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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000850-WC

JOSEPH JEWELL — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-11-00091

FORD MOTOR COMPANY;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Joseph Jewell appeals from an opinion and order of the Workers' Compensation Board affirming in part and reversing in part the decision

of the Administrative Law Judge (ALJ) as to what constitutes "wages" pursuant to KRS 342.140(6).

Jewell works for Ford Motor Company at its Louisville assembly plant. It is Ford's practice to periodically temporarily layoff workers when retooling or demand is reduced. During such periods, Ford applies for state unemployment benefits on behalf of its workers and also pays supplemental unemployment benefits (SUB) to them pursuant to a collective bargaining agreement. Between unemployment benefits and SUB pay, workers are paid 95% of their standard wages while laid off and then return to work at their original wages.

Jewell received a work-related injury, filed a workers' compensation claim and was awarded temporary total disability benefits and permanent partial disability benefits as an hourly worker under KRS 342.140(1)(d). Neither party challenges his impairment and entitlement to benefits. The only issue on appeal is whether in calculating Jewell's average weekly wage (AWW), "wages" should include unemployment benefits and SUB pay.

During Jewell's most favorable quarter used to calculate his AWW pursuant to KRS 342.140(1)(d), Jewell was laid off one week. Ford argues Jewell received zero wages for this week and Jewell argues he received wages in the form of $373 in unemployment benefits and $400 in SUB pay which should be counted in calculating his AWW.

On November 20, 2012, the ALJ awarded Jewell workers' compensation benefits and calculated his AWW without including his unemployment benefits, but included his SUB pay. Both Jewell and Ford moved for reconsideration, which was denied on December 6, 2012.[1]

Jewell and Ford filed cross-appeals with the Board. On April 12, 2013, the Board affirmed in part and reversed in part, determining the ALJ correctly rejected unemployment benefits as wages, but incorrectly included SUB pay as wages. Jewell appealed.

On appeal, we are presented with a pure legal issue as to the correct interpretation of a statute. "The interpretation to be given a statute is a matter of law, and we are not required to give deference to the decision of the Board." *Wilson v. SKW Alloys, Inc.*, 893 S.W.2d 800, 801-802 (Ky.App. 1995).

It is a matter of first impression in Kentucky whether unemployment benefits and SUB pay should be considered wages for purposes of the workers' compensation statute. We look to the language and previous interpretations of the statute to decide whether these payments should be considered wages. In interpreting statutes, we seek to "ascertain from their terms, as contained in the entire enactment, the intent and purpose of the Legislature, and to administer that intent and purpose." *Lach v. Man O'War, LLC*, 256 S.W.3d 563, 568 (Ky. 2008). To the extent words in the statute's definitions are not defined, we give them their common and literal meanings unless to do so would lead to an absurd result.

[1] The ALJ did grant reconsideration to correct a typographical error.

Kentucky Unemployment Ins. Co. v. Jones, 809 S.W.2d 715, 716-717 (Ky.App. 1991); KRS 446.080(4).

We liberally construe statutes "to promote their objects and carry out the intent of the legislature[.]" KRS 446.080(1). Workers' compensation statutes are to be interpreted consistently with their beneficent purpose. *Jewish Hosp. v. Ray*, 131 S.W.3d 760, 764 (Ky.App. 2004); *Wilson*, 893 S.W.2d at 802. However, "we must also keep in mind the duty of the Court to construe the law so as to do justice both to employer and employee." *Fitzpatrick v. Crestfield Farm, Inc.*, 582 S.W.2d 44, 47 (Ky.App. 1978).

Under KRS 342.140(6) the term "wages" is defined as (1) "money payments for services rendered[;]" (2) "the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the employer[;]" and (3) "gratuities received in the course of employment from others than the employer to the extent the gratuities are reported for income tax purposes."[2] Whether Jewell's unemployment benefits or SUB pay should be included as wages involves an interpretation of the first two categories of wages. Jewell has the burden of proving every element of his claim, including his AWW. *Fawbush v. Gwinn*, 103 S.W.3d 5, 10 (Ky. 2003).

[2] KRS 342.0011(17) gives an almost identical definition: "'Wages' means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging, fuel, or similar advantages received from the employer, and gratuities received in the course of employment from persons other than the employer as evidenced by the employee's federal and state tax returns[.]"

Jewell argues his state unemployment benefits should be considered wages because under KRS 342.730(5) employers are entitled to a credit for unemployment benefits, the benefits are paid directly to him and taxable, and are part of his pay based upon his contractual "regular benefits."

Wages fixed by a period of time are earned by work performed during that period of time. *See* KRS 342.140(1)(e) (using subsection (d) to compute wages for an employee working less than thirteen weeks as "the amount he or she would have earned had he or she been so employed . . . and had worked"); *Anderson v. Homeless & Hous. COA*, 135 S.W.3d 405, 413 (Ky. 2004) ("Payment for work constitutes 'wages' if it is proportional to the type of work that is performed and not gauged by what is required for subsistence.")

If the source of claimed "wages" is not derived from regular employment, these payments cannot be considered for calculating AWW. In *Justice v. Kimper Volunteer Fire Dept*., 379 S.W.3d 804 (Ky.App. 2012), Justice, an unpaid volunteer firefighter, was injured while responding to a rescue call. As a volunteer firefighter, he was entitled to income benefits based on his AWW from his regular employment. KRS 342.140(3). The ALJ rejected Justice's claim for workers' compensation benefits, finding Justice had no regular employment or income when he was injured because he was laid off from a prior job and was drawing unemployment benefits. *Justice*, 379 S.W.3d at 805-806. In a petition for reconsideration, Justice argued the unemployment benefits he received following his layoff should have been included in calculating his AWW. *Id.* at 806. The

ALJ denied his petition and the Board affirmed, stating "We believe any attempt to attribute an average weekly wage to Justice would be speculative and result in an artificial average weekly wage. Therefore, we find no error in the ALJ's determination Justice had no average weekly wage at the time of the injury." *Id.* at 807. Our Court affirmed, concluding "in the absence of being engaged in 'regular employment,' a workers' compensation claimant has no AWW from which disability income benefits can be based." *Id.* at 808. Although the Court did not directly state in *Justice* that unemployment benefits are not wages, the determination Justice had no regular employment from which to calculate AWW implies they are not.

State unemployment benefits cannot qualify as wages because they are not "money payments for services rendered[.]" Instead, unemployment benefits are the antithesis of wages because they are paid to employees by the state when services are not rendered to the employer. Unemployment benefits are a wage substitute and social benefit that protects workers from variations in the business cycle, rather than compensation for work. *Reifsnyder v. W.C.A.B. (Dana Corp.)*, 584 Pa. 341, 359-360, 883 A.2d 537, 548 (2005); *Parise v. Indus. Comm'n*, 16 Ariz. App. 177, 179, 492 P.2d 426, 428 (1971); *Devon C. Negethon, Petitioner*, 2006 MTWCC 40, 5 (Mont. Work. Comp. Ct. 2006).

Accordingly, we agree with the Board's determination unemployment benefits are not wages.[3] We join our sister courts' uniform rejection of including

[3] We note the Board has previously determined unemployment benefits should not be considered wages, but this issue was not considered on appeal. *See Desa Intern., Inc. v. Barlow*, 59 S.W.3d

unemployment benefits as wages for purposes of calculating workers' compensation benefits. *See Strand v. Hansen Seaway Serv., Ltd.*, 614 F.2d 572, 576 (7th Cir. 1980) (state unemployment compensation is not "earnings" under the Longshoremen's and Harbor Workers' Compensation Act and, therefore, cannot be used to calculate AWW); *State ex rel. Warner v. Indus. Comm.*, 2012-Ohio-1084, 131 Ohio St. 3d 366, 369, 965 N.E.2d 288, 292 (2012); *In re Mike's Case*, 73 Mass. App. Ct. 44, 49, 895 N.E.2d 512, 515 (2008); *Reifsnyder*, 584 Pa. at 360, 883 A.2d at 548; *Zanger v. Indus. Comm'n*, 306 Ill. App. 3d 887, 892, 715 N.E.2d 767, 770 (1999); *Page v. Gen. Elec. Co.*, 391 A.2d 303, 306 n.2 (Me. 1978); *Parise*, 16 Ariz. App. at 179, 492 P.2d at 428; *In the Matter of Michael Drew, Claimant*, AHD 11-373 A, 2013 WL 5934094, 6 (D.C. Dept. Emp. Srvs. 2013); *Devon C. Negethon, Petitioner*, 2006 MTWCC 40 at 5.

We are not persuaded the treatment of unemployment benefits under KRS 342.730(5) or the taxation status of these benefits is relevant to whether they constitute wages under KRS 342.140(6). *See State ex rel. Warner*, 2012-Ohio-1084, 131 Ohio St. 3d at 369, 965 N.E.2d at 292 (determining federal taxability is irrelevant to whether a source of income should be included in an AWW calculation).

Jewell further argues that his SUB pay should be considered wages because it is given in exchange for services rendered. He explains it is bargained for pay

872 (Ky. 2001).

which Ford pays directly to him, is accounted for on a W-2 form with taxes withheld and is part of an overall payment scheme to retain employees.

The KRS 342.140(6) definition of "wages" does not include all amounts paid to an employee. "Money payments for services rendered" includes overtime hours paid at the employee's regular hourly rate, a higher base wage for working an undesirable shift, pay for exceeding base output requirements during normal working hours and similar forms of income. *The Gap v. Curtis*, 142 S.W.3d 111, 113 (Ky. 2004); *Whittaker v. Robinson*, 981 S.W.2d 118, 120 (Ky. 1998); *Denim Finishers, Inc. v. Baker*, 757 S.W.2d 215, 216 (Ky.App. 1988); *R. C. Durr Co., Inc. v. Chapman*, 563 S.W.2d 743, 745 (Ky.App. 1978).

Wages do not include amounts paid for profit-sharing bonuses, overtime and premium pay. *Pendygraft v. Ford Motor Co*., 260 S.W.3d 788, 792 (Ky. 2008); *Whittaker*, 981 S.W.2d at 120; *Denim Finishers, Inc.*, 757 S.W.2d at 216; KRS 342.140(1)(d), (e). Fringe benefits such as employer pension plan contributions, health insurance benefits, life insurance premiums and the value of training and control are similarly excluded from being wages. *Salvation Army v. Mathews*, 847 S.W.2d 751, 753-754 (Ky.App. 1993); *Rainey v. Mills*, 733 S.W.2d 756, 758 (Ky.App. 1987).

After examining Ford's SUB pay plan, we agree with Jewell that SUB pay should be considered part of his wages because they are in the nature of wages rather than fringe benefits, including them in calculating Jewell's AWW will aid in advancing the remedial goals of the workers' compensation statute and excluding

them would artificially deflate the calculation of his AWW. The Commonwealth Court of Pennsylvania evaluated a very similar workers' compensation statute to our own in *Bucceri v. W.C.A.B. (Freightcar America Corp.),* 31 A.3d 985 (Pa. Commw. Ct. 2011), and determined SUB payments should be considered wages for calculating a claimant's AWW, explaining as follows:

> the purpose of calculating AWW . . . is to create a reasonable picture of a claimant's pre-injury earning history to use as a projection of potential future wages to determine the corresponding wage loss. . . . Thus, the calculation is designed to focus on the economic reality of a claimant's recent pre-injury earning experience.

Id. at 990 (internal citations and quotation omitted). While unemployment benefits are not to be included in calculating AWW, SUB payments made pursuant to a collective bargaining agreement "are in the nature of wages . . . if such payments are an entitlement accrued as a result of the claimant's services for the employer." *Id*. SUB pay is not a fringe benefit because it is direct pay. *Id.* at 991. Therefore, if SUB payments are excluded from the calculation of AWW, this artificially deflates a claimant's earning history and earning capacity and fails to provide adequate compensation. *Id.*

Similarly, the Iowa Workers' Compensation Commission has repeatedly included SUB pay in the calculation of workers' weekly compensation rate. SUB pay fits within its definition of earnings because it is a "recurring payment by an employer to the employee for employment" and is not listed among payments

excludable under its statute. *Alfred Chia, Claimant*, FILE NUMBER: 1015200, 1994 WL 16019992, 10-11 (Iowa Workers' Comp. Com'n 1994).

We agree Ford's SUB pay should be considered part of Jewell's wages for purposes of calculating his AWW, because it is part of his base wage paid during periods of layoffs to retain him as an employee. Ford pays its employees this extra amount when they are not working so they will remain available to resume working for Ford later, rather than pursuing other, more steady employment.

Accordingly, we affirm the opinion and order of the Board excluding unemployment benefits for the purpose of calculating AWW, but reverse and remand for inclusion of SUB pay in the calculation of AWW.

ALL CONCUR.

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