APPEAL NO. 000176

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 January 11, 2000. The issue at the CCH was whether the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the fifth and sixth compensable quarters. The hearing officer determined that the claimant is not entitled to SIBS for the fifth quarter but is entitled to SIBS for the sixth quarter. There is no appeal regarding SIBS for the fifth quarter and that determination has become final. Section 410.169.

The appellant (self-insured) appeals the hearing officer's findings regarding the sixth compensable quarter that claimant's depression is reasonably presumed to be permanent; that claimant's unemployment during the relevant (sixth quarter) qualifying period was a direct result of the impairment from his compensable injury; and that claimant is entitled to SIBS for the sixth quarter. The self-insured cites that the four items that the hearing officer relies on to show permanence are "legally insufficient" to establish "permanence of [claimant's] depressive condition from these items." The self-insured requests that we reverse the hearing officer's decision and render a decision in its favor. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The parties stipulated that claimant sustained a compensable (apparently right arm and psychological condition) injury on _____; that he has reached maximum medical improvement with an impairment rating (IR) of 15% or greater; that impairment income benefits were not commuted; and that the qualifying period for the sixth quarter was from July 14, 1999, through October 13, 1999. Although not referenced, we note that the "new" SIBS rules, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.100 *et seq.* (Rule 130.100 *et seq.*), effective January 31, 1999, were in effect during the relevant qualifying period. Although it would have been preferable that Rule 130.102 had been at least mentioned in that neither party nor the hearing officer referred to it, we will review the case on the basis that it was litigated. We would also note that this case was almost entirely decided on the issue of whether there was sufficient medical evidence to establish that claimant's psychological condition (severe depression) was reasonably presumed to be permanent. Claimant contends that he has a total inability to work (which does not appear to be challenged) and that the total inability to work is due primarily to his psychological condition which is a direct result of his impairment.

Claimant's original treating doctor was Dr. D, apparently a family practice physician. Based on Dr. D's reports and the facts set out in Texas Workers' Compensation Commission Appeal No. 991525, decided August 30, 1999, (Unpublished) the Appeals Panel decision on claimant's fourth quarter of SIBS, claimant is a 62-year-old laborer who sustained a right arm injury (at the wrist), has had at least two surgeries on his arm,

developed severe depression and has been referred to several mental health professionals for treatment. Claimant testified that his condition is getting progressively worse, that he must be accompanied at all times outside the house and that he is no longer able to drive at all (although he retains a valid driver's license) as he had during the fourth quarter. Claimant was apparently given an IR on his arm and it appears undisputed that the impairment for the arm is permanent.

The hearing officer, in his discussion, defines the disputed point as:

> [W]hether, even for the 6th quarter the Claimant's unemployment is a "direct result of the impairment from his compensable injury", i.e. does the Claimant's depression meet the definition of impairment. Again, there is no question that the depression is causally related to the compensable injury; the operative question is whether the depression is "reasonable [sic] presumed to be permanent". Another item available here and not previously is the report of [(Dr. K)], the Claimant's previous psychologist, releasing (or discharging) him from her treatments based on a lack of progress. That, together with the evidence of the Claimant's continued deterioration from his testimony and appearance and from [also spelled (Dr. H)] and [Dr. G], indicate that at this time the Claimant's condition can indeed be "reasonably presumed to be permanent". The evidence for the 6th quarter is thus sufficient to sustain both elements of the Claimant's SIBS eligibility.

Sections 408.142 and 408.143 and Rule 130.102(c) provide (among other things) that to be entitled to SIBS an employee must be earning less than 80% of his preinjury average weekly wage "as a direct result of the impairment."

The hearing officer, in Appeal No. 991525, *supra*, had found claimant not entitled to SIBS for the fourth compensable quarter on what the self-insured contends was essentially the same evidence. The hearing officer cites Dr. G's (claimant's present treating psychiatrist) report dated November 5, 1999 (which the hearing officer notes is after the qualifying period), which diagnoses claimant with major depression and pain disorder, comments that claimant "is unable to work at this time due to his severe depressive symptoms"; comments that claimant "is unable to do [sic, go] outside to his mailbox without getting lost"; and that claimant could not "function in any work situation" and has "difficulty coping with even minimal daily stress." In a note dated October 12, 1999, Dr. G states that claimant "is unable to work and the depression is a result of his injury." The hearing officer also references Dr. H's August 20, 1999, report, where Dr. H did a vocational analysis and discusses claimant's disorientation, that "he tends to wander off and get lost," which supports or is supported by Dr. G's report. Opposed to these reports is a letter dated June 14, 1999, from Dr. SK, identified as a psychiatrist, who comments that claimant's psychological "condition is not permanent" and is treatable.

Self-insured cites Texas Workers' Compensation Commission Appeal No. 972228, decided December 10, 1997, as controlling. The self-insured contends for claimant's major

depression to be considered to be a direct result of the impairment it must be reasonably presumed to be permanent. Appeal No. 972228 went on to define impairment (Section 401.011(23)), reconsidered Texas Workers' Compensation Commission Appeal No. 962006, decided November 20, 1996, and held that the unemployment must be as a direct result of the impairment rather than the IR, and that a new condition not part of the IR is not necessarily excluded from determining entitlement on the direct result criterion. In that case, as in the present case, there was an after-acquired mental condition (depression). The Appeals Panel went on to state:

> There is virtually no medical support to show that the claimant's mental condition or depression (medically described as minor) starting in May 1996 was an "anatomic or functional abnormality or loss reasonably presumed to be permanent." The hearing officer does not so indicate nor find in his decision and order. While there is sufficient evidence to support a causal relationship between the 1993 knee injury, and the subsequently developed mental depression in May 1996, there is insufficient evidence to establish that the mental depression was a part of her impairment from the compensable injury as found by the hearing officer. . . . Of significance in this case, we are confronted with a subsequent mental depression condition not directly involving the body part injured and occurring some three years following the original injury to the knee. For the subsequent, non-rated mental condition to serve as a basis for entitlement to SIBS by satisfying the direct result requirement, there must be evidence that shows the "mental depression" to be "reasonably presumed to be permanent."

In the instant case, claimant's condition is described as "major depression" and "severe depression," and the hearing officer makes a specific finding in Finding of Fact No. 5 that claimant's "depression is causally related to his compensable right arm injury and is reasonably presumed to be permanent," explaining in his discussion why that is so.

The self-insured appeals the hearing officer's finding, referring to Dr. K's notes of May 12 and August 2, 1999, which diagnose claimant with "dysthymia and depressed mood" which is related to his right arm injury, and refers claimant back to Dr. D due to "lack of progress while under my care" and that claimant's needs "would be better met by another therapist." Nothing in those notes indicate the permanence or nonpermanence of claimant's condition. The self-insured argues that referral to another therapist shows the condition is not permanent. We disagree and the hearing officer could believe that claimant may need therapy for the rest of his life from a variety of therapists. Interpretation of these notes was in the sole province of the hearing officer to judge. Section 410.165(a) and Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ).

The self-insured next argues that the hearing officer's reference to claimant's testimony and appearance at the CCH as evidence of permanence of the mental condition should not be considered because it is not medical evidence. While some medical

evidence may be required, statutorily, in Section 410.165(a), the hearing officer is the sole judge of the weight and credibility of the evidence and we decline to hold that the hearing officer may not consider claimant's testimony, appearance and demeanor in determining whether a mental condition, which is supported by some medical evidence, is or is not permanent.

The self-insured challenges Dr. H's credentials as "a vocational evaluator" to render any professional opinion concerning the duration of claimant's depression because "he is not a psychiatrist or psychologist." This issue was not raised at the CCH and so the challenge to Dr. H's qualifications, or lack thereof, was not preserved for appeal. We can only note that Dr. H's letterhead refers to Dr. CH, vocational appraisal and planning. Fairly clearly Dr. H is not a doctor as defined in Section 401.011(17), but we are at a loss to hold one way or the other whether he might be a health care practitioner or provider as defined in Sections 401.011(21) and (22). The self-insured's objections to Dr. H's report on this point was not developed or preserved for appeal.

Self-insured also complains that the language of Dr. G's November 5, 1999, report and/or the October 12, 1999, note uses the phrase "at this time" and it would be unreasonable to presume from those comments that claimant's depression would be permanent. As we remarked before, regarding Dr. K's reports, the inferences to be placed on a medical report or doctor's comments are solely within the province of the hearing officer. Because the self-insured, or another fact finder, may have interpreted the report differently or reached a contrary opinion is not a basis on which we will disturb the hearing officer's decision. Salazar, *et al.* v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The self-insured also notes that the hearing officer had reached a different conclusion in Appeal No. 991525, *supra* (the appeal denying SIBS for the fourth quarter), based on only Dr. D's reports, stating that in his opinion claimant's "mental depression is reasonably presumed to be permanent." As the hearing officer noted, since that time there have been additional comments by Dr. G, Dr. K, and Dr. H. Although the self-insured states that there "is no competent medical evidence in this case" (emphasis in the original) that claimant's depression is reasonably presumed to be permanent, we leave the interpretation of the medical reports to the hearing officer to resolve. Campos, *supra*. We understand that the self-insured does not agree with the hearing officer's interpretation of what constitutes "competent medical evidence" in this case, but that is not a basis on which to reverse the hearing officer. We hold that the inferences reached by the hearing officer are sufficiently supported by the evidence.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150

Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

CONCURRING OPINION:

I concur, albeit for a slightly different reason. While I note that I was on the panel for Texas Workers' Compensation Commission Appeal No. 972228, decided December 10, 1997, it should be noted that the crux of that case was the lack of evidence that the subsequently developing psychological condition did not directly involve the body part injured. That is not the case here.

Where, as here, the psychological condition is directly linked to, grows out of, and is the result of the physical injury which caused impairment, then I believe it satisfies the requirement of being "a" direct cause of unemployment. Whether there is such direct evidence, and the underlying physical condition results in permanent impairment, the resultant psychological condition can likewise "reasonably be presumed to be permanent" for purposes of supplemental income benefits.

Susan M. Kelley
Appeals Judge