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Supreme Court of Texas.
Margarita Morales, Individually and as Next Friend of Paulette Morales
and
Laura Morales, Minor Children of Guadalupe D. Morales, Deceased,
Petitioner,
v.
Liberty Mutual Insurance Company and Continental Casualty Company,
Respondents.
No. 05-0754.

November 16, 2006.

Appearances:

Marc S. Tabolsky, Yetter & Warden, L.L.P., Austin, TX, for petitioner.

R. Scott Placek, Arnold & Placek, P.C., Round Rock, TX, for petitioner.

David P. Boyce, Wright & Greenhill, P.C, Austin, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Don R. Willett, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister

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JUDGE: The court is ready to hear arguments in 05-0754 for Morales against Debits.

JUDGE: May it please the Court. Mr. Tabolsky would present arguments with the petitioner. Mr. Placek present argument for the immediate petitioner who will open for the first 11 minutes, has reserved 3 minutes for rebuttal.

ORAL ARGUMENT OF MARC S. TABOLSKY ON BEHALF OF THE PETITIONER

MR. TABOLSKY: Good morning, may it please the Court. The worker's compensation has a true tract system for judicial review under 410.301 and 255. Any system that effects whether a claimant receives income benefit or death benefits if one of our compensability or eligibility and this governed by 301. This includes decisions regarding whether or not a claimant, she been a worker, as an employee or independent contractor. Section 255 on the other hand only covers a narrow arrange,

a collateral issue that would not affect whether a claimant receives benefits.

JUDGE: What, what arguments, what, what things do you have to try in Travis County.

MR. TABOLSKY: So very narrow range as this court explained it functional restoration, a transvestite issues and certain issues regarding different opinion on spinal surgery. This Court recognized functional retreat, functional restoration. If 255 does not affect anything about an income benefits or death benefits but only cover that narrow range of collateral issues. If possible the legislature and likely the legislature intend for medical benefits to found there 255 as well. But this Court concluded this drafted the statute do not reach medical benefits at all and that only thing left the 301 for the real work habit. 301 is for everything regarding the award or amount of death benefits or income benefits occurs. The court of appeals of Romeo's distinction between question of coverage and compensability should be reverse for three reasons. First, he has no basis in the text to Workers Compensation Act. Second, it concludes of this court decisions in Rodriguez and Garcia. And third, decrease in unworthful test that will lead to confusion create absurd consequences the legislature never intended. The word "coverage" never appeared in Section 255, 301 or anywhere else in chapter 4 in the Labor Code which governs judicial review. This because were compensability includes coverage. Coverage is an element of compensability and this sustain in the plain text statutes. The statute to finds compensable injury as any injury that arise out of the course and scope of employment. And employment necessarily requires that a worker give employee of the subscriber. And you can this by looking at the sta-- because of what the definition to cope for each other at 401.011. The compensability said, anything that a person skill of employment. of course the scope of employment is to find this an activity perform by employee will engage in or about the borders to be fairs or than employer. Employer itself statutory defined as a person who meets contracts or buyer, employees-employees and has coverage. Coverage is not a separate inquiry at all, this part and parcel of the compensability inquiry. The Court of Appeals' distinction here, only for confusion and a lack of clarity towards a simple test. It is a test of this Court set forth on Rodriguez. That's the decision affect benefits, if the answer is "yes" it false under 301. Only the specific only income or death benefits. The effects income or death benefits is 301 analysis. On it's 254 Rodriguez, the court simply note that when it concluded because in permanent readings affect benefits, it's 301. It's the test is no more complicated than that. Secondly, employment disputes urges dismiss regarding employment status that is a worker on employee or independent contractor is not an issue. To the coverage is separate all, employment status does not fall in that category. Employment status is an element of the course and scope of employment. This court in Garcia specifically noted, that whether a worker's in course and scope of their employment when they're injured falls under 301. And course and scope employment specifically define the activity performed by an employee. So whether or not solution of employee is part of course and scope of employment whose falls under 301. Then, is inconsistent with the [inaudible] composition analysis of worthiness state going back to 1930. Partly 1989 ending task and this court in trying on the file-- in said injuries compensable it and the coursing itself he said, he is an employee, that on the statute it is none was past the definition of "course and scope of employment", mere the definition imply whether not

your employee follows within that definition.

JUDGE: What were the coverage dispute you would like that, that was filed here and also you would just say, the point the employer and the conqueror is whether the employer wasn't back in a shore, in short were back Mr. Weder the first there was their employer not.

MR. TABOLSKY: Your Honor, the first point is that we don't ask whether something is coverage at all. Is also court knew, know the Texas property is not a usual distinction. Compensable in the coverage often overlap. There is no question, there's no question regarding well not something is a coverage issue. The sole test under 301 is doesn't regard to compensability or eligibility. It is in general case presented very differences situation. In that case he have situation were close undisputed that he-- the worker was an employee of a single employer.

JUDGE: But for example if, if-- we know the, the carrier was signed that the employer had pay premium in the policy of laps. The deputy coverage question to bring a Travis County. Whether the employer had the policy?

MR. TABOLSKY: Yeah, whether the lor-- whether the employer had the policy, inquiries whether not is a question compensability. Coverage is partly impartial that analysis. Now, to be extend it does not fact whether a plain proceed benefit-- a factual or plain proceeds benefits.

JUDGE: Well, is just that question was say that you know that the carrier policy deck action and says, there's no coverage here. Where we that file?

MR. TABOLSKY: There will be filed in the 301 your Honor because to the extent a carrier says, I don't have coverage if that leads the employee but effectively are not working for nonsubscriber that decision affects compensability. It affects whether the employee proceeds benefits.

JUDGE: Understand, understand what it go, what-- does constitute just coverage. That's the sole coverage questions that will be appropriate here.

MR. TABOLSKY: The facts that in decision general case maybe -- may fall with your virtual coverage questions. In that case the benefits-- employer-employees benefits were never issue. It's fight between two carriers as [inaudible] benefits from injury occurred on August first when the employer was rolling over between policies. That the important, the important inquiry was important for the jury [inaudible] State under explained and shelf is that we don't even need to ask the coverage question. It's simply-- it is compensability or not compensability. Asked as a visual question of coverage as the third court of appeals never in Texas property only is confusion because this are heavily overlapping issues.

JUDGE: Why is this a question of jurisdiction were had been best in you?

MR. TABOLSKY: It's bear point your Honor, not I honestly and not quite sure this point is clear.

JUDGE: It seems to me were give a whole reason alleged certain change avenue statute 'cause we don't do exactly what we do here. Every case gets appeal to takes the Supreme Court to find out be file in a right place before we have a trial or anything else, we just back to please a privilege if this is jurisdictional. That the -- in statute said its jurisdictional. We ever said its jurisdictional or says, we just have your own avenue matter.

MR. TABOLSKY: I believe in wrote radiance the Court may refer-- and at mediate impact for those the jurisdictional inquiry. For this

point it effectively it's jurisdictional because it's too late for go back in refile in Travis County. That import issues is to rule doesn't need to be back complicated. The test laid out in Rodriguez for oaths [inaudible] for compensability, who wills over uncertainty. If the effect of the decision of the appeals panel a batch with their claimant is getting benefits fit or not getting benefits. Your under 301 it is a simple clear rule that provides certainty and avoids collateral litigation over which County filing and you don't need word after what [inaudible] venue issue or jurisdictional issue. It's just a simple task that appeals panel's decision which being review affects compensability. Furthermore, the test of that by fourth below in this case in response express for.

JUDGE: Before we go to far I'm not sure understand why you say it's jurisdictional matter. If just continue matter and the trial court just wrong in exercising venue legislator wasn't to say, that go ahead to the all trial, waste the time of appeal and were rehearse automatically been transferred to Travis County. So was that is this not venue question.

MR. TABOLSKY: Because the difference between -- venue is one aspect to the difference between 301 and 255, were there are number other issues employed in particular standard of review. If the court hold that an issue is governed by 255 ...

JUDGE: Force, force therein people applied a wrong standard of review and when attend to trial, the trial court of jurisdiction normally.

MR. TABOLSKY: Let's, let's have we sure your Honor. However, if -- when you missed something under 255 and not just making taken the venue. We thinking that the fundamental procedure of how strife it's no longer going to be modified the de novo jury file in behalf of substantial elements review under the Administrative Procedures Act. This is much more in just what County file it. All does want to be important issue that this issue of facts. I agree would like to turn to response the first result turn it issues in this performance. Every issue appeals panel's padded the first league. Morales says, was challenge in the first amended petition on file in the trial court.

JUDGE: The time in this issue compensability to trial.

MR. TABOLSKY: Absolutely, compensability she was directly challenge. Specifically said that that appeals panel erred instead what they talk about analysis was. And you can see at the page 28 in the record. It, it also at page 25 in record, incorporate by reference to entire decision of the appeals panel. And on page 29 of the record and the foot the first submitted petition, they asked that the judgment of the the appeals panels be reversed. And this a case not cite in the briefs but I think it's particularly constructive. It's the first court's decision in Houston Community College Systems versus Snider. 57 Southwestern; 241 which covers almost safely identical issue. And the court bearer held that this is just a pleading issue. It-- you nothing get founds on it. It's consisten with the court's statement [inaudible] versus St. Claire that the procedural requirements with, I'm not jurisdictional. It also makes clear that this, this inquiry in particular is non-constitutional. Let Mr. Placek get up now, thank you.

MR. PLACEK: May it please the Court. Scott Placek, Texas Mutual and Insurance Company. I, I'd like to first respond to the question that why this is jurisdiction and how that it arises in the context of jurisdiction. Until under 410.301 has statutory found deadline 40 days. On appeal under 410.255 is under the APA judicial review provision

which has 30 day found here. So why this generally arises, is some by files in compensability challenge and the, and the County of workers residence, the 20, 30 and 40 days after the decision. They found then moves to dismiss it before the jurisdiction saying, "This is substantial evidence, you didn't file within 30 days, the court doesn't have jurisdiction because of ..."

JUDGE: Because it's not the CA's thinking them whistle blower and other context but that's a not jurisdiction, that's just limitation. It's like limitations you need to raise about summary judgment.

MR. PLACEK: Well, it's, it's ...

JUDGE: May if your like your lay.

MR. PLACEK: The court is allows the ...

JUDGE: People power stop late in courts all the time. Courts don't throw up and say, "we are out of jurisdiction", we have no power to the say, "You're late, your out."

MR. PLACEK: In, in the context though administrative law and review of agency decisions. I think it's been and, and -- I will seem a little surprised by first inside the citation for you. But I think numerous cases say that if you don't file within the deadline, the court has no jurisdiction over the case. That, that power of it of the court to review an agency decision arises because you follow the APA not in contains a 40-day deadline. And if you have-- if you don't follow it then there's no jurisdiction.

JUDGE: Of course, push to it's logic conclusion, we could do the same but limitations. We can't as I asked, counsel you get your state turn everything in the rule book into a plea to the jurisdiction 'cause that way you can appeal them all the way out but are in old rules, they can't do evidence or maybe not do evidence all the sudden step we really want to do that?

MR. PLACEK: No, but I think the difference comes because you are in the administrative process and you are in a right to be in court that creates only because that exist, only because the statute create it with very specific instructions as to how you get there to be deemed. I would like to address though why Texas Mutual Insurance in amicus. They have a great concerned over the threat of the, of the Morales decision. The Labor Code does not-- at no point enumerates what issues are to be consider for PO under the substantial-evidence rule. It just refers to compensability and other than compensability. Now as Mr. Tabolsky mentioned the Coloton Garcia incompetent of casualty as noted by substantial-evidence is a bear mere category and that's a good-- because the lack of specific to commemoration in the code leads many carrier and sometimes employments to double file their usage and Travis County ended the County of the Worker's license to make sure they don't waive some rights of appeal because is some orbit toss that a jurisdictional grounds just like we seen in this case. That difficulty is now significantly grade under Morales. All under Morales, all questions of employments that is to be sure along with any other issue that to be possibly cope a coverage issue falls in the discreet area and your going to see cases by Travis and on the worker's home county to make sure you don't loose your rights and the scope of a coverage compensability distinction which is found lower in the statute despite in New York. In this case indefinite time record versus employee. Does a policy exist, was a policy cancelled other two potential coverage employee, employers, which one, is there any additional name concern? What was the date of injury which is always been a compensability issue? Now is it a coverage issue because that date of injury affects whether it's inside or outside of the policy.

Each of those issues could be called coverage issues but is also could appeals noted in Texas property that controlling inquiry is whether the dispute is one of compensability or eligibility for benefits not whether the claim can alternatively or additionally we called a coverage incline or a coverage issue. That's the crux of the problem with Morales and with the falls [inaudible] that the respondent urges by counting for this coverage versus compensability distinction. At end there ...

JUDGE: Most of there legislative intent though to move this issues outside the court as much as possible.

MR. PLACEK: It was to restrict the number list of ...

JUDGE: You can have the [inaudible].

MR. PLACEK: Not as to the court compensation issues as a I think the court make clear in Garcia. The court issues of compensation-- compensability through the a work form. Is a worker part of the decision, were you the course and scope of your employment those things remained and preserved a jury trial right could a claimant of the carrier bringing one involved and can't you can't determine either those compensable injury or turned the- course and scope of employment without walking to the statute figuring out as some point was their think. Any other question?

JUDGE: One other question what if the-- what do you think Garcia meet when it said we that it's not compensability that we had a disputal or medical benefits.

MR. PLACEK: The question of compensability is were we injured the course and scope of his employment. The statute set up a very specific message for determining what medical benefits are covering. Was this care met reasonable and not reserve. Did the doctor charge light piece under the statute? Those are think, those are rights their created under the statute. For two-- for instance he watch the feet and the doctor gives for a particular service. Those are things are set by the, by the old compensation permission, now with Division for worker's compensation. Those all rights only arise from the statute. They have no common-law predecessor, they are raised those rights to remain the regular initially before Scott Canner occasionally organizer there was a review system tort. The Legislature now come back in creative one and specifically put law as medical benefits under substantial-evidence review and that was done in the statute.

JUDGE: Any other questions? Thank you. Courts ready here on response.

JUDGE: May it please the Court Mr. David Boyce to present argument for respondent.

ORAL ARGUMENT OF DAVID P. BOYCE ON BEHALF OF THE RESPONDENT

MR. BOYCE: May it please the Court. David Boyce to represent to respondents. If you waive the brief of petitioner in amicus curiae the court is left with the impression of this case present the chemical issue about the independent contractor of employed creates a coverage questions. We don't believe that they all passed a court appeals held any such thing nor do we believe that you can a live detector conclusion and less for record in this case discovering as a [inaudible]. Fortunately, we do have benefits of the record of this case and we don 't believe that the court can even addressed death

issue with the facts to this case. Court held in this case, first that a coverage questions is a question that is not a question of compensability and before they held pursue to this court decision on Rodriguez v. Service Lloyds, the question of noncompensability are subject to judicial review under 410.255. They then held that because the 410.255 is a jurisdictional provision, 410.255 mandates that jurisdiction is on Travis County for this dispute. Now ...

JUDGE: Now what's going to happen in that set? What is she's believe before the court in this court [inaudible].

MR. BOYCE: Look, if the set was brought in district court excellent suit was brought before stand by the point. At, at a time this suit stand on El Paso at the same time they fought suit drugs count.

JUDGE: Okay.

MR. BOYCE: So we recognized it. In Travis County the court were first addressed the threshold issue as to whether the claimant had the worker's compensation policy that extended to the injury or another. Was the employer has defined by the act, why is code of ...

JUDGE: As an under can be a jury trial on courses scope, right?

MR. BOYCE: Only if there's a worker's compensation and insurance policy. It's a threshold question, you don't get to the questions of someone to the course and scope if it not by ...

JUDGE: So how do you determine whether there's a policy? I'm sure be able this trial can look up.

MR. BOYCE: Yeah, and I agree that the, the, the coverage question on the worker's compensation settings is different in have questions in any other policy. In any other claim we have four claimable rules for you look at a policy, you look at a take to determine does the policy create coverage? In a worker's compensation setting, coverage is a threshold into the entry into the system. The statute defines employer as someone who has employees and someone who has worker's compensation insurance policy. If you don't have an employer, you do not have any access to the worker's compensation system. So the question-- that coverage questions that court addressed it is. Does the entity met the definition of "employer" under the Labor Code and you look at the statutory definition because a worker's compensation policy has one thing about the coverage. We will cover all times that arisen to worker's compensation.

JUDGE: That's it.

MR. BOYCE: That's what coverage worker's compensation cover to large and the statute defines that-- so the threshold inquiry here is not easy in the independent contractor employee, that's, that's a definition of "employee" and the definition of "employee" if you look at 410.1.

JUDGE: Come on seems chances that Travis County save is going to be, you got three recorded employers.

MR. BOYCE: Right.

JUDGE: Say you going to look at this employer aim a policy does employer aim policies this employers say at policy. And that stay on the both Travis County actually.

MR. BOYCE: No, because Travis County also has a territory to consider that rest to that-- if I want to it claim to [inaudible] take consider the rest of the issues if, if they were relevant and the plaintiff said that because 410.301 is not jurisdictional as a court is on uplift and the Skedul says, let us in venue, it's only 410.255 the Travis County is jurisdictional. Now in this case the reasons that issues so important, the reason you have this threshold issue which is

rear and unique to this case is because you have a nonsubscriber. It mildly if you look at the plaintiffs petition which is the sole source of the [inaudible] jurisdictional question. This court held you look at a plaintiff for original petition in this case a First Amended Petition because they didn't at page 26 of record and you focus some matt a civil plaintiff pledge PGD, the entity is a nonsubscriber. It has no coverage.

JUDGE: Do you think if a worst subscriber, then this case would be under 301.

MR. BOYCE: They would no question to the employers because he know ...

JUDGE: Whether question met and there's no question within the employer-- yeah ...

MR. BOYCE: The question is for whom was he worked in a courses and scope of employment? Who is she in the employee-employer not to the employers? They different questions. A lower sound although logically the sound is exactly the same, through define differently by the statute and they serve different functions. The definition of the "employee", the definition of "courses and scope" is someone who is interpret as course and scope of employment in further job in care the employer. Their seems that there's an employer who are working for and a word is "counseling" as to questions is seems to the-- one of the people is a subscriber. If their not a subscriber note no aspect of the active employees. We go back to the 1867 record, 1860 said run to a common-law cause of action against the nonsubscriber.

JUDGE: Let us to be take to be file in our PESO.

MR. BOYCE: Can be file anywhere. It's there-- it's just a pure venue question.

JUDGE: If the guy is worked in a PESO is were leaves in a PESO, that's can be file on the PESO.

MR. BOYCE: Perhaps, now I don't think so under the common-law questions we have a general line statute would be filed with the independent place of this is further action ...

JUDGE: Over the action occurred -

MR. BOYCE: That's correct, that's correct.

JUDGE: - and the issue on who is employers who controls whether they incurred to common details where it is.

MR. BOYCE: No important, no that's the, that's the questions of whether he is in the course and scope of employment. Course and scope back to where going to further to the pair if the person-- you can have the contract for a higher and be an independent contractor if beyond the control of the details. That's a questions of courses and scope independent contractor.

JUDGE: So that was tragic ware.

MR. BOYCE: That's tried-- it's tried worked under the statute and the venue of the claimant residence and masses of death line. However, all of those are pure venue question that I have nothing to do with standard of review and they deemed of fight they don't require suited Travis County under the noncompensability questions.

JUDGE: So we worked look in this case whether who control the details of the [inaudible].

MR. BOYCE: No, I mean that was an issue but wasn't judicial appeal.

JUDGE: What happen to decide whether there was employer -- because there was one if is was the bank or Turnkey but not it is was PGD right?

MR. BOYCE: You, you would-- this correct on just had you correct.

This ...

JUDGE: No one to solve that issues though was he worked?

MR. BOYCE: No, the reason it's different in this case because of the waive they raised to pleadings and again we go back to the pleadings now that was heard the admission. In this case they allows the PGD was a nonsubscriber. They set let the media's articulate the report from the PGD, then I go on to say, that a policies-- that the bank had or the policy that liberally media had should be extended to PGD. In other words coverage should be extended to the nonsubscriber for this reasons. I don't know you get to compensability questions when you talking about extending coverage under policy on the DF.

JUDGE: That tense I would like the civil cases in the do employer context.

MR. BOYCE: The single be the same from ...

JUDGE: If we look to look control simple way if there's subscriber in the end of their -- who controls employees not a subscriber, your out.

MR. BOYCE: Does not would-- there are those cases but that's different from the pleadings in this case.

JUDGE: Why?

MR. BOYCE: Because does not the allegation of this case. They only leads to control, that even raised the easier the right to control. What they raised is a question of extending coverage entities based on different entity periods. In other words, their saying that-- on one their saying that the it's a same corporation that really want the same entity and therefore, you can't have a policy of coverage of one employer and not a policy for another neither a potorum of appellate decisions and appeals panel decision refusing to apply, refusing to disregard a corporate structures with regard to insurance policy. They don't did that because it is [inaudible] perpetuated it's not by the carry on, carry on has collected premium. So they just generally extend it but that's they were doing in this case and that's what they were pleadings get rise.

JUDGE: The court of appeals so far the issue was to employed venue. Well, it seems to it says, it's clear from review that Commission decision that based from the hearing panel's affirms the hearing office was filing is great that, that [inaudible] was not an employee of any of the complex.

MR. BOYCE: That's correct, I agree the statute decision and I believe that if you read the decision along absent of record. It could be confusing.

JUDGE: The court appeals the state of the issue.

MR. BOYCE: I think that, I think that there was a misunderstanding of the purposes 401.011 Section 18. Section 18 defines "employer" and the issue identified if you seen a free for identified the issues were this three potential employers for purposes of the Act. That's different from a different impression that was also addressed as to whether be was ...

JUDGE: Now that's a free with jurisdiction that we have to sent back down to let them. If all we going to do if we sent it back down to see if going to plead that right to control this issue which a probably do now as you concede the battle lead on El Paso relevant Travis County. That's all were hear all.

MR. BOYCE: No, no that the -- we don't do that because what we do is to define jurisdiction from the four corners of pleadings and ...

JUDGE: We have a letter or end and let of other cases as it -- you know if you can retrieve to [inaudible] to the jurisdiction. We got, we

got an opportunity to do that and same like you should get an opportunity since fairly the court did think-- so that's exactly what they were plead.

MR. BOYCE: I don't think that's what's a heavy court file, I think it's, I think what they see is the section, the same just as it read. If you read the recent decision the next recess they outline their conclusion, one there was an issue of coverage. Coverage is not compensability and therefore, it's under substantial-evidence review. If that's the decision and they inarticulate of the issue, that's not reversible, that's accurate. And let this court reverses president on the past and so you counted the conclusion only from reading that paragraph without reference to the record which this court has.

JUDGE: Counsel, started up by saying, that the difference between the independent contractor on an employee in this con-- in this case, that's not material, that's not even an issue on coverage -

MR. BOYCE: That's correct.

JUDGE: - and himself not sure of status which seems for me at least -- it did say that, for an employer to this under the Labor Code they must both have employees and worked as count coverage since, since the percent cover must be in employee by definition under 401.011 (18). Why does into question of whether the first is really an independent contractor versus employee coming into fight. That in some employee that he didn't fed on that staff mission right?

MR. BOYCE: They different and, and let me independent contractor and employees.

JUDGE: No, no, no, the question whether there is an employer based whether the employee question.

MR. BOYCE: If we look at standard. If you start with how they act constant employees, in other words how you end up the system. You look at for 406.002 in Labor Code. 406.002 in Labor Code says, the Act applies coverage exist under the Act, coverage generally elected. Coverage exist under the Act from an employer who let's to obtain worker's compensation. Then, they define an "employer." It defines an "employer", has someone to ask employees not a claimant or inter-worker but employees and has, and has coverage, "yes" the scope. So that's to threshold question, do you have an employer on that Act they could rise to be right to give an participating system. Then, you have the next question, if you look at the traditional course and scope of employment, they used the word "employee." "Employee" is define under 18 and if you look at Section 18, employees define the someone who is under the right to control and the, and it's not independent contractor for them, for them.

JUDGE: Employees defined where?

MR. BOYCE: I'm sorry, 401.012 and 401.012 defines employee and if you look at by plead they fought one of the instruction that's an, an independent contractor. This was a construction circulation.

JUDGE: It's a different definition and the question-- the first question do you have employers, why do you want to the employers because could the employers is identified the "defendant", a person is liable for benefits. Could you bring to the Commission PGD wasn't there. They want there because the Commission has no jurisdiction over PGD or nonsubscriber. They have no carrier, so no carrier was there represent PGD in, in the proceedings. They have no representative in the proceedings. They are not subject to the end that's the four questions. He code up in this case employment could said, I'm the employers state fact and a fact was the issue that they brought up and no other issue do you going to question compensability.

MR. BOYCE: So you-- sounds like you saying that under 012 employees this an independent contractors can be an employee.

JUDGE: And independent contractor is generally none on the four [inaudible].

MR. BOYCE: In last, the employer contracts to the Greece to provides count or last the employer controls the details, this are 401.012.

JUDGE: The complainant contain position we don't care whether the policy is extended PGD or not. We were beg that the decision was the [inaudible].

MR. BOYCE: Surely can't, surely can't and the fact have you ...

JUDGE: A 301 question.

MR. BOYCE: If would be defend occurred attached now what happened in this case and becau-- because the court has look at the pleadings and face it, he could have filed the pleading after we follow fundamental pleading as we file the period of jurisdiction removing that allegation of please extend coverage.

JUDGE: Do you agree with him the both wonder as argued then the other that -- do you worked before is a 301.

JUDGE: Identity question of whether you are not course and scope of employment for specific entity is a 301 question.

MR. BOYCE: That's correct, I agree. And, and we've never challenge that in any level.

JUDGE: This is a 255 issue because question is your be whether the district policies extended to nonsubscriber.

MR. BOYCE: That's correct, and, and the pleadings make better threshold questions not as defendants in my threshold question if you, if you look at 410.302 which governs jurisdictions for 410.301. It says that, in this case in a worker's compensation case, the court is limited to issues that sided by the appeals panel and in looks the pleadings complaints and they said that the pleadings have to specifically identified the issues which the claimant claims is a great file. In this case the issues that they are identified page 26 to 27 are the issues of, of extending coverage. Because that what identified is a threshold issue that was we call look at, just, just expressly correct, there is an opportunity to amend but if you look at the cases the opportunity to amend doesn't occur as the court is honoring his the or-- the court is look as the pleadings, makes a decision if the party ask to amend the court before the courts makes decision then were there. In this case and there's a reason case [inaudible] I'm sorry I don't set it to the court. With Horeso I should defend an opportunity to amend and I did it and the court says, why the second laid the jurisdiction was filed and you amended. It is saying have unlimited opportunity to amend just the opportunity amend that was that occurred view. Several questions that were raise by the panel. Why not, why is in this thing, why is in this thing it's, it's not venue because the court has save for life 20 years that appeals from administrate of agencies or appeals of limited jurisdiction that not general jurisdiction like general venue and therefore venue, the right court and timing is not an occasion for jurisdictional for the court much like whether are found my [inaudible] of period within 30 days. If I file it 50 years 60 days later, the appellate court has no jurisdiction because the decision below the confines on an appeal of law. That's why repeat jurisdictional has suppose to just venue and now limitation questions. Coverage questions court ask about nonpayment of premiums because the statutory vehicle in terms of the most file a notice of coverage with state agency and until a supplemental form is filed

reflecting to the state agency that no coverage exist and has been on proper 20 days. There's coverage was they paid from you, because the statute-- coverage on the statute, coverage into they have and coverage into the policy are united by the legislature.

JUDGE: Any other questions?

JUDGE: Thank you, Counsel. Just a sec. Whether you have one point [inaudible].

JUDGE: Yes, Counsel, Mr. Ramil. Mr. Greyhart.

MR. TABOLSKY: Oh, I'm sorry.

JUDGE: Judge Johnson nice question.

JUDGE: Pleading question.

REBUTTAL ARGUMENT OF MARC S. TABOLSKY ON BEHALF OF PETITIONER

MR. TABOLSKY: Yes Sir.

JUDGE: If they'd have plan the-- you have plan that Mr. Morales was the employee of one of this three employer-- a late employer.

MR. TABOLSKY: No. [inaudible] ...

JUDGE: Will change your position? May present this kind of position you say their pleading is not look that with their pleadings says, he was the employer of PGD who is nonsubscriber, that this so I try to differentiate there that claimant is not employed of one of this three. Will change your position?

MR. TABOLSKY: You mean any one of the three.

JUDGE JOHNSON: Yeah, if there, if there also exceed he was the employee of one or all of it.

MR. TABOLSKY: Justice Johnson, if they did not have PGD and they did not included in nonsubscriber that they would be no coverage question but because you ...

JUDGE JOHNSON: State that was cover in the [inaudible] of a policy and also the Turnkey was covered in the ...

MR. TABOLSKY: There was no question coverage with regard to those enemies of because they brought with the nonsubscriber and believe that, that not a threshold question that they choose great and that's why.

JUDGE: So they only be your position only be as a coverage question go on to Travis County if there's an allegation against the nonsubscriber.

MR. TABOLSKY: Your correct in this case.

JUDGE: In this case under the [inaudible]. I also agree that the issue in general case deals with the policy that's not infect and not included in coverage question.

JUDGE: Thank you.

MR. TABOLSKY: Regarding the allegation in this case on page 26 the record, claim to lodges, Guadalupe Morales is an employee of PGD and the State National Bank in page 27 on the record.

JUDGE: That's on your petition.

MR. TABOLSKY: That's why a first amend.

JUDGE: The first amended petition.

MR. TABOLSKY: Which are file for -- part of the dismissal, on page 27 of the record. To see that was also an employee a Turnkey Services, so and this court explain in [inaudible] logic-- logistics and Winford and [inaudible] versus Arbarada, a single employee could have multiple employers. So the employers are conceded here that -- we're to talk

about whether he's an employee of Turnkey or the bank that were under course and scope of employment under 301. The fact that there's an additional question regarding PGD. In it is court more to pay the coverage that somehow threshold issue independent of compensability doesn't change that fact. That the more important point is that coverage is an element of course and scope of employment and not because of statutory definition. Course and scope of employment says, are you supporting activity was an act of employee forming that activity in that further and employer. Employer is specifically identified the soft-- define as someone that has worker's coverage.

JUDGE: In PGD was talk the court provision.

MR. TABOLSKY: No, your Honor. Propose I admitted they did not have any popped policy in the [inaudible]. That stop ...

JUDGE: That's great however, in page 27 we are large of the personal, personal petition page 27 of the record. We are lodge that the through the contract under PGD and Turnkey will then stop [inaudible]. So it's a matter to contract there.

MR. TABOLSKY: And was that before the Commissioner solved that allegation.

JUDGE: Commission Fanny that stop using that [inaudible].

MR. TABOLSKY: The, the commission is totally fixed 31, 35 of requisites never reach that questions because he said, he's an employee and not independent contractor. It one of this -- what happened which this issue whether, whether it is established in the supply because it's not an employee at all, better reach to question if he's an employee doesn't then become-- he's a then on a employee thought employers.

JUDGE: This policy are reaches fundamental an worth through the [inaudible] distinguish coverage compensability. Every compensability question may request every [inaudible] entry we refer. It's only coverage that policy would time for the policy. For those who offense compensability as Boma were held in party suit. Also further immu-- pleads a jurisdiction apply the plead, that's immunity contract for Haberson how differently fallen to statute that find out previous questions about Garcia. It is regard ...

JUDGE: Judge Hecht I want to concede your mind.

JUDGE HECHT: Just the same

JUDGE: Yeah.

JUDGE: Did you know I'm going to start the court.

JUDGE: Is that confusing to me. What is the reconsider from the court that relief in [inaudible].

MR. TABOLSKY: From this court.

JUDGE: Yes.

MR. TABOLSKY: Resting this court a verses officially a court of appeals and let's go back and try this case in El Paso County under 301 and the modified de novo standard and not in this the Travis County under 255 where it's now [inaudible] in Travis County. It's under the administrator of the under the ATA versus [inaudible] 301, when we go back to El Paso for 301 review.

JUDGE: And that would be a trial.

MR. TABOLSKY: Pardon?

JUDGE: Not be a trial when ...

MR. TABOLSKY: Would be a modified de novo trial under it reason to check 410 of Labor Code.

JUDGE: Before we going to say got Garcia.

MR. TABOLSKY: The Garcia this court identified this possible "claro" issues extensive attorney suit extension and medical benefits.

This court later and a functional restoration explained that although that may be intent of 255 as trap it between actually get there that medical benefits did fall under 301 or 255, 301 that applies any issue that affects income benefits or death benefits and not [inaudible] in this case. Is that benefits arising at the death of Guadalupe Morales.

JUDGE: Any other questions. Thank you, Counsel.

JUDGE: Concludes the argue in first case that the court will take [inaudible].

JUDGE: Alright.

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