COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2014-SC-000234-WC
COA NO. 2013-CA-00091
DWC CLAIM NO. 2011-00091

JOSEPH JEWELL — APPELLANT

VS

BRIEF FOR APPELLANT,
Joseph Jewell

FORD MOTOR COMPANY;
HON. JOHN B. COLEMAN, ALJ; AND
KENTUCKY WORKERS' COMPENATION BOARD — APPELLEES

*** *** *** *** *** ***

Respectfully submitted,

CHED JENNINGS
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CERTIFICATE

This is to certify that on the 8 day of July, 2014, the original and four copies of this Petition for Review were mailed by Federal Express to the **Clerk, Supreme Court**, State Capital, Ste. 200, 700 Capital Ave., Frankfort, Kentucky 40601, and U.S. Mail to **Hon. Phil Reverman**, Boehl, Stopher & Graves, 400 West Market Street, Suite 2300, Louisville, KY 40202, Attorney for the Appellee; **ALJ John B. Coleman**, 107 Coal Hollow Rd, Suite 100, Pikeville, Ky 41501; and the **Hon. Dwight Lovan, Commissioner**, Department of Workers' Claims, 657 Chamberlain Avenue, Frankfort, Kentucky 40601.

CHED JENNINGS

STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

In this appeal, the Appellant, Joseph Jewell, requests the Supreme Court to review whether the Court of Appeals erred in affirming in part the 4/12/13 Opinion of the Workers' Compensation Board which affirmed in part, reversed in part, and remanded the Opinion, Award & Order of ALJ John B. Coleman. As recognized by the Board and Court of Appeals, the issues presented are issues of first impression.

In the proceedings before the ALJ, the parties litigated whether the unemployment benefits and supplemental pay ("SUB pay") received by the Appellant should be included in the calculation of average weekly wages for benefit purposes per KRS 342.140(6). The ALJ held that the actual unemployment benefits should not be included while the "SUB pay" wages should be included since such pay is taxed just like regular wages.

Both parties appealed to the Board. On April 12, 2013, the Board found that neither income source should be included in the calculation of average weekly wages per KRS 342.140(6). The Board remanded to the ALJ with directions to not include either unemployment benefits or "SUB pay" for the calculation of average weekly wage. The Appellant timely filed a Petition for Review with the Court of Appeals.

The Opinion of the Court of Appeals affirming in part, reversing in part, and remanding was entered on April 11, 2014.

The Court of Appeals remanded with instructions that "SUB pay" should be included in the calculation but Unemployment payments should be excluded. The Appellant timely filed this appeal to the Supreme Court. Although Ford Motor Company also filed a Cross-Appeal, such was not filed timely.

Mr. Jewell respectfully requests the Supreme Court to enter an appropriate Opinion overturning the ALJ , Board and Court of Appeals as to the exclusion of unemployment earnings in the calculation of the Appellant's average weekly wages for Award purposes. Since Ford Motor Company failed to file its cross-appeal, the issue involving the "SUB pay" is no longer at issue.

PRELIMINARY MATTERS

1. The Appellant, **Joseph Jewell**, is represented by the undersigned, Ched Jennings, 455 South Fourth Street, Suite 1450 Louisville, Kentucky 40202;

2. The Appellee, **Ford Motor Company**, is represented by Hon. Phil Reverman, Boehl Stopher, 2300 Aegon Center., 400 West Market Street, Louisville, KY 40202;

3. The Appellee, **ALJ John B. Coleman**, 107 Coal Hollow Road, Suite 100, Pikeville, KY 41501;

4. The Appellee, **Workers' Compensation Board**, Commissioner Dwight T. Lovan, Department of Workers Claims, Prevention Park, 657 Chamberlin Avenue, Frankfort, Kentucky 40601.

5. The Opinion and Award of ALJ John B. Coleman was entered on November 16, 2012. His Order overruling the Appellant's Petition for Reconsideration was entered on December 12, 2012.

6. The Opinion of the Workers' Compensation Board affirming in part, reversing in part and remanding was entered on April 12, 2013.

7. The Opinion of the Court of Appeals affirming in part, reversing in part, and remanding was entered on April 11, 2014.

8. To the Appellant's knowledge, there are no other

actions concerning this workers compensation claim before any other State or Federal Court.

ORAL ARGUMENTS

Since this case involves an issue of first impression, the Appellant respectfully submits that oral arguments may serve to be helpful in this appeal.

STATEMENT OF THE CASE

The appeal in this workers compensation case is limited strictly to the calculation of average weekly wage for the Appellant, Joseph Jewell. As such, the facts presented herein are primarily limited to the evidence concerning average weekly wage, the collective bargaining agreement, and the business employment practices of the Appellee, Ford Motor Company.

In the proceedings before the ALJ, the evidence confirmed a collective bargaining agreement ("CBA") between the Appellee and the United Auto Workers. Per the CBA, the Appellee guarantees their employees two paid weeks of vacation per year and their base pay (hourly rate x 40 hours per week) for the other 50 weeks each year. In summary, the employees are guaranteed fifty-two (52) weeks of pay based upon their base pay for forty (40) per week irrespective of whether the employees work or are laid off.

During the past couple of years, the Appellee retooled its Louisville Assembly Plant ("LAP") thereby laying off most of

its union employees for substantial periods of time. Some employees would work here and there, but not the usual fifty (50) weeks per year with overtime plus two (2) weeks of vacation during the annual plant shutdown in July. The Appellant's AWW-1 had limited number of weeks actually worked during the fifty-two weeks preceding the subject work injury. The calculations of average weekly wages did not properly reflect the typical income of the Appellant or his unemployment benefits plus "SUB pay".

First, it should be noted that the two weeks of annual vacation pay have not been at issue in these proceedings and all parties have recognized that such vacation pay should be included in the calculation of average weekly wage of Mr. Jewell.

During other plant shut down periods or when the Appellee "lays off" its employees, Ford Motor Company automatically files for unemployment benefits on the employees' behalf for those weeks. In addition to the unemployment benefits, Ford contractually pays a weekly supplemental pay ("SUB pay') in order to meet its contractual obligations per CBA between the Appellee and the United Auto Workers.

Unlike other employees for other employers in the Commonwealth, the Appellant never had to actually apply for unemployment benefits or actively seek other employment. All form filings are electronically processed by Ford Motor Company on behalf of its employees.

During the periods of lay-off or plant shutdowns, the employees receive two checks. One check is for unemployment benefits and another check is for the "SUB pay". Both incomes have taxes withheld and are reported to the IRS. Employees of the Respondent actually receive a W-2 statement for the "SUB pay". Mr. Jewell testified that during the year preceding his work injury there was never a week wherein he did not receive either his regular pay check OR his unemployment benefits plus "SUB pay" (Tr. 11-15).

In the proceedings before the ALJ, the mandatory AWW-1 Form filed by the Appellee for the wages of Mr. Jewell included a computerized sheet which did not include either unemployment benefits or "SUB pay" income. Such wage information was contrary to the testimony of Mr. Jewell that there was never a week during 2009 wherein he did not receive his regular pay OR his unemployment benefits plus "SUB pay". The employer also filed copies of the W2's of Mr. Jewell for 2009. One W-2 reflected withholdings and income being reported to the IRS for his "sub pay". Both were taxable incomes for Mr. Jewell.

During the Deposition of the Appellee's Human Resource associate, Jan Steiff, she was asked several questions regarding the Benefit Wage Determination Report that was filed by the Defendant with AWW-1 Form (Deposition Exhibit 1). This HR representative was not familiar with the computerized document

being relied upon by the Appellee in these proceedings. Ms. Steiff confirmed that the document did not reflect the actual number of hours worked. She described COLA, as a cost of living differential. She stated that "shift-p" stands for shift premium, in which certain shifts are paid higher. Ms. Steiff was unable to explain what the "other" column represented.

Ms. Steiff further testified that during any lay-offs of employees, Ford Motor Company actually files for the unemployment benefits for the employees and employees who receive such benefits pay taxes on such income. Ms. Steiff described "SUB pay" as a supplemental benefit for when the company lays a worker off. Per the collective bargaining contract, this spokesperson confirmed that the employees are entitled to 95% of their base pay less all taxes. Ford then subtracts what the worker receives in weekly unemployment benefits from the 95% figure and then kicks in "SUB pay" to bring the worker to the 95% threshold. When comparing costs to costs, it is cheaper for Ford Motor Company during plant shut-downs to pay unemployment benefits plus "SUB pay" than it is to pay the guaranteed 100% of the regular base wages (hourly rate x 40 hours per week).

Ms. Steiff further testified that "SUB pay" was not reflected in any of the columns in the computerized Deposition Exhibit #1. She testified that employees receive two (2) separate W-2's, one for "SUB pay" and another for actual wages.

The material facts are not at issue. Fortunately for the Appellant, there is only one week of his preceding best thirteen (13) week quarters that come into play for the calculation of average weekly wages. Although there are several weeks of lay-offs and unemployment benefits not reflected in the AWW-1 Form for Mr. Jewell, the legal issues presented by this appeal are strictly limited to the one week of his best quarter.

In the ALJ's Opinion & Award of November 16, 2012, ALJ Coleman held that unemployment benefits should not be included in the calculation of average weekly wage while the "SUB pay" should be included since such income is subject to withholdings and is reported to the IRS. Both parties timely filed petitions for reconsideration. The Appellant appealed the determination that the unemployment benefits should be included in the calculations while the Appellee appealed the finding that "SUB pay" should be included for the calculations of average weekly wages. The Order overruling both Petitions for Reconsideration was entered on December 3, 2012.

Both the parties appealed to the Workers' Compensation Board. On April 12, 2013, the Board issued their Opinion affirming in part, reversing in part, and remanding. The Board declared that neither the unemployment benefits nor the "SUB pay" should be included in calculations of average weekly wage. According to the Board, such unemployment and "SUB pay" is not "income" since the Appellant did not actually work to earn such income. The Appellant

timely filed his Petition for Review to the Court of Appeals. The Opinion of the Court of Appeals affirming in part, reversing in part, and remanding was entered on April 11, 2014. The Court of Appeals reinstated the findings of the ALJ that only "SUB pay" should be included in the calculations for average weekly wage purposes. The Appellant timely filed this appeal to the Supreme Court. Although Ford Motor Company filed a Cross-Appeal, such was not filed timely.

Mr. Jewell respectfully requests for the Supreme Court to enter an appropriate Opinion overturning the ALJ, Board and Court of Appeals as to the exclusion of unemployment earnings in the calculation of the Appellant's average weekly wages for Award purposes. Since Ford Motor Company failed to perfect its cross-appeal to the Supreme Court, the inclusion of "SUB pay" is no longer at issue and the law of the case.

ARGUMENT

1. The amount of the Appellant's guaranteed weekly base pay should be substituted for any week the Appellant received unemployment and "SUB pay".

Irrespective of whether the Court finds that that unemployment benefits or "SUB pay" fall under the definition of "wages" per KRS 342.140(6), it is respectfully submitted that the Appellant's contractual "base wage" should be used to calculate his average weekly wage. This base wage was contractually agreed upon

by the United Auto Workers and the Appellee. The Appellant has testified that he received either his regular active pay, contractual base pay, or vacation pay for every one of the fifty-two (52) weeks preceding the work-injury of December 4, 2009.

Per the "Your Employee Benefits" packet entered into evidence as deposition exhibit #2, the Appellant is entitled to weekly "Regular Benefits". Except for a few rare exceptions, these "Regular Benefits" as they are called, ensure that Appellee's workers receive guaranteed weekly pay. Most companies who offer a guaranteed weekly pay for every week of the year usually just call it a base salary, the fact that Ford calls and treats it as something different does not change what it actually is.

The AWW-1 Form filed by Ford Motor Company showed $0.00 income for the subject work week of these proceedings, but the Appellant still received his base salary for that week. The fact that Ford prefers to call it "Regular Benefits" and not show such benefits on their "Workers Compensation System - Benefit Wage Determination Report", should not allow them to pretend that this weekly guaranteed pay doesn't exist. It is also irrelevant how and through what channels it is paid. The simple fact is the Appellant receives at the very least a guaranteed minimal base weekly salary every week of the year. Employees are responsible for the payment of taxes on such income.

Since there is no such thing as $0.00 pay week for the

Appellant and there was never a week for which he was not paid, the Appellant respectfully submits that his guaranteed weekly base pay figure should be substituted for any week in which Ford Motor Company claims that he received $0.00 pay. Therefore, the Appellant respectfully requests for the Supreme Court to enter an Opinion remanding to the ALJ for the entry of award based upon the appropriate wages of the Appellant as his contractual hourly rate times 40 hours per week.

2. Unemployment income should be included in the in the calculation of average weekly wages.

If the Supreme Court does not find the Appellant's first argument as persuasive, Mr. Jewell also respectfully submits that both the ALJ and the Board committed error by not including unemployment benefits in the calculation of Appellant's AWW.

First, it should be noted that KRS 342.730(6) permits employers the credit for unemployment benefits. Then why shouldn't the employee's receipt of unemployment benefits be included in the calculation of income pursuant to KRS 342.140?

Second, it should be further noted that unemployment benefits are paid directly to the employee and taxable just like regular wages received by an employee. Why should unemployment benefits be treated differently in the calculation of AWW? An employee could be hurt on the first day of employment and is entitled to have his AWW calculated based upon comparable wages for comparable employees. Why should an employee who receives

unemployment benefits for weeks or months be penalized in the calculation of AWW?

Although there is no specific provision in KRS 342.140 specifically including unemployment benefits in the calculation of AWW, there is no specific exclusion either. With regards to unemployment income, the Appellant does not ask this Court to make a blanket ruling radically altering the way in which average weekly wage is calculated. However, what the Appellant does ask this Court to take into account the totality of the facts regarding the nature and way in which the Ford Motor Company utilizes Kentucky Unemployment benefits to compensate their employees instead of paying the contractual base rate. It is this narrow circumstance in which a corporation actually uses unemployment benefits as actual pay that the Appellant feels as though statutory silence on the matter leaves the door open for logic and basic fairness to prevail.

As previously discussed, Ford utilizes a combination of "SUB pay" and unemployment benefits as cost-saving technique. Ford does not "lay off" employees in a traditional sense, but rather rotates employees through off weeks so that they can use unemployment benefits to partially cover the worker's salary. Now, there may be a compelling public policy rationale for allowing Ford to capitalize on the Unemployment system in such a way (such as keeping a large number of its trained work force in place during

periods of shutdowns), but nevertheless, it does go against the traditional function and use of Unemployment. The Unemployment system is designed to temporarily aid fired workers or workers who are actually laid off by providing them with a fraction of their former income to sustain themselves and provide them with a platform from which to seek out and obtain new employment.

Ford utilizes Unemployment in such a routine way, that their own "laid off" workers don't even have to fill out or file forms. Rather the employees are told not to report to work that week, and instead of their regular pay check they receive two checks close to the amount of their base pay. The reason that Ford does this is to save on cost and yet at the same time keep a larger skilled work force on the ready. Since Ford so clearly uses Unemployment to cover part of their employee's guaranteed wages, it is only fair that those employees be able to count those wages towards the calculation of average weekly wages for workers' compensation benefits.

In their April 12, 2013 Opinion, the Board relied at least part on the opinions of Professor Lawson and his treatise on Worker's Compensation, in which he declares that unemployment benefits are not "wages". Larson's Workers' Compensation Law (2012) §93.01[2][a]. However, it seems highly likely that even the learned Professor Lawson did not anticipate a scenario in which a corporation systematically utilizes unemployment system to pay

their workers in lieu of paying contractual base wages. That is to say, why should unemployment benefits not be considered "wages" when it is systematically used to fulfill a contractual guarantee of pay?

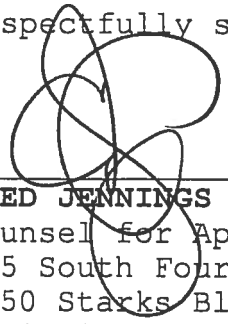
In conclusion, the Appellant respectfully submits that unemployment wages for the employees of Ford Motor Company is a payment for services rendered and not a fringe benefit. Employees do not pay taxes on fringe benefits. Since employees must pay taxes on Unemployment benefits, such should be included in any calculation of average weekly wage just like "SUB pay" and other weekly income. Therefore, it is respectfully submitted that the Court of Appeals, Workers Compensation Board and ALJ committed reversible error by not including unemployment wages in the calculation of the Appellant's average weekly wage. The Appellant requests the Supreme Court to accordingly reverse and to remand to the ALJ with directions to include the Appellant's unemployment benefits in the calculation of his average weekly wage.

CONCLUSION

In summary, the Appellant respectfully requests the Supreme Court to render an appropriate Opinion remanding this case to the ALJ with directions to include either the Appellants' contractual base pay for those weeks he received unemployment benefits or actual unemployment pay plus "SUB pay" in the

calculations of his average weekly wage.

Respectfully submitted,



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