COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2007-SC-000658-WC

SARAH L. PENDYGRAFT

APPELLANT

vs.

FORD MOTOR COMPANY,
HON. JAMES L. KERR, ALJ; and,
WORKERS' COMPENSATION BOARD

APPELLEES

Appeal from Court of Appeals of Kentucky
No.: 2007-CA-613-WC
(Worker's Compensation Board No. 2003-00550)

BRIEF FOR APPELLEE, FORD MOTOR COMPANY

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 the this 8th day of January, 2008 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; Hon. Christopher P. Evensen, Cotton & Evensen, 429 W. Muhammad Ali Blvd, Suite 1102, Louisville, Kentucky 40202; Hon. James Kerr, Spindletop Office Complex, 2780 Research Park Drive, Lexington, KY 40511; and Samuel Givens, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601.

This 8th day of January, 2008.

By _____
WESLEY G. GATLIN
ELIZABETH M. STEPIEN

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** ** ** ** *

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, Office of Workers' Claims, Prevention Park, 657 Chamberlin Avenue, Frankfort, Kentucky 40601, (ii) Administrative Law Judge James L. Kerr, 2780 Research Park Drive, Spindeltop Office Complex, Lexington, Kentucky 40511, and (iii) Ford Motor Company, represented by Mr. Wesley G. Gatlin and Elizabeth M. Stepien, of Boehl, Stopher & Graves, 400 West Market Street, 2300 Aegon Center, Louisville, Kentucky 40202

MATTERS IN LITIGATION

No other matters remain in litigation between the parties.

NEED FOR ORAL ARGUMENTS

The Appellee, Ford Motor Company, does not request an oral argument with regard to this matter.

STATEMENT OF BENEFITS PENDING REVIEW

Pursuant to the initial award in this case, Ms. Sarah L. Pendygraft has been receiving past due TTD benefits as well as PPD benefits with no enhancement factors, pending the outcome of this Appeal.

ISSUES

The Court of Appeals rendered a decision on August 10, 2007, reversing the Workers Compensation Board and Decision of the Administrative Law Judge, (hereinafter ALJ). The Court of Appeals has determined that profit sharing should not be included in the calculation of average weekly wage. The Appellant has appealed to this Supreme Court, contending that profit sharing should be included in average weekly wage calculations.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The underlying facts of this case are not in dispute and are as follows:

Ms. Pendygraft (Appellant herein) initially filed this workers' compensation claim against Ford Motor Company (Appellee herein) alleging injury to her back to have occurred on October 15, 2001, and to her foot on September 7, 2004. Accordingly, this case was litigated and the ALJ eventually dismissed the claim for the foot, but the ALJ did find that a work related injury to the back occurred on October 15, 2001, and awarded past due temporary total disability benefits and permanent partial disability benefits for a 28% permanent impairment rating. He awarded the three multiplier, based upon the opinion that Ms. Pendygraft was not physically capable to return Ford earning equal or greater wages than she was earning on October 15, 2001.

Appellee filed the wage printout sheets that "break down" the different categories of income, including regular pay, overtime, holiday, bonus pay, etc. The column labeled "Other" includes income from bonuses, including bonuses from profit sharing (Deposition of Lonnie Corkum, page 14). The Appellant calculated AWW to include this "other" category and the ALJ determined that the Appellant's average weekly wage calculations were correct. However, it is the Appellee's position that profit sharing is not appropriate to be included in the calculation of average weekly wage and although it is taxable, it is not a "wage" as defined by KRS 342.140 (6).

OPINION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge entered and Opinion and Award on July 21, 2006 in this case. In finding that Ms. Pendygraft suffered a work related injury, he also assigned a 28% impairment and stated as follows:

> 21. Addressing the extent and duration, the Administrative Law Judge concludes that the plaintiff lacks the physical capacity to return to the type of work performed on October 15, 2001 as a tug operator. Both Dr. Wilkey and Dr. Jacob have placed significant restrictions upon the plaintiff which would preclude her from that

> position. The question before the Administrative Law Judge is whether plaintiff has returned to work earning the same or greater wages. The plaintiff has done an excellent job on the average weekly wage issue and Exhibit 1 to the deposition demonstrates that including bonus pay, plaintiff's average weekly wage at the time of the injury of October 15, 2001 was $1, 586.23. The Administrative Law Judge finds plaintiff's calculations to be correct. Further, the Administrative Law Judge finds, based upon the testimony of Mr. Corkum, that the Ford bonuses, being taxable, should be included in her wage calculations. The plaintiff has also calculated her post injury average weekly wage with bonuses and it appears to the undersigned that the plaintiff has average less than $1, 586.23 in each of the seventeen post injury quarters. Consequently, the Administrative Law Judge finds that the plaintiff is not making the same or greater wages presently and the three factor is applicable to her claim (Opinion and Award page 11).

Upon Petition for Reconsideration, the Appellee requested that the Administrative Law Judge make specific findings as to whether profit sharing should be included in the average weekly wage calculation. In an Order dated September 29, 2006, Hon. James Kerr overruled the Appellee's Petition for Reconsideration.

OPINION OF THE WORKERS' COMPENSATION BOARD

Following this Order, the Appellee appealed the Decision to the Board and Briefs were filed by the respective parties. The Appellee argued that profit sharing, although *taxable* income, is more likened to a dividend or fringe benefit, and should not be included in the calculation of average weekly *wage*. Furthermore, the plaintiff failed to prove what monies in the "Other" column were from profit sharing, and what monies were from includable income.

The Workers' Compensation Board issued a 2-1 Opinion on February 23, 2007, affirming the decision of the Administrative Law Judge. The Board reprinted their unpublished Board decision from the case of Linda Bond v. Eminence Speaker, LLC, Claim No. 04-80145. That case involved an issue of average weekly wage and profit sharing. The Board determined that the distribution of profit sharing monies "qualifies as 'money payments for services rendered'" (Decision of the

Worker's Compensation Board, page 11). The Board stated that, pursuant to Rainey v. Mills, 733 S.W.2d 756 (Ky. App. 1987) fringe benefits, such as employer pension plan contributions, health insurance and life insurance premiums, are excluded from the calculation of average weekly wage. In the Bond case, reprinted in the Board's Decision in Pendygraft, the Board analyzed whether or not Bond's profit sharing income is excluded as fringe benefits and determined that profit sharing should not be excluded as a fringe benefit. Furthermore, the Board determined that profit sharing was included as a wage, as being received from services rendered. The "services rendered" decision was largely supported by proof of Eminence's specific profit sharing policy, procedures, and goals with relation the employee's service. However, contrary to the instant case, Eminence's Employee handbook stated that the goal of profit sharing is to encourage employees to work harder and better.

> Moreover, the distribution is not a flat amount divided equally among employees. Rather, the profit-share is distributed to employees according to a formula that takes into account "the amount of wages earned by [the employee] at straight time rates (absenteeism will affect it) and the (employee's) number of years with the Company"". Plainly, the hours worked by the employee during the distribution quarter and the employee's number of years with the company reflect "services rendered (Board Decision pages 14, 15).

In the instant case, there is no similar proof in the instant case regarding what Ford's profit sharing is based upon, and whether there is any relation to "services rendered" by Ms. Pendygraft to what profit sharing bonuses she received. The Board did not specifically address how Ford's profit sharing, as opposed to Eminence's, is distributed, and whether there is a correlation to services rendered, as in Bond, or whether it is merely based upon company profits.

Moreover, the Board failed to address the Appellee's argument that although profit sharing is considered taxable income, it does not equate to a wage. For instance, a dividend from a company would be considered taxable for income purposes, but certainly could not be construed as a wage earned for services rendered.

Justice Dyche dissented from the 2-1 majority. He stated that there was no need to interpret the intention of the General Assembly because they have enacted the definition of wages per KRS 342.0011(17). The definition "does not include a profit-sharing bonus. I would reverse". The Decision was appealed to the Court of Appeals of Kentucky.

OPINION OF THE COURT OF APPEALS

In an Opinion dated August 10, 2007, in an unanimous decision, the Court of Appeals reversed the decision of the Administrative Law Judge and Workers' Compensation Board and determined that profit sharing should not be included in the calculation of average weekly wage. In the Opinion, the Court stated that "the primary issue of course is whether the ALJ properly included profit sharing disbursements in the calculation of Ms. Pendygraft's AWW. It appears that this issue has not been squarely been addressed by our Appellate Courts"(Opinion of the Court of Appeals, pg. 2).

The Court of Appeals noted that in this case, since it involves a case of statutory interpretation and that this is a matter of law, the Court of Appeals owes no deference to the findings of the Board and the case will be reviewed *de novo* Newberg v. Thomas Industries, 852 S.W.2d 339, 340 (Ky. App. 1993)(Opinion of the Kentucky Court of Appeals pg. 3).

KRS 342.140 (6) was cited and relied upon in the Court's ultimate determination that the statute does not allow profit sharing to be included in average weekly wage. The pertinent provision states:

> "the term wages as used in this section...means, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging and fuel or similar advantage received from the employer, and gratuities received in the course of employment for others, the employer to the extent that gratuities are reported for income tax purposes. KRS 342.140 (6)."

In addressing the interpretation of KRS 342.140 (6), the Supreme Court referred to the case

of Rainey v. Mills, 733 S.W.2d 756 (KY. App. 1987), wherein a claimant sought to calculate her average weekly wage by including funds that her employer contributed to her pension plan, her health insurance and her life insurance. In determining that these "fringe benefits" were not included within the definition of wages, the Court of Appeals stated:

> "the general phase (or similar advantage received from the employer) follows the specific items of board, rent, housing or lodging." The "similar advantage received" must be of the same class as those specifically delineated, according to general principals of statutory construction. For specific items or classes are followed by a more general language, the general word should be restricted by the specific designations so they encompass only items of the same class or those specifically stated. The express language of the statute and the failure of the Legislature to include fringe benefits in any of the Acts or Amendments compels us to conclude that they were not intended to be encompassed within the Workers' Compensation scheme. It would be impermissible to extend the Act beyond its legitimate scope. Citing Rainey v. Mills at 358.

The Court of Appeals determined that they found the interpretation established in Rainey to be controlling and therefore, "**since profit sharing is not specifically contemplated by the statute, we decline to expand the meaning of "wages" beyond what the Legislature. Likewise, we do not find that profit sharing is "a similar advantage" to "board, rent, housing, lodging, or fuel.**" KRS 342.140 (6). (Opinion of Kentucky Court of Appeals pg. 4).

In reviewing the arguments made by both parties, the Court of Appeals has acknowledged that this issue has not been widely addressed in the other jurisdictions, and therefore, found the reasoning in Stewart v. Ford Motor Company, 474 N.W.2d 162 (Min. 1991), to be persuasive. The Court noted that the facts were nearly identical to the case at bar and the Supreme Court of Minnesota concluded that profit sharing disbursement should not be calculated in average weekly wage. (Opinion of the Kentucky Court of Appeals pg. 4). In citing Stewart, the Court in this instant case stated as follows:

> **"such bonus types payments to all employees at the end of the year, out of the profits of the employer's business, does not represent the individual efforts of the employee on the line. Rather, the profit sharing here as reflected and the financial status, not of the employee's earning capacity, because whether Ford realizes a profit depends largely on factors outside of the employee's control, e.g. interest rates, supply and demand, sales, and manufacturing costs."** Citing Stewart at 164.

Ultimately, the Court of Appeals stated that "We conclude the plain meaning of KRS 342.140(6) does not encompass profit sharing as a form of 'money payments, payments for services rendered'. Accordingly, we reverse the Board's decision and remand to the ALJ for recalculation of Pendygraft's average weekly wage excluding the profit sharing disbursements." (Opinion of the Kentucky Court of Appeals pg. 5).

ARGUMENT

I. SINCE THIS ISSUE INVOLVES STATUTORY CONSTRUCTION, IT WAS PROPERLY BEFORE THE COURT OF APPEALS AND SHOULD HAVE BEEN ADDRESSED *DE NOVO*.

As stated by the Court of Appeals and pursuant to AK Steel Corporation v. Childers, 167 S.W.3d 672 (Ky. App. 2005) and Newberg v. Thomas Industries, 852 S.W. 2d 339 (Ky. App. 1993) "interpretation to be given statute is a matter of law, and the Court of Appeals is not required to give deference to decision of Workers' Compensation Board." In their Brief to this Court, the Appellant herein sites extensively to the Opinion of the Workers' Compensation Board. However, the Court of Appeals was required to review this legal issue of statutory interpretation *de novo*. Therefore, any findings of the Workers' Compensation Board should have not been considered by the Court of Appeals or this Supreme Court.

II. THE COURT OF APPEALS PROPERLY INTERPRETED KRS 342.140(6)IN DETERMINING THAT PROFIT SHARING BONUSES SHOULD NOT BE INCLUDED IN THE CALCULATION OF AN AVERAGE WEEKLY WAGE.

The Court of Appeals stated that the "primary issue before us is whether the ALJ properly

included profit sharing disbursements in the calculation of Pendygraft's AWW. It appears this issue has not been squarely addressed by our appellate courts" (Court of Appeals Opinion page 2). The Appellee made the following argument to the Court of Appeals:

As stated in the Dissent of the Workers' Compensation Board, profit sharing is not included in the definition of wages under KRS 342.140 and should not be included in the calculation of AWW. The Statute is inclusive with regard to the specific items that are to be included in calculation of the average weekly wage, and, by omission, benefits such as pension plans, profit sharing, and dividends, are NOT to be included in the calculation of average weekly wage. The Rainey court was unable to find "statutory support to include fringe benefits" and noted that KRS 342.140 defines wages as including not only money payments for services rendered, but; the reasonable value of board, rent, housing, lodging, and fuel or similar advantage received from the Employer, and gratuities received in the course of employment for others than the Employer to the extent such gratuities are reported for income tax purposes."

The Court ruled that "[I]n order to be included as a similar advantage received, such benefit must be of the same class as those specifically delineated, according to the general principles of statutory construction". The Court went on to state that "when specific items or classes are followed by more general language, the general words should be restricted by the specific designations so that they encompass only items of the same class or those specifically stated." Citing State v. Brantley, 274 P.2nd 661 (Or.1954). Furthermore, the Court cited Lovell v. Osborne Mining Corporation, 395 S.W.2nd 596 (Ky. App. 1965) in stating that "the express language of the statue and the failure of the legislature to include fringe benefits in any of the Act's amendments compels us to conclude that they were not intended to be encompassed within the Workers' Compensation scheme. It would be impermissible to extend the Act beyond its legitimate scope." The Court stated that in Wengler v.

Druggists Mutual Ins. Co., 616 S.W.2nd 859 (Mo.App., 1981), that Blue Cross payments were not included at part of a weekly earning because "*their omission in statutory provisions creates presumption of their exclusion.*"(Emphasis added).

In applying the applicable law to the instant case, it is clear that is was not within the legislature's intention to include benefits such as profit sharing in the calculation of average weekly wage. Fringe benefits are explicitly excluded from the calculation of average weekly wage and, according to the case law and legislative intent, by omission, they are excluded. In addition, profit sharing benefits are not in the same category and class as lodging, housing, or reimbursement for monies earned as contemplated by the specific benefits included in average weekly wage in the Statute. Like a dividend, the profit sharing may be taxable for income purposes, but is not a wage earned for "services rendered" from the employee. Profit sharing and dividends are based upon Employer profit, not the specific services rendered by the employee. Like pension contributions and health insurance in Rainey, profit sharing bonuses require no additional efforts or work by the employee in order to receive these bonuses and they are excludable from AWW calculation.

In this case, the Court of Appeals agreed and reversed the Decision of the ALJ and Board. In the Brief to the this Court, the Appellant cites various cases, stating that other jurisdictions include profit sharing in calculating AWW. Those cases are distinguishable and while some jurisdictions include year-end bonuses in calculating wages, the statutory language is not identical to KRS 342.140 and those cases can not control interpretation of a Kentucky statute.

Furthermore, the Denim Finishers, Inc. v. Baker, 757 S.W. 2d 515 (Ky. App.1988)case is also clearly distinguishable from the instant case. In that case, bonuses were given based upon employee output production and this was properly calculated into the average weekly wage, as it relates to services rendered. In the instant case, profit sharing is more likened

to a fringe benefit, and is not based upon services rendered, but upon the financial success of the company The Kentucky Court of Appeals interpreted the statute *de novo* and ultimately determined that the Legislature did not include profit sharing as the type of wages earned for services rendered that should be included in average weekly wage calculation. That Opinion should be affirmed.

Furthermore, while some jurisdictions allow some year end bonuses (not necessarily profit sharing) to be included in average weekly wage, there are also numerous jurisdictions that specifically exclude profit sharing from the average weekly wage calculation. In deciding that profit sharing bonuses are not includable, the Court of Appeals acknowledged that this issue had not been widely addressed in the sister jurisdictions and determined that the reasoning under Stewart v. Ford Motor Company, 474 N.W.2d 162 (Minn. 1991) was persuasive. The Court noted that the facts were merely similar and sated that they find persuasive the Supreme Court's reasoning that profit sharing disbursements at the end of the year do not represent the individual efforts of the employee on the line. The Minnesota Court reasoned that profit sharing is reflective of Ford's annual financial status, not of the employees earning capacity; and because whether Ford realizes a profit depends on factors outside of the employees control, such as interest rates, supply and demand, sales, and manufacturing costs.

Likewise, the state of Ohio has also adopted a similar interpretation with regard to the exclusion of profit sharing from calculation of average weekly wage. In the case of The State of Ohio ex rel. Robert J. Cassese v. Ford Motor Company, (2005) WL 3484206 (Ohio App. 10 Dist. 2005), another Ford case, the Court determined that profit sharing was not properly included in the calculation of average weekly wage. The Court referenced the initial Opinion of the Magistrate in this Ohio case who determined that the Plaintiff had the burden to prove that the compensation

received from profit sharing constituted "wages" for the purposes of calculating average weekly wage. (Id. at 2).

The Ohio Court noted that the Plaintiff's contention that profit sharing should be included in average weekly wage was not persuasive. The Court cited to the hearing officer's findings that "profit sharing received by the claimant in 1998 represents money determined by the overall profitability of the company. Claimant has submitted a lack of evidence that the monies designated as profit sharing are the result of the individual labor and services provided by this Claimant. The Claimant has not submitted any documentation regarding the profit sharing agreement nor was claimant present to testify regarding the issue" Id. at 4. Thus, the hearing officer declined to include any profit sharing in the average weekly wage calculation.

Furthermore, the Court cited Webster's Third New International Dictionary of 1986 and stated that "'Income" is not synonymous with "earnings" or "wages.'" Webster's Third New International Dictionary (1986) 714, defines "earnings" as "wages earned as compensation for labor." Similarly, wages, constitute "monetary remuneration by an employer for waiver or services." *Id* at 2568. "Income," on the other hand, represents "a gain or recurrent benefit that is [usually] measured in money and for a given period of time, derives from capital, labor, or a combination of both." *Id.* at 1143. **Income is a much broader term than "earnings" or "wages," and cannot, therefore, be used interchangeably**" Id. Citing State ex rel. McDulin v. Indus. Comm., 89 Ohio St. 3d 390, 392 (OH. 2000) (Emphasis added).

" '[D]ividends, interest, and other forms of income unrelated to a claimant's job performance,' cannot be included into the AWW calculation". Id.

Like the instant case, the Ohio Hearing Officer found that profit sharing received by the claimant from Ford Motor Company represents money determined by the overall profitability of

the company, and since the claimant submitted a lack of evidence to designate profit sharing as the result of labor and services by the claimant, profit sharing was not properly includable in the calculation of average weekly wage. The Ohio Court of Appeals affirmed the decision.

With regard to the instant case, based upon the decision of the Kentucky Court of Appeals, the statutory interpretation of KRS 342. 140 (6), Kentucky case law, as well as the decisions of other jurisdictions, the Appellee respectfully requests that the legal interpretation given by the Court of Appeals with regard to the application of KRS 342.140(6) be affirmed by this Supreme Court.

CONCLUSION

Based upon the foregoing, the Employer respectfully urges this Court to affirm the Opinion of the Court of Appeals and determine that profit sharing should not be included in the calculation of average weekly wage.

Respectfully submitted,

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