APPEAL NO. 001131

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 25, 2000. The issues involved whether the claimant, who is the appellant, was entitled to supplemental income benefits (SIBs) for the fifth and sixth quarters of eligibility. The hearing officer found that for the fifth quarter the carrier was discharged from liability because the claimant did not timely file his application for SIBs. She further found that the claimant had not proven that he was "underemployed" for the filing periods in question and that he was not underemployed or unemployed as a "direct" result of his impairment.

The claimant has appealed, arguing simply that he was entitled to SIBs and that the deductions he made from the gross receipts of his business enterprise for SIBs purposes were all for proper business expenses. The carrier responds by pointing out the evidence in support of the hearing officer's decision.

DECISION

We affirm the hearing officer's decision.

The claimant was injured on _____, while working as a construction supervisor. The qualifying periods for the quarters under review ran from June 10 through September 8, 1999, and from September 9 through December 8, 1999. The claimant agreed that he filed Statement of Employment Status (TWCC-52) applications for both of these quarters on December 22 , 1999. The claimant was released to regular duty by his doctor on January 13, 1999. It was stipulated that his average weekly wage (AWW) was $600.

The claimant started a business in 1996 in which he supervised the performance of various short term construction and remodeling contracts through subcontractors. He also obtained a real estate license and was a realtor through (a large real estate firm). The claimant operated his businesses out of his residence. He owned two vehicles which he said were primarily used by the business with very little personal use, such as driving three miles to the grocery store and back. The claimant presented spreadsheets and testified at some length about his business expenses. He said that his business was one entailing purchases of materials to be used in small construction contracts but also that he operated through subcontractors. Evidence was presented showing that the claimant actively marketed his business including presence on a website.

Mr. R, the claimant's accountant, testified that his vehicle expenses were 96% business, his telephone calls were 95% business related, and his overall expenses reflected in his credit card billings and checks as 98 to 99% business expenses. He said that the claimant's business travel started the moment he left his driveway. Mr. R agreed this was based upon his years of experience as an accountant and the information provided; he had not performed a detailed audit, nor did he generally look at underlying

receipts and the like in preparing "compilations." He said that the claimant was on the cash basis of accounting and that Generally Accepted Accounting Principles were unnecessary because the claimant had a small cash basis business. Mr. R said he had known the claimant for 12 years and testified as to his military service and good character. He said that as far as "profits," the claimant had shown a pattern of doing better since his accident.

A letter from Mr. R, which forwarded his compilation of assets, liabilities, and expenses of the claimant's business, stated that the claimant operated as a Subchapter S corporation in which "the shareholders of an S Corporation are taxed on their proportionate share of the Company's taxable income." The claimant was the only stockholder. Depreciation and retained earnings are items on the financial statement.

The hearing officer detailed parts of testimony that were instrumental in assessing the credibility of the claimant's contention that his earnings were less than 80% of the preinjury AWW. Most notable were occasions where charged expenditures claimed as business related turned out to be personal and, while the examples brought forward may not have been large dollar amounts, the discrepancies could legitimately be considered by the hearing officer on the matter of credibility of the body of records and the claimant's testimony overall.

For example, the claimant was asked about an expense to a pet supplies store. He contended it was for purchase of a "doggie door" which he installed for a customer. Asked to identify the supporting receipts, he admitted that the expenditure was, in fact, for his personal pet. Several hundred dollars worth of restaurant or sporting tickets were contended to be business expenses for entertainment. There were some occasions where it was clear that the meal expense involved the claimant alone eating out at a restaurant in town. A hotel bill was described by him as entertainment for himself for stress relief. He owned two vehicles on which he charged maintenance expenses to the business.

Finally, the claimant contended he loaned the business $25,000 when he first started it in 1996 and that various payments on his credit cards made by the business during the filing periods under review were repayments of this "loan." He also contended that some of amounts shown as loans on his spreadsheet represented bank signature loans.

Gross receipts for the claimant's corporation as declared on his Texas franchise tax return for 1999 were $100,629. This was the same amount used as gross receipts on the claimant's Subchapter S federal income tax return (Schedule 1120S). He claimed taxable income of zero on his personal tax return for 1999 and $3,572 as Subchapter S ordinary income. Adjustments to personal income included carryover loss from prior years. Adjustments from gross receipts were made on Schedule 1120S for retained earnings. As to deductions, only $83 was shown as entertainment expense (50% of presumably $166 total expense for the year) and $30,753 for contract labor. Mr. R said that real estate commissions were simply “lumped in” to the Subchapter S corporation and that this was of no consequence since the claimant was the sole stockholder.

WHETHER THE CLAIMANT WAS “UNDEREMPLOYED”

It is important to emphasize that what could be argued as a deduction for the federal income tax and what constitutes taxable income or "profits" from self-employment are not entirely relevant inquiries for purposes of SIBs. A claimant may be said to be "underemployed" is he is "earning less than 80 percent of the employee's [AWW] as a direct result of the employee's impairment." While the Appeals Panel previously considered all gross receipts from self-employment as earnings, Texas Workers' Compensation Commission Appeal No. 950819, decided July 6, 1995, the majority of the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 970519, decided April 30, 1997, held that where a hearing officer can find that there are nondiscretionary amounts that must be expended to operate the business, and these need not be considered as earnings or wages for purposes of SIBs. That decision made clear that a claimant would be well-advised to document expenditures for "normal operating expenses" because the hearing officer would be required to evaluate the validity of such expenses.

In making this evaluation, a hearing officer is not bound by the subjective classification that a claimant may make of payments made by his or her business. For purposes of analyzing "underemployment," amounts that are claimed as "entertainment" may be seen as discretionary, rather than necessary outlays. Portions of automobile expenses, residential telephone expenses, and credit card bills for the benefit of the claimant that are paid by the business may be considered as "wages" for personal services. Adjustments to earnings for depreciation, carryover loss, or retained earnings are not normal operating expenses required to generate income that are allowable for SIBs purposes under Appeal No. 970519. Amounts which the claimant contended represented repayment to him of "loans" he made to the business, and not documented as such, need not have been considered as normal operating expenses within the meaning of Appeal No. 970519, *supra*. It was clear from the testimony and the record that the claimant operates a viable, ongoing, full-time business that generates earnings to him, regardless of what the Internal Revenue Service may or may not consider taxable income for federal income tax purposes.

FILING OF THE TWCC-52

Section 408.143 states that the failure to file a statement in the form and manner provided by the Texas Workers’ Compensation Commission (Commission), in this case the TWCC-52, relieves the carrier of liability for SIBs for the period it is not filed. The determination of the hearing officer that the claimant did not file his fifth quarter statement until after that quarter was ended is dispositive of the outcome of entitlement for that quarter.

THE DIRECT RESULT REQUIREMENT

Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 130.102(c) (Rule 130.102(c)) provides that to be considered the "direct result," the impairment must be a cause of

reduced earnings. In this case, the hearing officer obviously did not accept that the claimant's earnings were less than 80% of his preinjury AWW. However, the discussion makes clear that she believed that he was able to perform the duties of his job essentially full time on his business, and the additional realtor responsibilities, without adverse effects from his previous injury. Consequently, she could believe that variances in earnings would be accounted for by the marketplace or flow of business rather than the effects of the impairment. *See generally* Texas Workers' Compensation Commission Appeal No. 94918, decided August 26, 1994. The failure to meet the direct result "prong" of Section 408.143 would defeat entitlement even if the hearing officer had found wages below the 80% cutoff.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). In considering all of the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We affirm her decision and order on all appealed matters.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Dorian E. Ramirez
Appeals Judge