

APPEAL NO. 992666
FILED JANUARY 13, 2000

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. ' 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 4, 1999. The issues before (the hearing officer) were whether the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the 10th quarter, which ran from April 1, 1999, to June 30, 1999; for the 11th quarter, which ran from July 1, 1999, to September 29, 1999; and for the 12th quarter, which ran from September 30, 1999, to December 28, 1999. The claimant contended that his underemployment was a direct result of his impairment from the compensable injury, and the appellant (carrier) contended that it was not. The hearing officer determined that the claimant is entitled to SIBS for the 10th, 11th, and 12th quarters. The carrier appealed; contended that there is no evidence to substantiate the finding of fact that the claimant did not fail to cooperate with the Texas Rehabilitation Commission (TRC); argued that the claimant failed to establish his preinjury average weekly wage (AWW); stated that the claimant, the sole proprietor of a business, deducted expenses that are not reasonably related to the production of income in determining the profit or loss of the business; said that the claimant did not submit sufficient evidence on earnings of the company during the qualifying period for the 12th quarter; urged that the claimant's underemployment during the qualifying periods was not a direct result of his impairment from the compensable injury, but the result of loss of business due to competition; and requested that the Appeals Panel reverse the decision of the hearing officer and render a decision that the claimant is not entitled to SIBS for the 10th, 11th, and 12th quarters. In the alternative, the carrier requested that the decision be reversed and remanded to the hearing officer. A response from the claimant has not been received.

DECISION

We reverse and remand.

The claimant testified that he is 75 years old; that he is the sole proprietor of a business that places tile, brick, and plaster on walls and floors and installs carpet; that for years in installed products; that after he was injured, he could no longer install products; that his son installs products and his daughter works in the office and prepares estimates; that they are paid what have been standard wages for the area; that he now does book work, answers the telephone, makes deliveries, and determines the final figure on bids that are made; that he pays himself \$190.00 a week, about the minimum wage; and that if he obtained work elsewhere, he does not think that he could get a job that paid more than that. He said that he has cut down to six or eight employees; that when he needs additional workers, he obtains them through the union; that he pays employees the standard union wages; that some other contractors in the same business pay their employees lesser wages; that competition is fierce; and that he hopes to obtain additional contracts because of the quality of the work done by his company. The claimant stated that the records indicate that the company lost money during the filing period for the 10th quarter and the qualifying period for the 11th quarter, that the company did not yet have the information

needed to determine the profit or loss for the qualifying period for the 12th quarter, that he hoped to make money in the future, and that he needed SIBS until the company started making money.

Records show that the claimant was paid \$190.00 per week. Two Statement of Employment Status (TWCC-52) forms introduced by the carrier indicated that the claimant's AWW is \$511.54 as does a Decision and Order of the hearing officer dated September 3, 1997, that was admitted as a claimant's exhibit. For the period of January, February, and April 1999, the company showed gross sales of \$45,387.20, expenses of \$46,026.44, and a loss of \$639.44. Expenses included advertising; insurance; interest on loans; cost of materials, wages, health insurance, motel rooms, and meals for employees; truck expenses; office expenses; utilities; and rent. For the period of April, May, and June 1999, the company showed gross sales of \$11,536.60, expenses of \$20,141.70, and a loss of \$8,606.70. Expenses similar to those for the prior three months, but not for insurance or interest on loans, plus a significant amount for insurance for company vehicles were shown.

A federal income tax return for 1998; signed by the claimant, his wife, and a certified public accountant; indicates that in 1998 the business had a net profit of \$20,511.00. The filing and qualifying periods in question are in 1999.

We first address the finding of fact that the claimant did not fail to cooperate with the TRC. Section 408.150 effective through August 31, 1999, and Section 408.150 effective September 1, 1999, provide that a claimant who refuses services or refuses to cooperate with services provided by TRC loses entitlement to SIBS. The record does not indicate that the claimant was referred to TRC or was offered the services of TRC. The finding of fact that the claimant did not fail to cooperate with TRC is surplusage and will be disregarded.

In the discussion section of her Decision and order, the hearing officer stated that the carrier argued that the claimant was not entitled to SIBS because the gross receipts of the company did not result in the claimant earning less than 80% of his AWW and cited Texas Workers' Compensation Commission Appeal No. 970519, decided April 30, 1997. In that case, a certified public accountant testified that a self-employed taxpayer's "income," according to generally accepted accounting principles and the Internal Revenue Code, is derived by subtracting "normal operating expenses" from "gross receipts." The Appeals Panel wrote:

While it could be argued that amounts retained for a company's growth are discretionary, the expenses required to operate the business, such as equipment and materials purchases are not. They must be expended in order to produce income. A self-employed claimant would be well advised to document expenditures for normal operating expenses since a hearing officer may be required to evaluate the validity of such claimed operating expenditures.

In the case before us, the hearing officer stated in her discussion that she applied the holding in Appeal No. 970515 and that calculating the claimant's wage in that manner did

not disqualify him from receiving SIBS for the 10th quarter. Some of the expenses listed, such as insurance for company vehicles and interest on loans, perhaps should be applied only in part to a filing or qualifying period. If the expenses for insurance in the amount of \$5,912.40 and interest on loans in the amount of \$7,479.93 for the period of January, February, and March 1999 are prorated equally for 12 months, it appears that the claimant may not be entitled to SIBS for the 10th quarter. The information for the qualifying period for the 12th quarter should not be available. In Texas Workers' Compensation Commission Appeal No. 982773, decided January 13, 1999, the Appeals Panel reversed and remanded for the hearing officer to make findings regarding what the claimant's wages were during the filing periods in question. We reverse the decision of the hearing officer, remand for the production of information necessary to determine the net profit or loss for the filing and qualifying periods in question, and for the hearing officer to make findings of fact and conclusions of law and render a decision on whether the claimant is entitled to SIBS for the 10th, 11th, and 12th quarters.

The hearing officer did not err in applying the law concerning the direct result criterion to the facts.

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.

Tommy W. Lueders
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Gary L. Kilgore
Appeals Judge