing was recessed for a break. The CD recording was not turned back on after the recess or, for whatever reason, did not record after the recess. The hearing officer's decision indicates that not only did the claimant testify at the CCH, but also [SH], [CT], [RM], and [PW] testified at the CCH. The file indicates that there was no court reporter and the file does not contain a transcript, or tape recording of the CCH proceeding. Consequently, we reverse and remand this case to the hearing officer for reconstruction of the complete CCH record. See Appeals Panel Decision (APD) 060353, decided April 12, 2006.

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. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **(a governmental entity self-insured)** and the name and address of its registered agent for service of process is

**[DIRECTOR]  
[ADDRESS]  
[CITY], TEXAS [ZIP CODE].**

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Cynthia A. Brown  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Margaret L. Turner  
Appeals Judge