EXTENT OF INJURY ISSUES ARE NOT AUTHORIZED UNDER THE 1989 TEXAS WORKERS' COMPENSATION ACT

*by Vilhelm Hesness**

There have been a number of instances where hearing officers conducting benefit contested case hearings have been asked to determine the extent of a claimant's injuries, as opposed to if there had been a compensable injury. This has resulted in ongoing disputes concerning whether a claimant might be statutorily entitled to income benefits concerning the medical nature of the claimant's injury rather than the claimant's disability or impairment from an injury.[1]

Extent of injury issues are not authorized by the 1989 Texas Workers' Compensation Act (1989 Act). Disputes about income benefits, including the existence of a compensable injury, are resolved in the "Hearings Division Proceedings" section. Disputes about the reasonableness and necessity of continued medical treatment should be addressed through the "Administrative Procedures/Medical Review Hearing" system and not through a benefit-contested case hearing.

The Texas Workers' Compensation Commission (Commission), has never subscribed to the notion that a claimant is confined by his or her original request for benefits to the initial diagnosis described in such request. In effect, the prevalence of extent of injury issues are a throwback to pre-1989 law where causation and extent issues were treated differently than they are under current law.

Changes From Prior Law

Prior to 1989, compensable injuries were classified as either "specific" or "general."[2] A claimant could be compensated for a general injury or a specific injury, but not both, although the old law did provide for multiple specific injuries and for the cumulative effect of injuries over time.[3] A determination as to the type of injury was necessary because the method of calculating benefits was based on that determination.[4]

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1. In this article the word "extent" will be used interchangeably with the word "cause" or their variants because that is the way these issues are presented for resolution.

2. 1 HOWARD L. NATIONS, TEXAS WORKERS' COMPENSATION LAW: A GUIDE TO PRACTICE BEFORE COMMISSION & COURT § 21.01 (John C. Kilpatrick ed., 2000).

3. *Id.*

4. *Id.*

The 1989 Act eliminated the need for a determination as to the type of injury and concerned itself with the nature of the injury and its cause in only the most general way.[5] Under the 1989 Act, an income benefits system was established that applies to all forms of injury and calculates the benefits on the basis of a comparison with the worker's pre-injury wage.[6] The first measure of an injury is determined by the worker's date of Maximum Medical Improvement (MMI), after which an Impairment Rating (IR) can be determined.[7] This three-tiered system does *not* apply to compensation for medical expenses.[8]

While appeals panel decisions are merely the law of the case and are not mandatory precedent, parties to disputes before the Commission do depend on them for guidance.[9] There are a number of appeals panel decisions which conclude that extent of injury issues are not authorized under the 1989 Act in the absence of a cognizable income benefit issue.[10] These decisions make it clear that an injury under the 1989 Act is not determined for income benefit purposes in a vacuum but must be analyzed in a specific context; e.g., what is the claimant's impairment rating or does the claimant have disability from the compensable injury.[11] A significant corollary is that medical benefits do not depend on a determination made in the context of determining eligibility for or entitlement to income benefits.[12] Under § 408.021, prospective and/or retrospective review are to be determined in accordance with the enumerated criteria for medical benefits.[13] Those criteria do not distinguish the cause of the injury.[14] Rather, the focus is on the reasonableness of the treatment "required by the nature of" the compensable injury, not on its cause.[15]

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5. *Id.* § 20.

6. *Id.*

7. *Id.*; *see also* TEX. LAB. CODE ANN. § 408.121 (Vernon 1996).

8. NATIONS, *supra* note 2, § 20.20.

9. *Id.* § 41.13.

10. *See, e.g.*, Tex. Workers' Comp. Comm'n, Appeal No. 971824, *at* http://www.twcc.state.tx.us/appeals/appdfile/97pdf/971824.pdf; Tex. Workers' Comp. Comm'n, Appeal No. 971725, *at* http://www.twcc.state.tx.us/appeals/appdfile/97pdf/971725.pdf; Tex. Workers' Comp. Comm'n, Appeal No. 972064, *at* http://www.twcc.state.tx.us/appeals.appdfile/97pdf/972064.pdf.

11. *See, e.g.*, Tex. Workers' Comp. Comm'n, Appeal No. 971824, *at* http://www.twcc.state.tx.us/appeals/appdfile/97pdf/971824.pdf; Tex. Workers' Comp. Comm'n, Appeal No. 971725, *at* http://www.twcc.state.tx.us/appeals/appdfile/97pdf/971725.pdf; Tex. Workers' Comp. Comm'n, Appeal No. 972064, *at* http://www.twcc.state.tx.us/appeals.appdfile/97pdf/972064.pdf.

12. *See, e.g.*, Tex. Workers' Comp. Comm'n, Appeal No. 971824, *at* http://www.twcc.state.tx.us/appeals/appdfile/97pdf/971824.pdf; Tex. Workers' Comp. Comm'n, Appeal No. 971725, *at* http://www.twcc.state.tx.us/appeals/appdfile/97pdf/971725.pdf; Tex. Workers' Comp. Comm'n, Appeal No. 972064, *at* http://www.twcc.state.tx.us/appeals.appdfile/97pdf/972064.pdf.

13. TEX. LAB. CODE ANN. § 408.021 (Vernon 1996).

14. *Id.*

15. *Id.*; *see also* 1 JOHN T. MONTFORD ET AL., A GUIDE TO TEXAS WORKERS' COMPENSATION REFORM, § 4.22 (1991) (the authors, in discussing disability under the 1989 Act, state that:

> Income benefits accrue only if there is *disability* for at least one week. "Disability" is different from "incapacity for work," which triggered temporary disability benefits under the prior law.

The severity of an injury and whether it "included" something is largely irrelevant. It is irrelevant because as phrased there is no context for the question.[16] The question should always be: Should the condition, symptom or new manifestation be "included" in what constitutes the compensable injury and for what purpose? Deciding compensability, or direct result in a supplemental income benefit context, or a correct impairment rating, is one type of issue.[17] Medical benefits are another type of issue. There is no legally cognizable issue under the 1989 Act being decided in raw extent of injury/producing cause cases. Under § 408.021, the claimant "who sustains a compensable injury is entitled to all health care 'not just medical care' *reasonably required by the nature of the injury* . . . that *cures or relieves* the effects . . . naturally resulting [from it]; [and which] *promotes recovery*, or *enhances* the ability of the employee to return to or retain employment."[18] There is nothing in the 1989 Act about only being entitled to treatment for injuries that are "included in or which extend to" this or that.[19] A claimant might very well be entitled to medical treatment because in the professional opinion of a health care provider that treatment will promote recovery or enhance the prospects of returning to work. That is true even if the injury is restricted to the "accepted" one (this has the effect of shifting the financial risk onto the health care provider who will only be compensated if the treatment is reasonable and necessary). Similarly, the focus with respect to income benefits is on the benefit, not the injury.[20] These raw extent cases frequently result in advisory medical opinions. These opinions decide both too much and too little. By deciding what is not "included" in the compensable injury, hearing officers effectively predetermine the claimant's ability to obtain the health care to which he or she is entitled.[21] These so-called "extent of injury" issues have a place when the issue is compensability or the correct impairment rating *in an income benefit context*. Only an inchoate desire for legal consistency keeps the Commission from seeing that the bifurcated system has two different sets of remedies. We end up with uniformity at the price of distortion. The assertion that a hearing officer is the only one who may decide the "extent" of an injury (or even that the concept exists) results in claimants

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As defined in Section 1.03(16) of the new Act, "disability" means "the inability to obtain and retain employment at wages equivalent to the pre-injury wage because of a compensable injury." Incapacity, under the prior law, measured the ability to obtain and retain employment performing the *usual tasks of a workman*. Hence, *the capacity to perform usual tasks of a workman*, important under the prior law, is *no longer relevant*. Instead, the new disability concept measures post-injury wages against *pre*-injury wages instead of physical limitations to perform an occupational task.)

16. TEX. LAB. CODE ANN. § 408.021 (Vernon 1996).
17. *Id.* § 410.
18. *Id.* § 408.021 (emphasis added).
19. *Id.*
20. *Id.* § 408.081.
21. *Id.* § 410.168.

(and providers) being batted around between two Commission divisions and the State Office of Administrative Hearings when that is not logically or legally necessary.

It is illogical to suppose that the criteria for evaluating the "nature" of a compensable injury under the old law should continue to be used under the 1989 Act when the substantive structure of the law, this one in particular, at least, has changed so much. The significant change is one of focus, away from the nature of the injury and to the benefits payable because of the injury. The bifurcation of the dispute system into an "income-benefit venue" and a "medical-benefit venue" reinforces the idea that the analysis is to be driven by something other than the extent of the injury. There is widespread agreement that an injury, its consequences, and any treatment may evolve over time. Continued effort to fix the extent/cause of an injury and its symptoms through the income benefit dispute process results in the anomalous and unintended result of having the threshold issue of compensability being constantly re-litigated. The result is the claimants are denied medical and/or income benefits for long periods of time while the Commission does business with itself. The deliberate appropriation of an agency-sanctioned vocabulary to resolve this problem is long overdue. I suggest that one place to begin is to distinguish between "medical causation" and "legal causation." Legal causation in this context means causation in the particular sense of a workers' compensation case, rather than in the broader sense of a traditional tort case.

The derivation of the current law, in other words, uses the concept of "causation" in a different way than we are used to using it. As Professor Larson puts it: "Almost every major error that can be observed in the development of compensation law . . . can be traced either to the importation of tort ideas, or . . . to the assumption that the right to compensation resembles the right to the proceeds of a personal insurance policy."[22] Most importantly, our workers' compensation law is a system, not a contest, to supply security to injured workers and to distribute the cost to the consumer of the product.[23] This means that the focus is not on the cause of the injury, even in the strict liability sense, or on the equities of the injured worker with respect to his employer, but on the work relatedness of a damaging event (which may be specific, gradual, or occupational). In the Texas system, work relatedness is determined in the first instance by an evidentiary requirement that physical harm occurs in (arises out of) the course and scope of employment and in the furtherance of the employer's business. Once that is established, the income-benefit component of the system measures the harm by referring to the fiscal impact of the injury as a means of reaching the socially desirable goal of securing workers against at least some of the effects of work-related injuries.

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22. ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1.02 (2000).
23. *Id.* § 7.70

Viewed this way the question of whether or not a compensable injury is a "producing" cause of the claimant's current condition begins to disappear like a Cheshire cat. In the first instance, the expression-producing cause is drawn from the language of tort law. In the second instance, it is not necessary to any determination under the workers' compensation system, when properly viewed as a social system and not as a quasi-tort insurance system.

By way of illustration, a worker may injure his right knee on the job. The insurance carrier accepts the injury. The claimant does not lose any time from work at first, but because of the brace he is wearing, begins to favor his left leg. This, in turn, causes his lower back to become stiff and sore. He loses work because his back hurts. The carrier asserts that the claimant does not have disability because pain is not an injury and the right knee injury does not extend to or include the lower back condition. Further, the knee injury is not a producing cause of the lower back condition. It is apparent that the analysis has ventured into the field of tortious causation and that an attempt is being made to assess insurance-type liability. It should also be clear that the cause of the lower back pain and whether the knee injury extends to include the lower back is not, from a system perspective, relevant at all. The question is: Did the knee injury cause the claimant to lose time from work? If one of the consequences of the knee injury is lower back pain, then the claimant has established that he has a disability when he shows a connection to the knee injury. This does not mean that he is *entitled* to medical treatment for the lower back condition, nor does it mean that he is entitled to an impairment rating for the lower back condition. This is true even though the lower back pain might be seen as evidence of an impairment from the compensable knee injury if it is determined to be a permanent result of the injury.

The Commission Dispute Resolution Process Is Issue Driven, Not Case Driven

One of the problems with the existing use of the terminology under consideration is that the system is an issue-driven one, which anticipates the resolution of disputes about disability in an expedient and cost effective way.[24] The process which has been allowed to evolve of using archaic language in a wholly different context, treats the injured worker as if he was in a case-driven system where the extent of the injury is determined once and for all using (it need be said again) inappropriate tort-based language.

From the perspective of the medical witness in the case above, the health care provider need only describe the relationship of the knee injury to the lower back pain as it pertains to the workers inability to work earning 80

24. NATIONS, *supra* note 2.

percent of his pre-injury average weekly wage.[25] Later on, in a different context, that same health care provider might need to explain why specific treatment was reasonable and necessary for the lower back when the nature of the injury was, at least initially, reported to be a knee injury.[26]

In Texas, most disputes about causation occur in the context of an occupational disease because a specific incident rarely presents a relational problem at least as far as the existence of an injury is concerned.[27] Whether the issue of causation is framed in terms of the disease being indigenous to the work or present in an increased degree;[28] that the disease must be inherent in that type of employment;[29] or but for the employment, would claimant have suffered the harm;[30] what is required is evidence of a causal connection between the employment and the occupational disease.[31] Note that the causal connection being described is different than tortious causation.[32] It is also distinct from the type of evidence needed to prove the connection, which can vary depending on the circumstances.[33] In other words, the test is not does the repetitive trauma cause carpal tunnel syndrome, but does the work activity cause carpal tunnel syndrome (hence the bromide that a claimant can establish carpel tunnel syndrome by his own testimony if he can connect it to his work, but may need an expert to establish the work connection for a disease such as cancer).[34]

Subsequent Effects Should Be Evaluated Using the Same Criteria

When the question of producing cause or its variants is addressed to follow-on injuries or conditions, the same criteria should be used.[35] The

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25. TEX. LAB. CODE ANN. § 408.146 (Vernon 1996).

26. NATIONS, *supra* note 2, § 22.03(1).

27. *Id.* § 11.01(2)(a).

28. Home Ins. Co. v. Davis, 642 S.W.2d 268 (Tex. App.—Texarkana 1982, no writ).

29. Davis v. Employers Ins. of Wausau, 694 S.W.2d 105 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

30. Parker v. Employers Mut. Liab. Ins. Co. of Wis., 440 S.W.2d 43 (Tex. 1969).

31. Mueller v. Charter Oak Fire Ins. Co., 533 S.W.2d 123, 126 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).

32. NATIONS, *supra* note 2, § 3.01(2)(b).

33. *Id.*

34. *Id.* §§ 3.01(2)(b), 10.01(4)(a)(ii)-(iii).

35. I am not discussing here whether the question is original causation or causation of a follow-on injury, but rather what the correct standard for assessing the connection should be. On the point of subsequent injuries, Larson states:

> A distinction must be observed between causation rules affecting the primary injury . . . and causation rules that determine how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment. As to the primary injury, it has been shown that the "arising" test is a unique one quite unrelated to common law concepts of legal cause, and . . . the employee's own contributory negligence is ordinarily not an intervening cause preventing initial compensability. But when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way

system does not require a different standard following an initial determination of compensability. Since one does not ask the following: Is the claimant's employment a producing cause of the injury when the question is compensability, there is no reason to make that inquiry when the question is a subsequent condition, symptom, or other manifestation of the injury or disease.[36] In both cases the operative inquiry should be: Does the injury, disease, condition, or symptom, arise out of the employment in the special sense of the workers' compensation law?[37] Scientific causation in the sense of proving a mechanical connection is not required, and generally contrary to current thinking about causation.[38] Hence, Professor Larson can refer to the issue of causation in workers' compensation cases as requiring a type of "quantum causation" (balancing the arising out of and furtherance elements so that, e.g., a strong arising out of case may justify a finding of compensability even though the furtherance requirement is weak), or as requiring a direct and natural result analysis (from which the claimant's intervening conduct may break the requisite work connection).[39] In either case, the use of the producing-cause locution, and along with it the idea of a sole-cause defense, appears to be an instance of using a word, which describes the amount of proof required to establish the work relation, and confusing it with the type of proof required.[40] Producing cause simply means a cause.[41] The requirement of a work connection is the pertinent requirement and the one which requires the closest attention in the dispute resolution process.[42] The problem is resolved if the focus is shifted from the idea of workers' compensation as an injury-based, strict liability law to a perspective which views the Texas Workers' Compensation Act as a statement of legislative policy, a policy which requires a relational analysis which measures the injury against the economic harm sustained as a result of the injury, or which determines the reasonableness of treatment after the fact in the context of the injury.[43]

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to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results" and of claimant's own conduct as an independent intervening cause.

LARSON, *supra* note 22, § 13.11; *see also* Tex. Workers' Comp. Comm'n, Appeal No. 93725, *at* http://www.twcc.state.tx.us/appeals/appdfile/93pdf/93725.pdf.

36. LARSON, *supra* note 22, § 13.11.
37. TEX. LAB. CODE ANN. § 406.031(a)(2) (Vernon 1996).
38. LARSON, *supra* note 22, § 6.10.
39. *Id.* §§ 29.10, 13.11.
40. NATIONS, *supra* note 2, § 10.01(4)(a)(i).
41. *Id.*
42. LARSON, *supra* note 22, § 6.11.
43. *Id.* § 57.