APPEAL NO. 012074-s
FILED OCTOBER 24, 2001

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 August 7, 2001. The appellant (self-insured) appeals the hearing officer's determination that the respondent (claimant) had disability as a result of the injury sustained on ____________, beginning on June 15, 2001, and continuing through the date of the CCH. The self-insured offers new evidence for the first time on appeal. The self-insured also appeals the hearing officer's determination that the claimant has not had post-injury earnings (PIE) after May 10, 2000. The claimant responds, urging affirmance.

DECISION

Affirmed in part; reversed and remanded in part.

Along with its appeal, the self-insured submitted a copy of the "Operative Procedure Report," dated August 15, 2001, for the surgery that was performed on the claimant's left knee after the CCH. The claimant testified that she requested preauthorization to undergo left knee surgery on several occasions but was denied until the self-insured authorized the surgery as recommended by the Texas Workers' Compensation Commission (Commission)-appointed independent medical examination doctor on August 2, 2001. The "Operative Procedure Report" is new evidence offered for the first time on appeal. We will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). It is undisputed that the claimant suffered a compensable knee injury. The document that the self-insured submitted has not been shown to be so material that it would probably produce a different result had it been in evidence at the CCH.

On ___________, the claimant was injured while working when she became entangled in a vacuum cleaner extension cord and fell. She sustained injuries to her left shoulder and left knee. The evidence adduced at the hearing depicted the claimant as capable of performing light-duty work, but unable to return to full-duty work as a custodian for her employer due to her left knee condition. This evidence is sufficient to support the hearing officer's determination of continuing disability through the date of the CCH, if the claimant's PIE are less than her preinjury earnings as discussed below. Accordingly, we affirm the hearing officer's determination of disability, subject to the outcome of the remand for the hearing officer to determine whether the claimant's PIE exceed her average weekly wage (AWW).

The self-insured appeals the hearing officer's determination that the claimant has not had PIE. The income in question was earned by a business originating after the claimant's date of injury. The claimant testified that during May 2000, she and her husband opened a rental business that supplies various articles for parties, including tables and chairs. She testified that although they have rented equipment 41 times between May 2000 and June 2001, it is difficult to state the average amount that the business makes on a rental. The claimant testified that she would estimate the revenues from the business for the year 2000 to be about $2,000.00 with about the same amount for the year 2001 prior to the CCH. The claimant also testified that, at least occasionally, she actively participated in the business by assisting with setting up tables and chairs, along with her husband and son. The treating doctor was shown a surveillance videotape depicting the claimant engaged in set-up activities, and he opined that the claimant was working within her medical restrictions. The hearing officer determined that "[a]ny income generated after May 10, 2000, as a result of the Claimant's party rental business, is not considered wages" and that "[t]he evidence was insufficient to establish that the Claimant received [PIE] during the period beginning May 10, 2000 and continuing through the date of the hearing." The hearing officer then concluded that "Claimant has not had [PIE] after May 10, 2000." The hearing officer erred in this regard, as we will explain below.

We hold that the money collected by the claimant's business was income, i.e., wages earned for personal services, that should have been reported to the self-insured to reduce the amount of temporary income benefits (TIBs) that might otherwise be due the claimant. TIBs are due when an injured worker has not reached maximum medical improvement and has disability. Section 408.101(a). Section 401.011(16) defines "disability" as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." The claimant had the burden of proving disability for any period claimed. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. In Texas Workers' Compensation Commission Appeal No. 000783, decided May 22, 2000, we identified that the claimant has the burden of proof concerning income from a business and stressed the need for the claimant to be forthcoming and accurate with information about self-employment income:

> Collateral source income, such as from a passive investment, generally has little or no impact on the ability to earn the preinjury wage and is not relevant to a disability question. Texas Workers' Compensation Commission Appeal No. 91132, decided February 14, 1992. In this case, the claimant described his business as an investment even though it was a proprietorship. The hearing officer could have inferred from the organization of the business that it involved some personal activity or labor on the part of the claimant, and was not merely a passive investment vehicle. The proper framework for analysis in this case was not in terms of investment income, but whether the claimant was engaged in a self-employment activity and whether the reasons for not earning the preinjury wage was his compensable injury or the nature of the business. *See* Texas Workers' Compensation Commission Appeal No. 982415, decided November 30, 1998. In such an analysis, evidence

> about what the claimant actually did to conduct and develop the business became as critical as financial data about the business. For his own reasons and despite the fact that he had the burden of proof on the issue of disability, claimant declined to present any such evidence. His unwillingness to share this information with the carrier under these circumstances was at his own risk of not prevailing on the merits, which is precisely what happened in this case.

We have held that self-employment or going into business and not drawing a salary cannot be used as a subterfuge to qualify for full TIBs if indeed there are some wages as defined in the 1989 Act earned or being generated and which inured to the benefit of the claimant. Texas Workers' Compensation Commission Appeal No. 950962, decided July 26, 1995; Texas Workers' Compensation Commission Appeal No. 94755, decided July 20, 1994. *See, generally,* Texas Workers' Compensation Commission Appeal No. 950819, decided July 6, 1995, a supplemental income benefits (SIBs) case where we observed that carriers are not required to subsidize a small-business operation, and Texas Workers' Compensation Commission Appeal No. 94918, decided August 26, 1994. To the extent that our prior cases have held that self-employment income does not qualify as wages, such cases are overruled. We conclude that the better view is as stated in Texas Workers' Compensation Commission Appeal No. 970519, decided April 30, 1997:

> The express provisions in the 1989 Act are tailored to the "plain vanilla" employment situation where a paycheck, or other remuneration, are provided by an employer on a weekly basis to an unrelated employee. The fact that self-employment is not directly dealt with in the statute, however, does not mean that such status falls outside its provisions. We cannot interpret the SIBS provisions concerning underemployment to reach an absurd result because an employee may on occasion become his own employer after an injury. The hearing officer has, and we believe correctly, identified those items in this case, supported by expert testimony, which are not available to the claimant to in turn pay himself a "wage" because they were incurred and were paid as necessary expenses to allow the business to continue.

We see no reason to differentiate between SIBs and TIBs in this regard.

Section 408.103(a)(1) provides in relevant part that TIBs are to be computed "by subtracting the employee's weekly earnings after the injury from the employee's [AWW]." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.2(b) (Rule 129.2(b)) defines "lost wages" as the "difference between the employee's gross [AWW] and the employee's gross [PIE]." Rule 129.2(c) provides, in pertinent part, that PIE shall include "(1) all pecuniary wages paid to the employee after the date of the injury, including wages based on work performed while on modified duty . . . ." Section 401.011(43) defines "wages" as "all forms of remuneration . . . for personal services."

Having reviewed the record in this case, the determination of the hearing officer that

the claimant has not had PIE is not supported by sufficient evidence and is against the great weight and preponderance of the evidence so as to be manifestly unjust. The self-insured correctly sought to have the claimant's self-employment income reduce the amount of TIBs, contending that this "income," in whole or part, constituted wages earned for personal services as opposed to passive income. We agree with the self-insured, and therefore reverse and remand on this issue for the hearing officer to further consider and develop the evidence to determine the claimant's AWW and what weeks, if any, the claimant's PIE were equal to, or more than, the AWW, which in turn will decide the disability issue. On remand the hearing officer should be aware that only that income properly attributable to the claimant should be apportioned to her and not that which would be properly apportioned to her husband. Further, we note that proper business expenses, such as those allowed under generally accepted accounting principles, or the Internal Revenue Code, may be deducted from the total revenue to arrive at the proper "wage" allocation for the claimant. *See* Texas Workers' Compensation Commission Appeal No. 001222, decided July 14, 2000, citing Appeal No. 970519, *supra*.

The decision and order of the hearing officer are affirmed in part, and reversed and remanded in part.

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 Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **(SELF-INSURED EMPLOYER)** and the name and address of its registered agent for service of process is

____
Michael B. McShane
Appeals Judge

CONCUR:

____
Robert E. Lang
Appeals Panel
Manager/Judge

____
Robert W. Potts
Appeals Judge