DECISION OF THE SOCIAL SECURITY COMMISSIONER

1. I dismiss the claimant's appeal against the decision of the Doncaster appeal tribunal dated 15 August 2001.

REASONS

2. I held an oral hearing of this appeal at which the claimant appeared in person and the Secretary of State was represented by Miss Deborah Haywood of the Office of the Solicitor to the Department of Health and the Department for Work and Pensions.

3. The claimant works as a steward on race days at various racecourses around the country. The question that arises in this appeal is whether, in calculating his earnings for the purpose of his claims for income-based jobseeker's allowance, his travelling expenses are to be deducted. The Secretary of State decided that they were not and the tribunal dismissed the claimant's appeal. The claimant now appeals with the leave of a Commissioner.

4. The claimant has raised two serious issues. One is that the Benefits Agency insisted on dealing with each of his periods of work separately so that he kept on having to complete new claim forms. He points out that his hours of work and earnings could have been averaged over a longer period. Miss Haywood concedes that that is so and I understand that the practice has now changed. The claimant's second point is that his travelling expenses should be deducted from his earnings because otherwise he is less well off going to work than he would be if he stayed at home and did nothing.

5. Regulation 99 of the Jobseeker's Allowance Regulations 1996 provides:

> "**99**–(1) For the purposes of regulation 94 (calculation of earnings of employed earners) the earnings of a claimant derived from employment as an employed earner to be taken into account shall, subject to paragraph (2), be his net earnings.
>
> (2) Subject to paragraph (3), there shall be disregarded from a claimant's net earnings, any sum, where applicable, specified in paragraphs 1 to 16 and 19 of Schedule 6.
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> (3) For the purposes of of calculating the amount to be deducted in respect of earnings under regulation 80 (contribution-based jobseeker's allowance: deductions in respect of earnings) the disregards specified in paragraphs 5 to 8 and 11 of Schedule 6 shall not apply.
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> (4) For the purposes of paragraph (1) net earnings shall be calculated by taking into account the gross earnings of the claimant from that employment less –

(a) any amount deducted from those earnings by way of –

(i) income tax;

(ii) primary Class 1 contributions under the Benefits Act; and

(b) one-half of any sum paid by the claimant in respect of a pay period by way of a contribution towards an occupational or personal pension scheme."

6. The tribunal correctly observed that there was nothing in regulation 99 or in paragraphs 1 to 16 or 19 of Schedule 6 that referred to the deduction of expenses. Nor is there anything in regulations 94 or 98. However, regulation 98(1)(e) provides that "earnings" *includes* –

> "any payment made by the claimant's employer in respect of expenses not wholly, exclusively and necessarily incurred in the performance of the duties of the employment, including any payment made by the claimant's employer in respect of –
>
> (i) travelling expenses incurred by the claimant between his home and place of employment;
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> (ii) expenses incurred by the claimant under arrangements made for the care of a member of his family owing to the claimant's absence from home"

and regulation 98(2)(d) *excludes* –

> "any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment".

Thus the legislation deals with cases where the employer makes payments in respect of expenses and regulation 98(2)(d) makes it unnecessary for there to be any provision for the deduction of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment (including the expenses of travelling between different work places) where an employer reimburses the claimant for the expenses. What one might expect to find in the legislation and does not is any provision for the deduction of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment in a case where the employer has not reimbursed the claimant.

7. This apparent lacuna has been filled in relation to family credit (now known as working families' tax credit) and income support by the application in R(FC) 1/90 and R(IS) 16/93 of the approach taken by the Court of Appeal in relation to family income supplement in *Chief Adjudication Officer v. Hogg* [1985] 1 W.L.R. 1100 (also reported as an appendix to R(FIS) 4/85). As the jobseeker's allowance legislation is virtually indistinguishable from the legislation governing family credit and income

support, the same approach must be taken to regulation 99 of the Jobseeker's Allowance Regulations 1996. In effect "gross earnings" is to be taken as meaning "taxable earnings" so that expenses wholly, exclusively and necessarily incurred in the performance of the duties of employment and not reimbursed by the employer are to be deducted from the gross payments made by the employer.

8. This, however, does not help the claimant. As implied by regulation 98(1)(e)(i), travelling expenses from home to work are not wholly, exclusively and necessarily incurred in the performance of the duties of employment. It is plain that the phrase "wholly, exclusively and necessarily" is intended to have the same meaning in social security legislation as it has in tax legislation, where it determines which expenses are deductible by Schedule E taxpayers. It is to be presumed that that is why that familiar phrase was used and, by virtue of regulation 3 of the 1996 Regulations and section 2(1)(a) of the Social Security and Contributions and Benefits Act 1992, "employed earner" means "a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E". It is well established that travelling expenses cannot be deducted by Schedule E taxpayers (*Ricketts v. Colquoun* [1926] A.C. 1, *Pook v. Owen* [1979] A.C. 244), save in the exceptional case of a person who has two places of work in respect of one special employment entailing work that could be done by no-one else (*Taylor v. Provan* [1975] A.C. 194).

9. However, this raises a different question which is whether the tribunal was right to regard the claimant as an employed earner, rather than as a self-employed earner which, by virtue of regulation 1(3) of the 1996 Regulations and section 2(1)(b) of the 1992 Act simply means any "person who is gainfully employed in Great Britain otherwise than in employed earner's employment". By virtue of regulation 101 of the 1996 Regulations, the earnings of a self-employed earner are his net profit and his net profit is calculated by deducting any expenses wholly and exclusively defrayed for the purposes of the employment (regulation 101(4)(a), which is subject to exceptions immaterial to this case). The phrase "wholly and exclusively" is again derived from tax legislation. In *Horton v. Young* [1972] 1 Ch. 157, the Court of Appeal held that a self-employed bricklayer, based at home but working on different sites, was entitled to deduct his travelling expenses for Schedule D tax purposes because they were wholly and exclusively defrayed for the purposes of his employment. Therefore, if the claimant is a self-employed earner, the cost of travelling to racecourses would be deductible.

10. Miss Haywood, to whom I am greatly indebted for her helpful submissions, drew my attention to the factors to which regard must be had in deciding whether a person is an employed earner or a self-employed earner. They are derived from a number of authorities but are usefully brought together at page 100 *et seq* of Wikely, Ogus and Barendt's *The Law of Social Security* (5th ed, Butterworths, 2002), where they are listed as: supervision of work, powers of appointment and dismissal, form of remuneration, duration of contract, equipment, place of work, obligation to work and discretion on hours of work. None of these is decisive and looking at them I cannot help thinking that the distinctions drawn between employed earners and self-employed earners and between Schedule E taxpayers and Schedule D tax payers may have outlived their usefulness and result in differences in the treatment of individuals that are disproportionate to the differences in their circumstances. However, the law

requires the distinctions to be drawn. I accept the Secretary of State's submission that, in this context, the question whether or not a person is an employed earner is not a question transferred to an officer of the Board of Inland Revenue by section 8 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 and so remains a question for the Secretary of State under section 8 of the Social Security Act 1998 and, on appeal, a tribunal or a Commissioner.

11. On the basis that it might be necessary for me to decide whether the claimant was an employed earner or a self-employed earner, I heard some oral evidence from the claimant to supplement the written evidence in the papers before me. I accept the claimant's evidence. He explained that he works at a number of racecourses. Worcester, Southwell and Wolverhampton he said are owned by one company but the others are owned by individual companies. He had written to all the racecourses in the United Kingdom to indicate his desire to work for them. Some send out an availability form on which he says when he will be available. Courses ring him up when they wish him to work. If two ring up, he chooses to which he will go. He is free to choose not to go at all. On the day of the hearing before me he had been due to work at Worcester from 3 pm but had informed them that he would not be able to work until 6 pm and that had been accepted. Once he has agreed to work, he can ring up and say that he will not be available. He could just leave once he had started work, but he would not do so unless it was necessary and he would inform the manager as a matter of courtesy. Although he lives in Doncaster he does not work there because the company objected to him working at Epsom. (He told me that he had claimed unfair dismissal in respect of this treatment but had been unsuccessful, although on what grounds I do not know.) Many stewards are elderly people who work only at the racecourses near where they live but there are a number, like him, who travel further. When he works, he usually does so for the period of a meeting, which varies from one day to five. Some courses pay by the hour and some by the day and some pay each day and some pay monthly. Tax and Class 1 National Insurance contributions are now deducted at source, although that used not to be the case. He is told where to work by the raceday manager. Sometimes he works on the main gate, sometimes on the number board, sometimes in the car park and sometimes in the bar. There is always a supervisor. Apart from racecourses, he has worked at a cricket ground, Trent Bridge, during a test match. He considers that he has a talent for the work, which he describes as "customer care". At Worcester, Southwell and Wolverhampton he wears a uniform but at other courses he generally wears a suit, with a particular tie at Uttoxeter and a bowler hat at Ascot.

12. The first of the factors to be taken into account is the supervision of the claimant's work. He described himself as an employee because "when you work they are your bosses" and he is plainly told where to work and has a supervisor. That is not conclusive but tends to suggest that the claimant is an employed earner. The second factor is powers of appointment and dismissal but, as Wikely, Ogus and Barendt say, the only power that is really only significant in this type of case is the power to employ a substitute. The claimant could not do that and that, again points to him being an employed earner, although it is not conclusive. The third factor is the form of remuneration. Insofar, as he is paid for the time worked, that is not of significance one way or the other. Nor is the fact that he may be paid at regular monthly intervals rather then at the end of each period of work because that is the sort of arrangement a company may well have with a regular supplier of goods or services.

More significant is the fact that tax is deducted at source. That implies that the employer considers that the claimant is an employed earner and that the Inland Revenue consider he is a Schedule E taxpayer but is not conclusive because the nature of a contract is to be determined by looking at its substance rather than the way it is formulated. The fourth factor is the duration of the contract but that seems to me to be unhelpful because I cannot see any clear distinction between the position in this regard of a casually-employed employed earner and a self-employed earner. The fifth factor is whether the employee provides his own equipment. The fact that he sometimes wears a uniform tends to suggest that he is an employed earner and I do not think that that indication is weakened by the fact that he provides his own bowler hat at Ascot. The sixth factor, place of work, is significant only if a claimant works from home, which this claimant does not. The seventh factor is the obligation to provide work. None of the racecourses is obliged to provide the claimant with work and he can pick and choose whether to take such offers as there are. At first sight, this tends to suggest that the claimant is a self-employed earner but again I find it difficult to distinguish between the position of a casually-employed employed earner and a self-employed earner. The eighth factor is the employee's discretion as to the hours of work. It seems to me that this points to the claimant being an employed earner, although it is not conclusive. Once employed, the claimant is employed for a particular number of hours on specified days. He cannot choose to perform his duties on a day when there is no meeting and, although in practice he could just decide to leave his work early and might not suffer any adverse consequences provided he informed the raceday manager, I think the claimant would regard it as a breach, or at least a variation, of his initial obligation.

13. On balance, I consider that the claimant is an employed earner each time he is employed at a racecourse. His employment is casual but that does not make the claimant a self-employed earner. In reaching this conclusion, I have considered the case of *O'Kelly v. Trusthouse Forte PLC* [1983] I.C.R. 728 where the Court of Appeal upheld a finding by an industrial tribunal that casually employed catering staff were not "employees". The industrial tribunal had decided that the lack of obligation to provide employment was crucial. Their decision was reversed by the Employment Appeal Tribunal on the basis that each separate period of employment involved a separate contract of employment. The Court of Appeal reversed the decision of the Employment Appeal Tribunal and restored the decision of the industrial tribunal but their decision was hardly a ringing endorsement of the industrial tribunal's decision. The majority, Sir John Donaldson MR and Fox LJ, held that the Employment Appeal Tribunal had erred because they had no jurisdiction to interfere with the industrial tribunal's decision in the absence of an error of law but the Master of the Rolls did say that the industrial tribunal's decision, although not "perverse", "may have been surprising". Ackner LJ considered the Employment Appeal Tribunal to have erred only in not remitting the question whether there were separate contracts of employment to an industrial tribunal, the fact-finding role of the Employment Appeal Tribunal being narrower than that of a Social Security Commissioner. I am satisfied that the decision of the Court of Appeal does not require me to find that the claimant in the present case was a self-employed earner.

14. Of course a Commissioner is entitled to substitute a decision made on the basis of his own findings of fact only if the tribunal's decision is erroneous in point of law. Ms Haywood argued that the tribunal erred in law in not considering whether the

claimant was a self-employed earner. As I would decide that the claimant was not a self-employed earner it is unnecessary for me to express a view as to whether the tribunal were obliged to consider that point, or were obliged to record in their reasons that they had consider that point, when it was not argued before them and the assumption on which they proceeded was correct. Either the tribunal did not err in law or he erred in law but I would substitute a decision to the same effect as his. In either event, the practical effect of my decision is that the claimant's appeal is dismissed.

15. The claimant has argued that it is unreasonable for him to be put in the position where he is better off, for at least part of the year, if he stays at home than if he goes to work. I am not sure that there are not arguments that the Secretary of State could not advance against the claimant's position, particularly as to the possibility of finding suitable, albeit not identical, employment nearer his home. However, I am obliged to apply the law whether it is fair or unfair and so I need not enter into this issue any further.

(signed) **MARK ROWLAND**
Commissioner
19 December 2002