APPEAL NO. 122314
FILED JANUARY 14, 2013

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 October 8, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) on [date of injury], [Employer 1] was respondent 1's (claimant) employer for purposes of the 1989 Act; (2) on [date of injury], [Employer 2] was not the claimant's employer for purposes of the 1989 Act; and (3) respondent 2 (carrier 2) has not waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Sections 409.021 and 409.022.

The appellant (carrier 1) appeals the hearing officer's determinations, contending the following errors: (1) the hearing officer erred in finding an injury because this issue was not before the hearing officer; (2) the hearing officer erred in finding that the claimant was an employee of employer 1 for the purposes of the 1989 Act because employer 1 did not control the details of the claimant's day to day activities at work and because there was a written contract between employer 1 and [Employer 3] that employer 3 would provide the workers' compensation coverage for the temporary workers assigned to work at employer 1's warehouse; (3) the hearing officer erred in not finding that the claimant was the employee of a temporary agency, either employer 2 or employer 3 or employer 2/employer 3, being that employer 2 and employer 3 are the same and are one temporary agency; and (4) the hearing officer erred in finding that carrier 2 did not provide workers' compensation coverage for employer 3 or employer 2/employer 3 and did not waive its right to contest compensability because carrier 2 initially accepted a workers' compensation claim submitted by the claimant and paid income benefits to the claimant.

Respondent 3 (subclaimant) responded, urging affirmance of the disputed determinations and contending that "[t]his is a case where the temporary agency agreed that it would provide workers' compensation coverage but did not. [Employer 1], did carry workers' compensation insurance for its employees. The unrebutted testimony in the case indicates that [employer 1] set hours and directed [employer 3] personnel concerning what jobs they were to work on, including the job in which the injury in this case occurred."

Carrier 2 responded, urging affirmance of the disputed determinations. In their response, carrier 2 stated "[the] [c]laimant initially reported her injury to [employer 3]. Due to a contractually challenged relationship between [employer 3] and [employer 2], the claim [the claimant's work injury on [date of injury]] was then reported to [employer 2's] insurance company [carrier 2]. . . . After it was discovered that [employer 2] had not

employed [the] [c]laimant [carrier 2] rescinded the insurance policy and terminated payment of benefits to [the] [c]laimant." Carrier 2 further stated in their response that the hearing officer properly concluded that "[employer 1] was [the] [c]laimant's employer and that [employer 2] was not [the] [c]laimant's employer on [date of injury]. It was determined that [employer 3] was also [the] [c]laimant's employer. (All pay checks identified [employer 3] as the employer.) Additionally, the [h]earing [o]fficer correctly found that [carrier 2] had not waived the right to contest compensability of the claimed injury."

The appeal file does not contain a response from the claimant.

DECISION

Reversed and remanded.

The Benefit Review Conference (BRC) report reflects that employer 1 and employer 2 were notified of the CCH to be held on October 8, 2012. However, the BRC report does not reflect that employer 3 was notified of the August 15, 2012, BRC or of the October 8, 2012, CCH. One of the disputed issues certified out of the BRC states "[w]as [employer 2] or [employer 1] the claimant's employer for purposes of [the] [Act]." Texas Department of Insurance, Division of Workers' Compensation (Division) records reflect that employer 3 was not present at the October 8, 2012, CCH nor was a copy of the hearing officer's decision and order mailed to employer 3.

At the CCH, conflicting evidence was presented as to the nature of the relationship between employer 2 and employer 3 and whether employer 2/employer 3 is the same temporary agency. In Finding of Fact No. 4, the hearing officer found that "[t]he claimant was hired by [Ms. G] to be an employee of [employer 3]." The hearing officer, in Finding of Fact No. 6, also found that "[o]n [date of injury] [carrier 2] did not provide Texas workers' compensation insurance coverage for [employer 3]."

28 TEX. ADMIN. CODE § 140.1(4) (Rule 140.1(4)) states that a "[p]arty to a proceeding" is defined as "[a] person entitled to take part in a proceeding because of a direct legal interest in the outcome."

Necessary parties have been defined as those persons who have such an interest in the controversy that a final judgment or decree cannot be made without affecting their interests. McDonald v. Alvis, 281 S.W.2d 330 (Tex. 1955). Rule 39(a) of the Texas Rules of Civil Procedure requires a person who is subject to service of process to be joined as a party in an action if: (1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence

may: (i) as a practical matter impair or impede his ability to protect that interest; or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. Rule 39(b) provides if such person cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or be dismissed, listing factors to be considered by the court. The Texas Rules of Civil Procedure have not been held applicable to CCHs and service of process is not issued to compel a party's attendance at a hearing. By analogy the same concepts of fairness and judicial economy that underlie Rule 39 and case law concerning necessary parties should be applied in these proceedings.

Therefore, we cannot address the hearing officer's determinations in this case because it is apparent that employer 3 was a necessary party to this proceeding and, without employer 3 being notified of the October 8, 2012, CCH, or afforded an opportunity to participate in the CCH, the hearing officer made material findings of fact concerning employer 3, which has an interest in this controversy.

Accordingly, because of lack of notice to and joinder of all necessary parties in this case, we do not reach the merits of carrier 1's appeal and we remand this case to the hearing officer for further action consistent with this decision.

We note that in his decision, in Finding of Fact 1.A and 1.B, the hearing officer states that the parties entered into two stipulations. However, a review of the record of the CCH does not reflect that the parties entered into stipulations on the record. On remand, the hearing officer is to ensure that any stipulations are included in the official record of the CCH, that all necessary parties are notified of the CCH to be held, and that all necessary findings of fact and conclusions of law on the disputed issues are supported by the evidence and consistent with this decision.

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* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of insurance carrier 1 is **ARCH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

The true corporate name of insurance carrier 2 is **ILLINOIS NATIONAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.

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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