APPEAL NO. 971725

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 July 25, 1997. The issues to be resolved were:

1. Is the Claimant's [respondent] psychological condition a result of the compensable injury sustained on _____;

2. Is the Carrier [appellant] relieved of liability for supplemental income benefits [SIBS] because of the Claimant's failure to timely file a statement of employment status for the fourth compensable quarter, and if so, for what period; and,

3. Is the Claimant entitled to [SIBS] for the fourth compensable quarter, beginning February 2, 1997, and ending May 22, 1997?

With respect to those issues, the hearing officer determined that claimant's psychological condition is the result of the compensable injury, that the carrier is relieved of some liability for SIBS and is not relieved of other liability for SIBS due to the late filing of a Statement of Employment Status (TWCC-52) for the fourth compensable quarter (determinations on this issue have not been appealed by either party and hence have become final pursuant to Section 410.169) and that claimant is entitled to partial SIBS for the fourth compensable quarter beginning February 21, 1997, and ending May 22, 1997.

Carrier in a 32-page brief, plus attachments, raises five allegations of error contending: (1) that the claimant's psychological condition is not the "direct and natural" result of the compensable injury; (2) that the claimant's psychological condition did not result in permanent impairment; (3) that a bona fide offer of employment (BFOE) letter should be used in calculating SIBS liability; (4) that claimant had not attempted in good faith to obtain employment commensurate with her ability; and (5) that claimant's underemployment was not a direct result of her impairment. Carrier seeks reversal on each of those issues and requests either a new decision more favorable to it or a limited remand. Claimant responds to the points raised by carrier and urges affirmance.

DECISION

Affirmed as to the issues before the hearing officer but reversed on one Finding of Fact.

The parties stipulated that claimant sustained a compensable knee injury (the hearing officer recites that claimant has had two knee surgeries, that a full knee replacement has been recommended but that claimant had declined the knee replacement "and uses a cane to ambulate") and that she has received SIBS from the carrier for prior quarters. Medical evidence would indicate that claimant was assessed a 16% IR based on

her knee injury alone. The parties further stipulated that Dr. G is claimant's treating doctor and that he referred claimant to Dr. N for treatment of depression, that Dr. S has evaluated claimant at the request of the Texas Rehabilitation Commission (TRC), that Dr. K examined claimant on behalf of the TRC, that Dr. A performed an independent medical examination (apparently at the request of the carrier), and that Dr. PG also examined claimant on behalf of the TRC. The parties stipulated that the applicable filing period for the fourth compensable quarter began on November 23, 1996, and ended February 20, 1997.

Claimant testified and the hearing officer found, that she has had fluid aspirated from her knee about 15 times, that she has been diagnosed with depression due to her knee injury, that she had a preexisting irritable bowel syndrome (unrelated to the compensable injury) for which she was prescribed Xanax, which was also prescribed for her depression, that during the filing period for the fourth quarter, she did some baby-sitting for a three year old but was unable to continue because of her knee impairment and she had done some telemarketing for a long distance telephone company (apparently quitting "after Christmas" 1996, which was during the filing period). Claimant testified that she had not had any prior emotional illness.

The hearing officer did a fairly detailed analysis of Texas Employers Insurance Association v. Wilson, 522 S.W.2d 192 (Tex. 1975), several Appeals Panel decisions and commented that the Appeals Panel has "endorsed" Wilson in a number of decisions and while attempting to clarify its application, "the distinctions outlined by the panel are not helpful" citing Texas Workers' Compensation Commission Appeal No. 961449, decided September 9, 1996. Carrier does an analysis, urging the application of a "direct and natural" or "flowing naturally" standard citing Wilson, Arthur Larson, The Law of Workmen's Compensation and various Appeals Panel decisions, including Texas Workers' Compensation Commission Appeal No. 93725, decided September 28, 1993 (a cat bite case which resulted in a follow-on overuse claim for the unaffected arm) but quoting language from Texas Workers' Compensation Commission Appeal No. 941575 decided January 5, 1995 (a case where the employee sustained a compensable paraplegic injury and later sustained a burn on his leg at a cookout because he had no feeling in his legs). At the risk of further confusing the issues, we might draw a distinction between follow-on injuries where there is a specific event following the compensable injury (the cookout burn case for example) from extent of injury cases where the question is whether the claimed condition is part of or causally related to the compensable injury. The present case is an extent of injury case. The hearing officer cites Texas Workers' Compensation Commission Appeal No. 961969, decided November 18, 1996 (Unpublished), which cites Wilson and Appeal No. 961449, *supra*, holding that the standard to be applied in an extent of injury case is whether the compensable injury "□is causally related□ (was a producing cause) of claimant's depression." Similarly, in this case, we believe the hearing officer applied the correct standard in making her determinations that the compensable knee injury was a producing cause of claimant's depression and other psychological problems. We interpret

this standard not to be contrary to Wilson which held that to be compensable "there must be a finding that the neurosis was the result of the injury."

Carrier further contends that there must be expert medical evidence regarding causation of a mental disease. In what appears to be a progress note or part of a report dated August 14, 1996, from Dr. G, he recommended counseling, for depression. Dr. K, whose letterhead indicated he is a psychiatrist, in a report dated October 23, 1996, notes he was authorized to do only an evaluation, diagnoses minor depression and disagrees with Dr. S that claimant has a "Dysthymic Disorder." Dr. K notes that claimant's depressive symptoms were situational driven by her injury and loss of productiveness. The record contains psychiatric evaluation progress notes of Dr. N from December 10, 1996, to March 11, 1997. Dr. N's notes contain no opinion on causation and we are reluctant to interpret raw notes as meaning one thing or another. Dr. A, whose letterhead indicates a bone and joint specialty, in a report dated February 28, 1997, notes that claimant "has been taking anti-depressants for years," apparently referring to the Xanax (which the hearing officer could believe claimant was taking for another condition) and comments that an "FCE would not be a good idea until her depression is under control."

The hearing officer could well believe that the multiple surgeries to claimant's knee, resultant unrelieved pain and the recommendations for a complete knee replacement, progressively led to claimant's depression, and that other stressors took heightened significance that would not have been present were it not for the compensable injury. There was no evidence, as noted before, of any preexisting emotional illness. The hearing officer determined that "the pain and ongoing medical requirements resulting from the compensable injury, as well as other stressors such as financial problems and disinterest in marital relations have caused the Claimant to suffer from major depression as well as other psychological problems." We find the hearing officer's determinations that the compensable injury was a producing cause of claimant's depression to be minimally supported by the evidence.

The hearing officer makes further determinations that claimant's "pain and other impairments resulting from her compensable injury are permanent, her depression and psychological problems, though treatable, are also permanent." First, we will note that aside from claimant's argument to that effect, there is no medical evidence to support that contention. Secondly, and more importantly, a determination on the permanence of the depression is not required, at this time, to support the hearing officer's conclusions of law and decision in this case. The determination of whether claimant's psychological condition is a result of the compensable injury does not require a determination on the permanence of that condition. The fact that claimant has obviously reached maximum medical improvement (MMI) and apparently had 16% IR based on the knee condition does not preclude claimant's entitlement to life-time health benefits under Section 408.021 "to all health care reasonably required by the nature of the injury as and when needed." What medical care is appropriate for the psychological condition is a medical review decision.

Consequently, we reverse so much of Finding of Fact No. 9 that purports to find claimant's "depression and psychological problems, though treatable, are also permanent" as not being supported by the evidence and superfluous to the issues before the hearing officer at this time. This does not change the hearing officer's decision on the issues before her.

Carrier also contends that the hearing officer erred in not allowing carrier to use a letter dated November 21, 1996, from the employer containing a BFOE, in calculating SIBS liability. That letter contained the duties claimant would perform (folding and stacking light linens) and that the duties were within the restrictions outlined by Dr. G (no repetitive movements, no squatting, no kneeling etc. and "able to walk or stand no more than 5 minutes per hour, and not sit for more than one hour.") The letter included the hours, and rate of pay with a reporting date of November 29, 1996. When claimant did not respond by November 29th, claimant was terminated. Employer's Human Resources representative testified the job was created for claimant (although she did not explain how one would fold and stack various linens while standing no more than 5 minutes an hour) and that the position has been filled and is no longer available. We agree that although Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE. 129.5 (Rule 129.5) applies to temporary income benefits (TIBS) that it is appropriate to look to that rule in applying a bona fide offer under Section 408.144(a). Texas Workers' Compensation Commission Appeal No. 961570, decided September 18, 1996. The hearing officer could have considered the employer's testimony, weighed that testimony and determined that the offer was not a bona fide offer. The hearing officer apparently did so, stating that the offer did not include an elevation accommodation (for claimant's injured knee) and state how long the position would be available. The hearing officer is the sole judge of the weight and credibility to be given to the evidence and we affirm the hearing officer's determinations on this point.

On the issue of entitlement to SIBS for the fourth compensable quarter, carrier contends that claimant had not made a good faith effort to obtain employment commensurate with her ability and that claimant's underemployment was not a direct result of her impairment, in this case the knee injury. We have noted that good faith is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995. Whether good faith exists is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994. We would note that claimant had some employment during the applicable filing period with the telemarketer, where claimant had only nominal earnings under a complicated reimbursement scheme. Claimant also did baby-sitting which claimant said she had to stop because of her knee condition. The hearing officer could accept evidence of claimant's employment during the filing period, and her testimony of other job searches as constituting the good faith effort to obtain employment commensurate with her ability and the evidence of claimant's inability to baby-sit as showing claimant's underemployment was a direct result of the compensable

injury. We affirm the hearing officer's determination on this issue as being supported by sufficient evidence.

Upon review of the record submitted, we find no reversible error which would change the hearing officer's decision 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 manifestly 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:

_____
Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

I concur in the result of the majority's decision and commend Judge Knapp for his reasoned decision regarding the adjudication of the supplemental income benefits (SIBS) issue. However, I disagree with the resolution of the "extent of injury" issue because it should not be an issue at all.

The first issue in this case is framed as "Is the Claimant's psychological condition a result of the compensable injury on _____?" The inclusion of this issue seems to benefit the claimant but, on further analysis, it really does not benefit her. We have allowed the Texas Workers' Compensation Commission's (Commission) hearing officers to determine so-called "extent of injury" issues, which are sometimes framed in the "Is the employee's current condition related to the compensable injury?" and "Was the compensable injury the producing cause of the condition?" formats. I believe we have been enticed by insurance carriers into endorsing adjudication of these issues. The resolution of an extent of injury issue rarely results in additional benefits to an employee. If health care is reasonably required, the carrier is liable for compensation for the health care. TEX. LAB. CODE ANN.

§ 406.031(a) and 408.021(a) (1989 Act, Sections 406.031(a) and 408.021(a)). The adjudication of the confines of an injury provides carriers a vehicle to limit their liability for the payment of medical and income benefits. It also gives carriers a weapon to use against employees' claims of reasonable health care, disability and impairment after such an adjudication.

We need to move away from the common law "producing cause" negligence notion and focus on the 1989 Act's benefit issues. I think the Appeals Panel's reliance on Texas Employer's Insurance Association v. Wilson, 522 S.W.2d 192 (Tex. 1975), is misplaced. That case was decided under a workers' compensation scheme vastly different from the 1989 Act. *See* TEX. REV. CIV. STAT. ANN. Art. 8306 *et seq.* (Vernon Pamph 1992), *now repealed* (predecessor statute). The very language of Wilson limits its precedent to cases under the predecessor statute. The court noted:

> When an injury has been sustained by a particular member of the body for which the [predecessor statute] provides a specific measure of compensation, the liability of the insurance carrier is limited to the statutory amount, even though the loss of or injury to that particular member actually results in total and permanent incapacity to the employee. An injured employee, however, is not precluded from recovering for total incapacity if he alleges and proves that the incapacity to the particular member also extended to and affected other portions of his body or has impaired his general health to such an extent as to totally and permanently incapacitate him. Wilson at 194. [citations omitted].

The effect of an employee prevailing on an "extend to and effect" issue under the predecessor statute was to make a "specific" or "scheduled" injury, like a hand or foot injury, a "general" injury. The result on the employee's recovery was dramatic. A general injury meant an award of benefits up to the maximum amount for a general injury, 401 weeks, and a specific injury meant limitation to the scheduled weeks for that injury. Predecessor Statute Art. 8306. 10(b) and 12. The 1989 Act contains no similar scheme limiting an employee's injury to specific parts of the body and limiting the amount of income benefits based on what type of injury was sustained and what the extent of the injury is.

Under the 1989 Act, "an employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed." Section 408.021(a). Employees are entitled to lifetime medical benefits under the 1989 Act. *Id*; Texas Workers' Compensation Commission Appeal No. 92649, decided January 6, 1993. Issues adjudicating the extent of an injury favor insurance carriers at the expense of employees' right to lifetime medical benefits. Extent of injury issues are not authorized by the 1989 Act and can only affect real issues which are contained in the law; whether health care is reasonably required by the nature of the injury, whether the employee has disability and whether unemployment or underemployment during a SIBS filing period was

a direct result of the employee's impairment. The determination of what "health care is reasonably required by the nature of the injury" is a matter for the Commission's Medical Review Division. Sections 406.021(a) and 413.031(a); Rule 133.305; *see also* Texas Workers' Compensation Commission Appeal No. 971653, decided October 2, 1997; Texas Workers' Compensation Commission Appeal No. 951258, decided September 13, 1995; Texas Workers' Compensation Commission Appeal No. 94326, decided May 2, 1994; and Texas Workers' Compensation Commission Appeal No. 970488, decided April 28, 1997 (Unpublished). The determination of "benefit disputes" are adjudicated by the Commission's Hearings Division. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 140.1 (Rule 140.1). A "benefit dispute" is one "regarding compensability or eligibility for, or the amount of, income or death benefits." *Id.*

While disputes regarding disability and SIBS entitlement are benefit disputes, disputes regarding the extent of an employee's injury are not a benefit dispute. Resolution of an extent of the injury issue affords an employee no benefits except medical benefits. If the claimant is unable to obtain and retain employment at his preinjury wages "because of a compensable injury," he has disability. Section 401.011(16). One of the criterion for entitlement to SIBS is that an employee's unemployment or underemployment during the filing period was "a direct result of the employee's impairment." Section 408.142(a)(2). The impairment must be "from the compensable injury." Rule 130.103(a)(1). "Impairment" is broadly defined as "any anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent." Section 401.011(23). When the Commission's Hearings Division adjudicates extent of injury issues, the issues of whether an employee's inability to obtain and retain employment was "because of a compensable injury" and whether an abnormality or loss "results from the compensable injury are predetermined," when disability and SIBS entitlement are not in issue.

In the case in review, the claimant's entitlement to SIBS for the fourth quarter is in issue and the inclusion of the extent of injury issue is unnecessary. There is no reason to determine whether her psychological condition is a result of the injury. The real issue should be "Was the claimant's unemployment during the filing period for the fourth quarter of SIBS a direct result of her impairment from the injury?" If her psychological condition *during the filing period for the fourth quarter of SIBS* was "from the injury and is reasonably presumed to be permanent," and her unemployment was a direct result of that condition, then she is entitled to SIBS for the fourth quarter, assuming all other SIBS criteria are met. With regard to health care for her psychological condition, the issue for the Commission's Medical Review Division is whether it is "reasonably required by the nature of the injury." The hearing officer's adjudication as to the extent of the claimant's injury at the time of the contested case hearing cannot possibly bear on whether any particular past or future health care was or will be reasonably required. Our decision does not affect the claimant's right to lifetime medical benefits under the 1989 Act. Appeal No. 92649, *supra*; Appeal No. 971653, *supra*.

I concur in the result of the decision since the evidence supports the hearing officer's decision that the claimant is entitled to SIBS for the fourth quarter.

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Christopher L. Rhodes
Appeals Judge