COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2007-SC-658

SARAH L. PENDYGRAFT — APPELLANT

v. **BRIEF ON BEHALF OF APPELLANT, SARAH L. PENDYGRAFT (COURT OF APPEALS NO. 2007 – CA – 000613 – WC; OWC NO. 2003 – 00550)**

FORD MOTOR COMPANY,
WORKERS' COMPENSATION BOARD,
and ALJ JAMES L. KERR — APPELLEES

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CERTIFICATE OF SERVICE

I hereby certify that the original and ten (10) copies hereof were filed, by mailing said documents via the U.S. mail on this the 7 day of November, 2007 with: Kentucky Supreme Court, Clerk, State Capital Building, Room 209, 700 Capital Avenue, Frankfort, Kentucky 40601-3488. It is further certified that a copy hereof was mailed to: The Workers' Compensation Board c/o William Emrick, Executive Director, Office of Workers' Claims, 657 Chamberlin Avenue, Prevention Park, Frankfort, Kentucky 40601; Mr. Wesley Gatlin, 2300 Aegon Center, 400 W. Market Street, Louisville, Kentucky 40202; and James L. Kerr, ALJ, 2780 Research Park Drive, Spindletop Office Complex, Lexington, Kentucky 40511.

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MAY IT PLEASE THE COURT:

INTRODUCTION

PARTIES

The Appellant is Ms. Sarah L. Pendygraft who is represented by Tamara Todd Cotton and Christopher P. Evensen of Cotton & Evensen, PLLC, 429 W. Muhammad Ali Boulevard, Suite 1102, Louisville, Kentucky 40202. The Appellees are (i) The Workers' Compensation Board, (ii) Administrative Law Judge James L. Kerr, 2780 Research Park Drive, Spindletop Office Complex, Lexington, Kentucky 40511and (iii) Ford Motor Co., represented by Mr. Wesley Gatlin, 2300 Aegon Center, 400 W. Market Street, Louisville, Kentucky 40202.

MATTERS IN LITIGATION

No other matters remain in litigation between the parties.

NEED FOR ORAL ARGUMENTS

Appellant, Sarah L. Pendygraft, does not requests oral arguments on this matter.

STATEMENT OF BENEFITS PENDING REVIEW

Appellant, Sarah L. Pendygraft has received past-due TTD benefits and PPD benefits without enhancement by the (3) factor of KRS 342.730(1)(c)(1).

ISSUE

Appellant, Sarah L. Pendygraft, hereby Appeals from the Opinion rendered by the Court of Appeals on August 10, 2007 wherein the Court of Appeals Reversed and Remanded an Opinion of the Workers' Compensation Board (hereinafter the Board) rendered on February 23, 2007 in which the Board affirmed the Opinion, Order & Award of Administrative Law Judge James L. Kerr (hereinafter ALJ Kerr) rendered July 21,

2006. The issue before this Court is whether the Court of Appeals erred in Reversing the Board's affirmation of ALJ Kerr's finding profit sharing bonuses are to be included in calculation of Ms. Pendygraft's pre-injury average weekly wage.

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I. **THE COURT OF APPEALS ERRED IN REVERSING THE OPINION OF THE WORKERS' COMPENSATION BOARD WHICH AFFIRMED ALJ KERR'S FINDING PROFIT SHARING BONUSES ARE TO BE INCLUDED IN CALCULATION OF MS. PENDYGRAFT'S PRE-INJURY AVERAGE WEKLY WAGE** 10-11

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(1) Court of Appeals Opinion (8/10/07)

(2) WCB Opinion (2/23/07)

(3) Opinion of ALJ Kerr (7/21/06)

On July 18, 2005, Dr. Keith Wilkey diagnosed Degenerative Disc Disease and Herniated Disc L4-5, Status Post Interbody Fusion L4-5, Right L5 Radiculopathy -- Moderate – Chronic. Dr. Wilkey opined Ms. Pendygraft's diagnoses are directly related to cumulative trauma sustained during her employment at the Ford Motor Company, assessed **28% whole person impairment** for Ms. Pendygraft's Back condition pursuant to DRE Category V of the 5th Edition of the AMA Guidelines and recommended permanent restrictions to avoid bending, lifting, twisting, driving, standing, and walking as tolerated.

Ms. Pendygraft has continued to work at Ford and has consistently earned less than her pre-injury Average Weekly Wage of $1,586.23 (with bonuses). Ms Pendygraft has averaged less than $1,586.23 in each of the 17 post-injury quarters. (Plaintiff's Transcript Exhibit #1; Comparison of pre-injury Average Weekly Wage with bonuses against post-injury Average Weekly wage with bonuses)

OPINION & AWARD BY ALJ JAMES L. KERR

ALJ Kerr found Ms. Pendygraft suffered a work-related Back injury for which she gave timely notice and which resulted in 28% whole-person impairment. ALJ Kerr, further, found Ms. Pendygraft lacked the physical capacity to return to the "tug" operator job she was performing at the time of her injury. ALJ Kerr found Ms. Pendygraft's pre-injury average weekly wage was $1,586.23 based on the calculations submitted by Ms. Pendygraft, which included bonus pay, (Plaintiff's Transcript Exhibit #1). ALJ Kerr found Ms. Pendygraft earned less than her pre-injury average weekly wage in all 17 post-injury quarters and, therefore, applied the (3) factor of KRS 342.730(1)(c)(1) to her

award of benefits. ALJ Kerr awarded past-due TTD and PPD based on 28% and the (3) factor. (Opinion & Award 7/21/06, pp. 9-11)

Ford Petitioned for Reconsideration requesting ALJ Kerr make a specific finding that profit sharing bonuses should not be considered in calculation of average weekly wage. (Defendant's Petition for Reconsideration 8/3/06)

ALJ Kerr Overruled Defendant's Petition for Reconsideration. (Order on Petition for Reconsideration 9/29/06) Ford Appealed to the Workers' compensation Board.

OPINION OF THE WORKERS' COMPENSATION BOARD

By Opinion entered February 23, 2007, the Board Affirmed the Opinion of ALJ Kerr. In so doing, the Board relied on recent opinions it had issued addressing the issue of bonuses in calculation of pre-injury average weekly wage. Specifically, the Board adopted, and reprinted, the opinion it set forth in Linda Bond v. Eminence Speaker, LLC, Claim No. 04-80145, entered October 24, 2006, in which the Board set forth a detailed examination of the issue with analysis from multiple jurisdictions, in finding profit sharing bonuses should be included in calculation of a claimant's pre-injury average weekly wage.

First, the Board found a profit sharing bonus is distinguishable from "premium pay," which would be excluded from the average weekly wage calculation pursuant to KRS 342.140(1)(d). Second, the Board found a profit sharing bonus is distinguishable form "fringe benefits," which would be excluded from the average weekly wage calculation pursuant to the holding in Rainey v. Mills, 733 S.W.2d 756 (Ky.App. 1987). Finally, the Board found statutory construction does not require the exclusion of profit sharing bonuses from the average weekly wage calculation due to their specific omission

from the statute(s), (KRS 342.0011(17) and KRS 342.140(6)), just as fringe benefits were excluded, because profit sharing bonus payments represent "money payments for services rendered" and are, therefore, within the Statutory definition of "wages" and includable in calculation of average weekly wage. The Board noted such was the finding of a majority of sister jurisdiction which have addressed the same issue. Specifically, the Board held;

> In The Gap v. Curtis, 142 S.W.3d 111 (Ky. 2004), the supreme court addressed the issue of "premium pay" in the context of what is commonly known as a "shift differential." The administrative law judge had excluded from the calculation of the claimant's AWW an additional fifty cents per hour she was paid for working the undesirable third shift. The Board reversed, concluding that the differential paid to the claimant and all other employees working the third shift was part of their regular hourly rate and, therefore, should be included in the AWW calculation. The supreme court agreed with the Board and offered the following analysis of the wage issue:
>
> > Chapter 342 does not define 'overtime or premium pay." Therefore, it is unclear whether the legislature intended to exclude two distinct types of pay or to exclude only the premium that is added to an individual's hourly wage for hours worked in excess of the regular work week. Two decisions have addressed the meaning of the exclusion.
> >
> > In R.C. Durr Co., Inc. v. Chapman, Ky. App., 563 S.W.2d 743 (1978) the Employer maintained that KRS 342.140 (1) (d) limited a worker's average weekly wage to his pay for forty hours a week and excluded any pay from working overtime. Rejecting the argument, the court determined:
> >
> > > The exclusion of overtime or premium pay in KRS 342.140(1) (d) refers to pay in excess of the employee's regular hourly rate because of the extra hours worked. It does not restrict the calculation of the employee's average weekly wage to the forty hour week.
> >
> > Id. at 745. The court concluded, therefore, that Chapman's average weekly wage was the product of sixty hours that he worked each week and his base hourly rate. It took into account the overtime hours but at the regular hourly pay

rate. In Denim Finishers v. Baker, supra, the employer asserted that the extra six cents per pair Ms. Baker received for pressing more than 350 pairs of pants in a forty-hour week was 'premium pay' and must be excluded when calculating her average weekly wage. The court rejected the argument, stating that the evidence suggested the extra payment constituted 'output pay' for her output above 350 pairs. Id. at 216. Relying on Durr v. Chapman, supra, the court also noted that Ms. Baker worked no extra hours and that KRS 342.140(1) (d)'s exclusion referred to 'pay in excess of the employee's regular hourly rate *because of the extra hours worked.*' Id. (emphasis original).

The plain language of KRS 342.140 (1) (d) could be construed either as referring to two distinct types of pay or as equating them. The employer argues that by adopting the latter construction in Denim Finishers v. Baker, supra, the court effectively negated the term 'premium pay' from the statute. We disagree. Despite dicta that could be read as equating the definitions of overtime and premium pay, Denim Finishers concerned only the principle that extra pay for each item produced in excess of a stated number per 40-hour week was a form of 'output pay.' The decision was rendered in 1988, and the legislature has not seen fit to amend KRS 342.140 (1) (d) or to define 'premium pay' since that time. For that reason, we are not persuaded that the decision was at odds with the legislative intent. We have concluded that the present circumstances do not require us to define the term 'premium pay.' Nonetheless, mindful that no statute defines the term and that questions regarding its meaning are likely to arise again, we note that a regulation defining the term would be helpful to both the bench and bar.

Like Ms. Baker, the claimant was not paid extra in return for working more than forty hours per week. The employer maintains that she performed the same work as day-shift employees and that the shift differential was 'premium pay,' but we are persuaded that she provided an additional service to the employer by working at an undesirable time. It was for that service that she received fifty cents more per hour. As a result, she had a greater earning capacity than a comparable day-shift worker. Therefore, consistent with the previous decisions, her average weekly wage takes that into account.

Id. At 112-113.

Unfortunately, we are no closer at this point to a statutory or regulatory definition of "premium pay." However, in light of the court's holding in Curtis, supra, and being informed by treatment of the subject in other jurisdictions and scholarly treatises, we conclude that "premium pay," as used in KRS 342.140(1), is extra compensation provided by a premium rate paid for work by an employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in non-overtime hours on other days. *Cf.* KRS 337.285 (1); 803 KAR 1:060; Bragg v. Champion Intern. Corp., 636 A.2d. 436 (Me. 1994) ("double time" pay for working on Sundays described as "premium pay").

"Premium pay" is akin to overtime pay in that it comprises a fixed hourly wage paid for work performed at extraordinary time, at a rate directly related to but greater than the regular hourly rate of pay. Indeed, the term "premium" pay is often used to describe merely that additional hourly amount paid on account of working "overtime" hours. *Cf.* 12 Couch on Ins. §173:47 (referring to statutes where "pay for regular overtime work may be considered in determining average wages, but the hourly rate for such work must be figured without addition of an overtime premium"); 82 Am.Jur.2d *Workers' Compensation* §431 (distinguishing hourly rate for "regular overtime work" from additional pay for "overtime premium") (both treatises citing R.C. Durr Co., Inc. v. Chapman, supra).

In the case *sub judice*, the income received by Bond through Eminence's profit-sharing plan was based on company profits and disbursed according to length of service and attendance. It was unrelated to particular dates or specific times worked by individual employees and, therefore, does not fit within the definition of "premium pay." ... Bond's income from the profit-sharing plan need not be classified as "output pay" in order to be included in her AWW.

The only reference in the statutes to "output" is found in KRS 342.140 (1) (d), which sets forth the method of calculating AWW for employees whose "wages were fixed by the day, hour, or by the output of the employee." KRS 342.140(1) (d) merely prescribes the formula for calculating AWW. While the statute specifically excludes from this calculation those wages representing "overtime or premium pay," it does not attempt to delineate what is or is not encompassed by the term "wages" in the first instance.

KRS 342.0011(17) defines the term "wages" to mean, "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." The question, then, is whether the distribution to Bond from Eminence's profit-sharing plan falls somewhere within this definition. We conclude it does. Specifically, **we believe the distribution to Bond qualifies as "money payments for services rendered."** (Emphasis added)

Reviewing KRS 342.0011(17), it may be noted that the general phrase "or similar advantages received from the employer" follows the specific items of board, rent, housing, lodging, and fuel. Thus, applying the rules of statutory construction, the court of appeals had held that the "similar advantages received" must be of the same class as those specifically delineated. Rainey v. Mills, 733 S.W.2d 756, 758 (Ky.App. 1987). From this principle, the court further reasoned that "similar advantages" does not include fringe benefits, such as employer pension plan contributions, health insurance benefits and life insurance premiums. Id. at 757-8. Because the legislature had not expressly included fringe benefits in the definition of "wages," the court held such benefits were not intended to be encompassed within the workers' compensation scheme. Id. at 758.

In so ruling, the court of appeals cited similar rulings from other jurisdictions with nearly identical wage definitions, Nelson v. SAIF Corporation, 78 Or. App. 75, 714 P.2d 631 (1986), and Wengler v. Druggists Mutual Ins. Co., Mo.App., 616 S.W.2d 859 (1981). Professor Larson notes that the exclusion of fringe benefits from the definition of "wages" for purposes of workers' compensation is the majority position, in accord with the Unites States Supreme Court's ruling in Morrison-Knudsen Const. Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor, 461 U.S. 624, 103 S.Ct. 2045 (1983) (employer contributions to union trust funds for health and welfare, pensions, and training are not "wages" for the purpose of computing compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, § 2(13), as amended, 33 U.S.C.A. §902(13) ("Longshore Act")).

Two obvious questions arise from the foregoing analysis. First, do the payments made to Bond under the profit-sharing plan qualify as "fringe benefits," so as to be excluded under Rainey v. Mills, supra? Second, if the rules of statutory construction require us to exclude fringe benefits from the definition of "wages" based on the legislature's omission of such benefits from those specifically enumerated in KRS 342.0011 (17), then are we not also required to exclude bonuses such as that

received by Bond under the profit-sharing plan at issue? We conclude both questions must be answered in the negative.

"Fringe benefits" have traditionally referred to goods or services purchased by the employer for the employee. They generally do not include cash payments made by the employer directly to the employee. *Cf.* Reliance Ins. Co. v. Com., Dept. of Transp., 576 S.W.2d 231 (Ky.App. 1978) (acknowledging distinction between payments of cash and contributions for fringe benefits, necessitating specific statutory language to ensure fringe benefits are included in prevailing wage on public works). The U.S. Supreme Court's holding in Morrison – Knudsen, supra, was codified in the 1984 amendments to the Longshore Act, which now provides, "The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement." 98 Stat. 1639 § 2(13). "Most often, fringe benefits take the form of some benefit other than an immediate payment of cash, for example, employer contributions specifically earmarked for the purchase of health, disability, or retirement insurance. The payment of a cash bonus does not fall within the description of fringe benefits." McAdam v. United Parcel Service, 763 A.2d. 1173, 79 (Me. 2001).

Likewise, we conclude the cash **payments made to Bond under Eminence's profit-sharing plan do not constitute "fringe benefits" and are not, for that reason, excluded from the definition of "wages"** pursuant to Rainey v. Mills, supra. Moreover, we do not believe the rules of statutory construction, which operated to exclude "fringe benefits" from the definition of "wages" in Rainey, supra, have like application to the profit-sharing distributions received by Bond. On the contrary, **we believe the rules of statutory construction compel inclusion of the payments made to Bond under Eminence's profit-sharing plan within the definition of "wages."** (Emphasis added)

KRS 446.080(1) provides, "All statutes of this state shall be liberally construed with a view to promote their objects and carry our the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state." Subparagraph (4) of the statute further provides, "All words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning." In accordance with these principles, **we hold that, as a matter of law, the cash payments made to Bond under Eminence's profit-sharing plan constitute "money**

payments for services rendered." KRS 342.0011(17). (Emphasis added) ...

It is worthwhile to note that the inclusion of payments made to Bond under Eminence's profit-sharing plan in the AWW calculation is in line with the majority of jurisdictions that have considered the issue, many in the context of wage statutes worded similarly to Kentucky's. *See, e.g.,* Ellen Kaye, Inc. v. Wigglesworth, 34 Va.App. 390, 542 S.E.2d 30 (2001) (bonus included in average weekly wage); Blaine v. Unum Life Ins. Co., 249 A.D.2d 633, 670 N.Y.S.2d 989 (1998) (average weekly wage properly included amounts received in settlement of dispute over salesperson's year-end bonus); Simmonds v. Eastman Kodak Co., 781 P.2d 140 (Colo.Ct.App. 1989) (wage dividend included in taxable earnings to be considered part of average weekly wage, notwithstanding discretionary nature of distribution(; Sullivan v. Empire Equip. Eng'g Co., Inc., 492 A.2d 1212 (R.I. 1985) (year-end bonus, if established in the record, should be included in wage calculation); Lane Enters. V. Workmens' Comp. Appeal Bd., 644 A.2d 726 (Pa. 1994) (year-end bonus could be included in average weekly wage calculation, pro-rated as wages over the entire year).

OPINION OF THE COURT OF APPEALS

By Opinion entered August 10, 2007, the Court of Appeals Reversed the Opinion of the Board which had Affirmed the Opinion of ALJ Kerr including profit sharing bonuses in calculation of Ms. Pendygraft's pre-injury average weekly wage. In so doing, the Court of Appeals found, "[S]ince profit sharing is not specifically contemplated by the statute, we decline to expand the meaning of 'wages.'" Further, the Court of Appeals found payment of cash bonuses does not qualify as "money payments for services rendered," and payment of cash bonuses is not a "similar advantage" to "board, rent housing, lodging [or] fuel." In making such a finding, the Court of Appeals relied Rainey v. Mills, supra, which excluded "fringe benefits" from average weekly wage calculations and on a Minnesota case which held profit sharing disbursements should not be included in calculation of average weekly wage.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REVERSING THE OPINION OF THE WORKERS' COMPENSATION BOARD WHICH AFFIRMED ALJ KERR'S FINDING PROFIT SHARING BONUSES ARE TO BE INCLUDED IN CALCULATION OF MS. PENDYGRAFT'S PRE-INJURY AVERAGE WEKLY WAGE

Counsel maintains the interpretation and analysis set forth by the Board regarding the inclusion of profit sharing bonuses in calculation of pre-injury average weekly wage was correct because such payments do, indeed, come within the definition of "wages" set forth in KRS 342.0011(17) and KRS 342.140(6). As noted by the Board, such a finding was in accordance with a majority of sister jurisdictions which have addressed the issue. Counsel maintains the Court of Appeals' Reversal of such a finding was in error as profit sharing bonuses clearly qualify as, "money payments for services rendered."

Stated briefly, the bonus in this case was a "money payment" to Ms. Pendygraft, (subject to income taxation), in return for work she performed for the Employer. Even the Ford representative, Mr. Corkum, acknowledged bonus pay, "goes in to what she [Ms. Pendygraft] takes home as a paycheck from Ford." (Corkum Depo. p. 12) (Brackets added) In Denim Finishers, Inc. v. Baker, 757 S. W. 2d 215 (Ky. App., 1988), the Court of Appeals found bonuses, (a production bonus in that case), can be included in calculation of average weekly wage. Therefore "bonus" payments have been found to be includable in average weekly wage calculations and distinct from "fringe benefits," (i.e. services purchased by the employer for the employee such as life insurance or health insurance premiums), which have been excluded from calculation of average weekly wage pursuant to Rainey v. Mills, supra.

Because bonus payments are necessarily different than fringe benefits, the Court of Appeals' reliance on Rainey v. Mills, supra, to exclude bonus payments is misplaced. Also misplaced is the Court of Appeals reliance on a Minnesota Supreme Court Case, (Stewart v. Ford Motor Co., 474 N.W2d 162 (Minn. 1991)), as such represents a minority view from sister jurisdictions. The Board's thorough opinion clearly pointed out inclusion of payments made under a profit-sharing plan in the average weekly wage calculation is in line with the majority of jurisdictions that have considered the issue, many in the context of wage statutes worded similarly to Kentucky's. Citing Ellen Kaye, Inc. v. Wigglesworth, 34 Va.App. 390, 542 S.E.2d 30 (2001); Blaine v. Unum Life Ins. Co., 249 A.D.2d 633, 670 N.Y.S.2d 989 (1998); Simmonds v. Eastman Kodak Co., 781 P.2d 140 (Colo.Ct.App. 1989); Sullivan v. Empire Equip. Eng'g Co., Inc., 492 A.2d 1212 (R.I. 1985); and Lane Enters. v. Workmens' Comp. Appeal Bd., 644 A.2d 726 (Pa. 1994).

The bonus payments made to Ms. Pendygraft clearly represented "wages," (money paid to her for services rendered at Ford) as set forth by the Board and, therefore, should be included in her average weekly wage calculation. The Court of Appeals Reversal of such a finding was in error.

CONCLUSION

Ms. Pendygraft requests the Opinion of the Court of Appeals be Reversed and the Opinion of the Board, Affirming ALJ Kerr's inclusion of profit sharing bonus in calculation of Ms. Pendygraft's average weekly wage, reinstated.

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APPENDIX

(1) Court of Appeals Opinion (8/10/07)

(2) WCB Opinion (2/23/07

(3) Opinion of ALJ Kerr (7/21/06)