APPEAL NO. 990133

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 7, 1998. All parties were present at that hearing. Although articulated as two issues under two different docket numbers, the issues were integrally related to each other, with both carriers necessary parties to the determinations on these issues. Involved in the case was whether the respondent (claimant) sustained a new injury on (date of injury no. 2), while working for (Employer 2), who was insured by respondent (National Union Fire Insurance Company (Carrier 2)), or whether her herniated discs were a continuation of a previous injury on (date of injury no. 1), while employed by (Employer 1), who was insured by appellant (American Insurance Company (Carrier 1)). The claimant is AL. Her position, and that of Carrier 1, were the same: that she sustained a new injury on (date of injury no. 2).

The hearing officer did not write a single decision but wrote a separate decision under each docket number for each carrier, and for each issue. There is no explanation in either decision for this. Carrier 2 was not served with a copy of the decision written on the matter involving whether claimant's condition was a continuation of her (date of injury no. 1), injury. Likewise, Carrier 1 was not served with a copy of the decision which broke out the issue of whether there was an injury on (date of injury no. 2).

The hearing officer found in the decision involving Carrier 1 that the claimant's condition (herniated lumbar discs) was "the result" of that injury, which was a "producing cause." As part of the fact findings, the hearing officer noted that there had been an "aggravation" in June 1998 but also found that the disc herniations complained of by the claimant were in existence after the earlier injury. Carrier 1 was ordered to pay medical benefits. In the second hearing decision, the hearing officer found that there was also a new injury by way of aggravation. Carrier 2 was ordered to pay income and medical benefits.

Carrier 1 has filed an appeal of both decisions. It urges that it was error in the issuance of two separate decisions from this single proceeding, pointing out that fact findings were made in the decision involving Carrier 2 which affect its rights, and it was thus a necessary party to that decision. Carrier 1 further points out that if the decision involving only the (date of injury no. 1), injury is considered in isolation, Carrier 1 and claimant were aligned in their position and there was no "dispute" for the hearing officer to adjudicate. Carrier 2 states that it agrees with the second decision but states that the effect should be to discharge it from responsibility for medical benefits. No response was filed to the appeal, which was sent to both parties.

DECISION

Agreeing that there was legal error in the issuance of two decisions in this case, we reverse and remand for issuance of a single hearing decision, as required by Section

410.168, and serving of that decision on all parties to afford all the opportunity to appeal and/or respond.

As noted above, this was a case involving whether the claimant's current problems relate to a 1996 injury or whether she had another, and perhaps intervening, injury in 1998. There was a single CCH and both carriers and the claimant were present. Claimant hurt her back on (date of injury no. 1), when a large board fell on her. After the 1996 injury claimant was found in an MRI to have a bulge at L4-5 and a small focal herniation at L5-S1. She was certified to have reached maximum medical improvement on January 13, 1997, with a seven percent impairment rating (IR). She did not dispute this IR and Carrier 1 paid impairment income benefits.

Claimant had two jobs in between her 1996 and 1998 injuries, one of which involved heavy lifting. She began working for Employer 2 on November 3, 1997. She said she hurt her back when she attempted to lift a tote on (date of injury no. 2), that was heavier than expected. Claimant said it felt like someone reached in and pulled something in her back. She worked until July 14, 1998, on which date she spent the day going up and down a ladder, while her back hurt, although she had complained to her boss that this was painful for her to do. Claimant said she could not get out of bed the next day. It was on this day that she first sought medical treatment.

After the 1998 injury, objective testing found a bulge at L4-5 and a herniation at L5-S1. The herniation protrusion was four millimeters on both MRI reports. Dr. W, who was claimant's treating doctor for a time on this injury, diagnosed discogenic back pain and sciatica and radiculopathy. An opinion from the medical administrator at Dr. W's office noted that the two MRIs are "virtually identical." Dr. W gave claimant a two percent IR, which claimant disputed; she also had applied for a change of doctor which was granted shortly before the CCH. A designated doctor assigned a 10% IR for the 1998 injury.

Claimant said she had continued to receive treatment, cortisone shots, for her 1996 injury through July 1997, at which time it was determined that shots were causing enhanced deterioration of a degenerative spine condition. On cross-examination, she agreed that she was treated in September 1997 for the last time prior to her (date of injury no. 2), injury. Claimant went to Dr. W on referral from the Carrier 1, who told her that it did not appear that her regular clinic was helpful to her. Claimant said she had a stroke in May 1998 that affected her recollection of dates.

Section 410.168(a) provides that after a CCH, the hearing officer shall issue a written decision. The only provision for a separate decision is set forth in Section 410.168(b), and then that decision must involve attorney's fees. Section 410.168(d) states that the Texas Workers' Compensation Commission (Commission) Division of Hearings shall send a copy of the decision to each party.

We find no provision in the statute or rules for the issuance of separate decisions on each issue or under each docket number which arise from a single contested case proceeding. The potential detriment to the rights of all parties is considerable where more than one carrier is involved. Had the hearing officer in this case agreed that there was no injury on (date of injury no. 2), with the only appeal being for the first decision's finding that her 1996 injury continued, the claimant could potentially be left without benefits for a compensable injury in the event the appeal was successful. Likewise, a carrier not made a nominal "party" in a separate decision could find itself owing benefits as a result of holdings made by the Appeals Panel in a reversal of that decision without having formal notice. Finally, we note that the hearing officer has potentially put a single dispute among three parties on two tracks that could be tried as two cases in court, with antagonistic outcomes.

In this case, we note that the decision involving Carrier 1 flatly states that the claimant's herniated discs are "a result of the compensable injury sustained on or about (date of injury no. 1)." As we review the second decision, it indicates that "an incident" occurred which represented a "significant worsening of her condition" and "an aggravation" in 1998. Left in separate decisions, these findings are not reconciled. Furthermore, left as an isolated decision stripped of the context of the overall dispute, Carrier 1's point of error on its own decision is literally correct–that the hearing officer erred by adjudicating a "dispute" while reciting in that decision that the claimant and Carrier 1, in fact, agreed. We do not so hold because we agree that a single decision should have been issued in this case.

Accordingly, we reverse and remand for the issuance of a single decision as required by Section 410.168. We also note that review of the evidence may be appropriate in light of decisions issued in Texas Workers' Compensation Commission Appeal No. 981319, decided July 29, 1998, and the decision on remand of that case, Texas Workers' Compensation Commission Appeal No. 982618, decided December 21, 1998, where the Appeals Panel expressed concern about the concepts of "producing cause" and "aggravation" given the need to give clear direction to "dueling" carriers as to their respective liabilities.

We would further note that, because we cannot remand the case again if appealed a second time, findings should be made delineating what the hearing officer believes the second injury to be, and if an aggravation rather than another type of injury, how the hearing officer believes the claimant's preexisting back condition was aggravated in June 1998. The mere recurrence or manifestation of symptoms of the original injury does not equate to a compensable new aggravation injury. Rather, as we discussed in Texas Workers' Compensation Commission Appeal No. 94428, decided May 26, 1994, a compensable aggravation injury must be proven by evidence of "some enhancement, acceleration, or worsening of the underlying condition . . . ." Of course, there need not necessarily be an aggravation for there to be a new "injury"; it is possible for a person with herniated discs to also strain their back in another incident. Nothing in this decision should

be taken as a suggestion that a different outcome, or the same outcome, is appropriate; rather, there are potentially conflicting findings that should be, and with more explanation perhaps can be, clarified.

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 Commission's Division of Hearings, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Judy L. Stephens
Appeals Judge