COMMONWEALTH OF KENTUCKY
SUPREME COURT
FILE NO. 2014-SC-000234-WC

JOSEPH JEWELL — APPELLANT

v.

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

Appeal from Court of Appeals of Kentucky
No.: 2013-CA-000850-WC
(Workers' Compensation Board No. 2011-00091)

BRIEF FOR THE APPELLEE FORD MOTOR COMPANY

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was mailed to the following this 5th day of September, 2014: Hon. Ched Jennings, 455 South Fourth Street, Suite 1450, Louisville, KY 40202; Hon. John B. Coleman, Administrative Law Judge, 107 Coal Hollow Road, Suite 100, Pikeville, KY 41501; the Workers' Compensation Board, Prevention Park, 657 Chamberlin Avenue, Frankfort, KY 40601; and, Kentucky Court of Appeals, Attn: Sam Givens, 360 Democrat Drive, Frankfort, KY 40601. The original and ten copies have been filed this day with the Susan Stokley Clary, Clerk, Supreme Court, Commonwealth of Kentucky, Room 235, 700 Capital Avenue, Frankfort, KY 40601.

COUNSEL FOR APPELLEE,
FORD MOTOR COMPANY

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* ** ** ** ** *

INTRODUCTION

The Appellee herein, Ford Motor Company, respectfully submits this Brief in response to Appellant, Joseph Jewell's, Appeal from the decision of the Kentucky Court of Appeals, Claim No. 2013-CA-000850-WC, rendered on April 11, 2013. The Procedural history set forth by the Appellant in his brief to this Court is accurate and the narrow issue before this Court is whether the lower Courts were correct in deciding that unemployment benefits should not be included in KRS 342.140(6) calculations of average weekly wages. This Appellee requests that this Court affirm the decision of the lower Courts as to the issue presented herein.

STATEMENT REGARDING ORAL ARGUMENT

As a matter of first impression, this Court may benefit from oral argument.

COUNTER-STATEMENT OF POINTS AND AUTHORITY

MAY IT PLEASE THIS COURT:

COUNTER-STATEMENT OF THE CASE

This is an appeal from a decision rendered by the Kentucky Court of Appeals on April 11, 2014, wherein the sole issue concerns the computation of average weekly wage and whether or not unemployment benefits should be included in computing average weekly wage under KRS 342.140(6). [1]

The Administrative Law Judge (ALJ), Workers' Compensation Board and Kentucky Court of Appeals have all ruled that Kentucky state funded unemployment benefits should not be included in the computation of an employee's average weekly wage as calculated in KRS 342.140(6). In its decision rendered on April 12, 2013, the Workers' Compensation Board found as follows:

> "KRS 342.0011(17) and 342.140(6) are the applicable statutory provisions regarding wages. KRS 342.0011(17) reads as follows:
>
> > 'Wages' means, in addition to money payment 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.
>
> KRS 342.140(6) reads as follows:
>
> > The term 'wages' as used in this section and KRS 342.140 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 from others than the

[1] The issue as to the inclusion of SUB Pay benefits in the calculation of AWW was not perfected for Appeal to this Court and the decision of the Court of Appeals is now Final.

employer to the extent the gratuities are reported for income tax purposes.

We have never previously addressed whether either unemployment benefits or SUB pay should be included in calculating the AWW. In his treatise, Professor Larson states as follows:

> In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but anything of value received as consideration for the work, as, for example, tips, bonuses, commissions and room and board, constituting real economic gain to the employee. A car allowance is includable as wage only if it exceeds actual truck, or travel expenses. **Unemployment benefits received during "down-times" during the year prior to the injury, while otherwise employed by the employer, are not "wages" and accordingly, are not used to compute the average weekly wage**. Larson's Workers' Compensation Law (2012)§93.01[2][a].
>
> (Board Opinion, pages 9, 10) [Our Emphasis added]

Wages include both monetary payments are the reasonable value of other items enumerated in the statutes above, including "similar advantage". The Court of Appeals of Kentucky in Rainey v. Mills, 733 S.W.2d 756 (Ky. App. 1987) stated as follows regarding the interpretation of a "similar advantage":

> The general phrase "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, accordingly to general principles of statutory construction. *Nelson v. SAIF Corporation*, 78 Or. App. 75, 715 P. 2d 631 (1986). Where 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. *State v. Brantley*, 201 Or. 637, 271 P. 2d 668 (1954).

The Board stated as follows:

We agree unemployment benefits do not constitute a "similar advantage" and are not payments for services rendered. Unemployment benefits are statutory, and are only authorized during periods of time when services are not rendered. Therefore, we affirm the ALJ's exclusion of unemployment benefits in the AWW calculation."

(Board Opinion, page 11) [Our Emphasis added]

Similarly, the Court of Appeals, in a published decision rendered on April 11, 2014, found as follows:

> It is a matter of first impression in Kentucky whether unemployment benefits and SUB pay should be considered wages for the 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. *Kentucky Unemployment Ins. Co. v. Jones*, 809 S.W.2d 715, 716-717 (Ky. App. 1991); KRS 446.080(4).
>
> (Court of Appeals Opinion, page 3,4) [Our Emphasis added]

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 beneficial 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)

(Court of Appeals Opinion, pages, 3-5)

Following further discussion of the definition of "wages", the Court held as follows:

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[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[.]"

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, 833 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)

(Court of Appeals Opinion, page 7) [Our Emphasis added]

Accordingly, we agree with the Board's determination unemployment benefits are not wages.[3] We join our sister courts' uniform rejection of including unemployment benefits as wages for the 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, 833 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. Srvcs. 2013); *Devon C. Negethon, Petitioner*, 2006 MTWCC 40 at 5.

(Court of Appeals Opinion, pages 7, 8) [Our Emphasis added]

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).

(Court of Appeals Opinion, page 8)

In this instant Appeal to this Court, Appellee's counter-statement of the case and argument offer minimal legal reasoning and precedent in support of his argument to overturn the narrow decision of Court of Appeals. Instead, the Brief offers "quasi policy argument" and

[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 872 (Ky. 2001).

innuendo based upon assumptions regarding Appellant's purported "business practices" that have not been discussed or proven as true by any fact finder in this case. Much of the "argument" was raised for the first time at the Kentucky Court of Appeals and is not part of the record. The Appellee herein submits the inflammatory argument relating to Appellee's purported "cost saving scheme" to "assist" its employees in "circumventing" the Kentucky Unemployment Act is unfounded and prejudicial and must be disregarded.

Instead, this Appellee requests that this Court narrowly focus upon the actual issue of the statutory interpretation as it relates to whether unemployment benefits should be calculated in an employee's average weekly wage in KRS 342.140(6). The lower courts have addressed this issue and the Appellee requests that this Court affirm. This is not the proper venue to settle disputes stemming from the interpretation of the UAW/FORD Collective Bargaining Agreement.

ARGUMENT

1. **STANDARD OF REVIEW: In this issue of legal first impression, the standard of review is *de nova* and the Courts are required to rely upon the analyses of Legislative intent and interpretation, along with the analyses of the opinions of surrounding jurisdictions and of treatise review.**

The issue as to whether unemployment benefits should be included in the calculation of an employee's Average Weekly Wage in KRS 342.140 is a matter of first impression in Kentucky. Thus, the Court's decision and reasoning will arise from a *de nova* review of the law and from an analysis of Legislative intent and interpretation, the legal opinions of sister jurisdictions, and from the analysis of learned treatises Newberg v. Thompson Industries, 852 S.W.2d 339, 340 (Ky. App. 1993).

2. **The Court of Appeals was correct in its interpretation of KRS 342.140 in finding that unemployment benefits are not includable in the calculation of an employee's average weekly wage.**

The actual issue at hand has been succinctly and appropriately addressed by the lower courts. The conclusions of law in this issue of first impression were based upon statutory interpretation, a review of legislative intent and history, and a review of decisions of other jurisdictions. The Court of Appeals found as follows:

> **It is a matter of first impression in Kentucky whether unemployment benefits and SUB pay should be considered wages for the 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 week 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. *Kentucky Unemployment Ins. Co. v. Jones*, 809 S.W.2d 715, 716-717 (Ky. App. 1991); KRS 446.080(4).
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Following further discussion of the definition of "wages", the Court held as follows:

> **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, 833 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).**
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> **Accordingly, we agree with the Board's determination unemployment benefits are not wages.[4] We join our sister courts' uniform rejection of**

[4] 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 872 (Ky. 2001).

> **including unemployment benefits as wages for the 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, 833 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. Srvcs. 2013); *Devon C. Negethon, Petitioner*, 2006 MTWCC 40 at 5.
>
> (Court of Appeals Opinion, pages 7, 8)

Moreover, Larson's Workers' Compensation Law (2012), Section 93.01(2)(a) declares that unemployment benefits are not "wages":

> "In computing actual earnings as the beginning point of wage-basis calculations...**Unemployment benefits received during "down-times" during the year prior to the injury, while otherwise employed by the employer, are not "wages" and accordingly, are not used to compute the average weekly wage.**" [Our Emphasis added]

Further evidence of Legislative intent is found in KRS 342.730(5) of the workers' compensation Act. In this section, the Employer is granted an offset credit for unemployment benefits paid during any period of time that temporary total or permanent total disability benefits are awarded the employee. If the Kentucky Legislature considered the effect of unemployment compensation when awards of temporary total disability or permanent total disability were made, this Appellee submits that it can be presumed that the Legislature would have considered the inclusion of unemployment benefits when defining average weekly wage in KRS 342.140. We, the Appellee, submit that the omission of unemployment benefits in KRS 342.140 demonstrates an intent on the part of the Legislature to not include unemployment compensation in computing average weekly wage.

In summary, the Appellee herein, submits that, quite clearly, unemployment benefits are not and do not represent payments for services rendered. By their very nature, they are payments made by the State (not Ford) for services NOT RENDERED during a time when an employee is not working and "unemployed". Even routine or planned layoffs are qualifying periods of "unemployment". Appellant was laid off during the time that he received unemployment benefits and he was not working and earning wages. Thus, the week at issue was properly excluded from the calculation of his AWW for his date of injury.

3. **There is no authority to support the Appellee's argument that Appellant's 'weekly base pay should be substituted for any week the Appellant received unemployment and SUB pay and this "proposal" is not an appropriate legal issue to be raised before this Court.**

The Appellee submits that the relevant legal issue relating to the interpretation of KRS 342.140(6) has been properly analyzed and decided by the Court of Appeals and that the Opinion of April 11, 2014, should be affirmed. However, Appellant has presented this Court with a lengthy discussion of the intricacies of the collective bargaining agreement between the UAW and Ford and how it purportedly relates to the narrow issue of the interpretation of KRS 342.140(6) that is currently before this Court. Appellant seems to take a position with this Court that Ford should be held to a "different standard" with regard to the interpretation of KRS 342.140(6) and that the Court of Appeals' decision of April 11, 2014, should apply to Employers OTHER THAN the actual party to the Appeal, Ford Motor Company. This Appellee submits that the unsupported innuendo regarding alleged cost saving practices of Ford is irrelevant and a "red herring" with regard to the very narrow issue actually presented to the Court of Appeal and to this Court. The issue as to whether or not unemployment benefits should be included in the calculation of an employee's average weekly wage per KRS 342.140(6) was clearly presented

and addressed by the ALJ, Board and Court of Appeals. Based upon the statutory interpretation and analyses of similar jurisdictions, it has been decided that state funded unemployment benefits are not to be considered in the calculation of an injured worker's average weekly wage per KRS 342.140. This very narrow issue is grounded in statutory interpretation and legislative intent and should be affirmed by this Court.

If the Appellant truly finds issue with the interpretation of the UAW/Employee contract and the Collective Bargaining Agreement, these concerns are better suited for discussion in the Union/Company Bargaining Table, not this Supreme Court of law. As to the legal issue of the inclusion of unemployment benefits in the calculation of AWW as it pertains to KRS 342 and specifically KRS 342.140(6), the legal issues have been clearly and concisely set forth and decided by the lower courts. Unemployment benefits are state funded and paid when an employee is not working. In Appellee's case, this employee, Jewell, was not working while he was laid off from work. He received unemployment benefits. Thus, since he was not paid by Ford Motor Company during that period for services rendered as defined in KRS 342.140(6), logically state unemployment benefits were not included in calculation for wages earned, as it follows that 'no wages were earned'. The discussion should end here and the Appellee requests that this Court affirm the lower Courts' decisions. Any innuendo and corollary policy disagreements between the UAW and Ford are not appropriate in this venue.

Nonetheless, the Appellant also suggested that a Ford employee actually earns a "salary" as a guaranteed pay rate. This is not true. The employees are paid by the hour, depending on production hours worked and can earn between $0.00 per week and a very large figure, especially when offered overtime. The hours fluctuate and therefore a salary is not an appropriate method of payment. Yes, there is a UAW guaranteed base rate agreement, but in a

company such as Ford, there are so many forms and categories of payments (vacation, disability, bonus, SUB pay, pension retirement, regular, bereavement, COLA, etc.) that the 95% is often met in some form or fashion. But not always in production. It does not appear that Ford has ever guaranteed 95% of pay in regular production wages. The fact that it is unable to guarantee as much, and must occasionally "pull" from other sources, such as SUB pay or the like, to fulfill contractual agreements should not be held against the company. Ford is actually quite an anomaly as an Employer, willing to pay workers for doing "no work" during many layoff periods when State unemployment does not meet the 95% threshold.

This Appeal must remain focused upon the narrow issue of the inclusion of unemployment benefits in the calculation of an employee's working average weekly wage. We submit that the lower courts were correct in deciding that the unemployment benefits are not benefits paid for services rendered, and should therefore be excluded from KRS 342.140(6) calculations.

CONCLUSION

The Opinion of the Court of Appeals should be affirmed in that unemployment compensation benefits are not includable in computing average weekly wage under KRS 342.140(6). While it makes for a compelling read, Appellant's allusions relating to alleged improper business practices of Ford are not appropriate herein, are unrelated to this instant case, and should not be considered in this Court's decision making process regarding the analysis of the issue as to the inclusion of unemployment benefits in the calculation of an employee's KRS 342.140(d) AWW.

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