

APPEAL NO. 950819  
FILED JULY 6, 1995

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 19, 1995. The hearing officer determined, in response to the issues before her, that the claimant is entitled to supplemental income benefits (SIBS) for the first and second compensable quarters. The carrier has appealed, contending that the claimant's self-employment should not be seen as a good faith effort to obtain employment commensurate with his ability to work, nor was his underemployment a direct result of his impairment, and that his reported wage figure should be the gross income of his business. The appeals file does not reflect that the claimant filed a response.

DECISION

The hearing officer's decision and order are reversed and remanded.

The claimant suffered a knee injury on \_\_\_\_\_, while employed by (employer). He underwent a total knee replacement in February or March 1993, and physical therapy until September or October 1993. He was released to return to work in early 1994 and his doctor, Dr. R, wrote that claimant was restricted from climbing, squatting, running, jumping from heights, and carrying anything heavy. The claimant, an electrician since he began as an apprentice in 1980, said that pursuant to these restrictions he was unable to go back to electrical or construction work. He had inquired about work with the local union hall but, as a letter from a union representative stated, no light duty work was available which would accommodate claimant's restrictions. The claimant testified that there was no nonunion electrical work in the city where he lives.

Claimant said Dr. R sent him to the Texas Rehabilitation Commission (TRC), where he spoke with a counselor, filled out questionnaires, and took written tests. He said the TRC recommendation was that he pursue an appliance repair course at a local college; however, because he said he did not believe he could work and go to school at the same time the claimant attended a small business seminar and set up his own appliance repair business in June 1993. He said he got his first job in September 1993 and has worked steadily since then. He testified that he advertises his business, has private customers in addition to contracts with several manufacturers to do their warranty repair work, and that he works from eight to 12 or 14 hours per day although he said business was slow during such periods as Christmas and income tax time.

In evidence were claimant's Statements of Employment Status (TWCC-52) for the first and second quarters. (According to the hearing officer's decision, the first SIBS quarter is from January 16 to April 16, 1995, and the second quarter is from April 17 to July 17, 1995. The decision fails to state the relevant filing periods.) On each of

these, the claimant reported amounts he had earned during the 13 weeks prior to the quarter. Under cross-examination, he acknowledged that these were net amounts, derived in part after he subtracted expenses of the business such as advertising and gasoline. As he described it, the figures he reported on each TWCC-52 represented his personal income, or those amounts taken out on a weekly basis for his personal and family expenses, and the remaining amounts were left in the business to cover operations and to "help the business grow."

In pertinent part, the SIBS provisions of the 1989 Act, Section 408.142, provide that in order to prove entitlement to SIBS a claimant must establish that he has been unemployed or underemployed as a direct result of the impairment from the compensable injury, and that he has made a good faith effort to obtain employment commensurate with his ability to work. We have held that these are generally issues of fact for the hearing officer to determine. Texas Workers' Compensation Commission Appeal No. 94466, decided May 25, 1994. The hearing officer in this case determined inferentially (and carrier does not complain of this lack of more specific findings) that claimant's self-employment, in light of his physical restrictions, constituted a good faith effort to secure employment, and we do not disagree. The carrier contends on appeal, however, that claimant's voluntary decision to become self-employed rather than to seek salaried employment with an established business, cannot be considered a good faith effort. We disagree, based upon the language, cited by the hearing officer, from Texas Workers' Compensation Commission Appeal No. 94918, decided August 26, 1994: "[T]his decision should not be interpreted to mean that a claimant who chooses to become self-employed must seek employment from third parties in order to qualify for SIBS. Had claimant provided evidence as to his good faith efforts to solicit business and customers for his self-employed welding business that might show a good faith effort to obtain employment (albeit self-employment) as required by Section 408.124(a)(4)." That decision went on to observe that the self-employed claimant in that case, who was not found to have demonstrated a good faith effort, had not appeared to advertise or otherwise solicit business.

While also not complained of on appeal, the hearing officer did not specifically find that the claimant's underemployment was the direct result of his compensable injury; however, this finding can be implied based upon the hearing officer's conclusion that the claimant was entitled to SIBS for both quarters at issue. In addition, such implied finding is supported by the claimant's testimony that he had had to turn away business where he did not have help in moving large appliances. The Appeals Panel has held that "a finding of 'direct result' is sufficiently supported by evidence that claimant sustained a serious injury with lasting effects and that he could not reasonably perform the type of work that he was doing at the time of the injury [citation omitted]." Texas Workers' Compensation Commission Appeal No. 950376, decided April 25, 1995. Accordingly, we find no reversible error in the hearing officer's implied findings that the claimant demonstrated a good faith effort to secure employment and that his

underemployment, if any, was a direct result of his impairment.

We are troubled, however, by carrier's final point on appeal: that the weekly income amounts given on the TWCC-52s comprise only those amounts the claimant took out of the business each week, and not his gross income. The carrier argues that this methodology "can result in the manipulation of a claimant's true and correct earnings over a given period." Carrier argues that the gross income of the business should be used in determining claimant's entitlement to SIBS.

Underemployment, for purposes of the SIBS statute, equates to earning less than 80% of the employee's average weekly wage (AWW) as a direct result of the impairment. Section 408.142. A review of the relevant statutory and regulatory provisions concerning underemployment provides little or no guidance as to how earnings of a self-employed claimant are to be calculated. The rule on calculation of SIBS, Rule 130.102 [Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.102], provides that after entitlement is determined the amount of SIBS is calculated based on the employee's "actual wages," during the filing period preceding the compensable quarter. The rule does not define "actual wages," although it states that underemployment occurs "when the injured employee's average weekly earnings during a filing period are less than 80% of the employee's [AWW] as a direct result of the impairment from the compensable injury." See Rule 130.101. In addition, the Act defines "wages" to include every form of remuneration payable for a given period to an employee for personal services. The definition goes on to state that the term includes the market value of board, lodging, laundry, fuel, and "any other advantage that can be estimated in money that the employee receives from the employer as part of the employee's remuneration." Section 401.011(43). *And see* Rule 128.1.

However, the form TWCC-52, the employee's Statement of Employment Status as adopted by the Commission, requires employees to provide their "gross wages received" for each of the 13 weeks prior to the quarter at issue. "Gross" is defined by Merriam Webster's Collegiate Dictionary, Tenth Ed., 1993, to include "overall total exclusive of deductions;" Black's Law Dictionary, Sixth Ed., 1990, defines "gross" as "whole, entire, total, as the gross sum, amount, weight-opposed to net," and the term "gross earnings" as "total income and receipts of a person or business before deductions and expenses." In the absence of any authority to the contrary, we hold that "gross wages" for a self-employed claimant means the total amount of income received from self-employment, without regard to expenses of the business or amounts retained for growth. While we can appreciate that a self-employed individual must cover expenses before profit is realized, nevertheless we are concerned that a contrary interpretation could require a workers' compensation carrier to subsidize a small business operation, which we do not believe is the intent of the 1989 Act.

Based upon the foregoing, the hearing officer's decision and order are reversed

and the case is remanded to allow it to be determined whether the claimant's total gross earnings from his self-employment constitute less than 80% of his AWW for purposes of entitlement to SIBS for the first and second compensable quarters. 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 Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

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Lynda H. Nesenholtz  
Appeals Judge

CONCUR:

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Philip F. O'Neill  
Appeals Judge

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Judy L. Stephens  
Appeals Judge