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Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000613-WC

FORD MOTOR COMPANY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-00550

SARAH PENDYGRAFT;
HONORABLE JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,[1] SENIOR JUDGE.

DIXON, JUDGE: Ford Motor Company seeks review of a February 23, 2007, decision of the Workers' Compensation Board affirming an administrative law judge's (ALJ) award of permanent partial disability benefits to Ford's employee, Sarah Pendygraft. We reverse and remand.

In October 2001, Pendygraft sustained a disabling back injury during the course of her employment at Ford's Kentucky Truck Plant in Louisville. Following a

[1] Senior Judge J. William Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

hearing on her claim for benefits, the ALJ issued an opinion and award assessing a 28% whole person impairment. The ALJ found Pendygraft unable to return to her pre-injury position as a "tug" operator. The ALJ accepted Pendygraft's calculation of her pre-injury average weekly wage (AWW) as $1,586.23, which included payments disbursed under Ford's profit sharing plan. The ALJ further found, based on Pendygraft's calculations, that her post-injury wage was less than her pre-injury wage, entitling her to a 3x multiplier pursuant to KRS 342.730(1)(c)(1).

Ford filed a petition for reconsideration seeking a factual determination from the ALJ that profit sharing disbursements could not be included in the AWW calculation. The ALJ denied the petition, stating, "the wage calculations do include plaintiff's regular pay, shift differential, vacation and holiday pay and profit sharing as all are earned through the work of the employee for the defendant-employer."

Ford then appealed to the Board, and in a 2-1 decision, the Board affirmed the ALJ. The Board rendered an opinion adopting one of its previous decisions on the issue. This petition for review followed.

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.

Normally, this Court gives deference to the Board's decision and only intervenes when the Board's action constitutes a flagrant error resulting in gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). However, this case

involves a question of statutory interpretation. Consequently, because statutory interpretation is a matter of law, we owe no deference to the findings of the Board, and our review is *de novo*. *Newberg v. Thomas Industries*, 852 S.W.2d 339, 340 (Ky.App. 1993).

KRS 342.140 addresses the computation of an injured employee's AWW. The provision at issue in this case 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 from others than the employer to the extent the gratuities are reported for income tax purposes.

KRS 342.140(6).

This Court has previously addressed the interpretation of KRS 342.140(6) in *Rainey v. Mills*, 733 S.W.2d 756 (Ky.App. 1987). In *Rainey*, the claimant sought to calculate her AWW including funds her employer contributed to her pension plan, health insurance and life insurance. *Id*. at 757-58. The Court considered whether such "fringe benefits" were included within the definition of "wages" found in the statute. *Id*. at 757. The Court stated:

> 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. 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. The express language of the statute 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 it's legitimate scope.

Id. at 358 (internal citations omitted).

We find the interpretation of KRS 342.140(6) established in *Rainey*, controlling here. Since profit sharing is not specifically contemplated by the statute, we decline to expand the meaning of "wages" beyond what the legislature intended. Likewise, we do not find that profit sharing is a "similar advantage" to "board, rent, housing, lodging, [or] fuel." KRS 342.140(6).

Pendygraft adopts the position of the Board and opines the profit sharing disbursement constitutes a cash bonus, and therefore qualifies as "money payments for services rendered" pursuant to KRS 342.140(6). We disagree.

Although this issue has not been widely addressed in our sister jurisdictions we find the reasoning in *Stewart v. Ford Motor Co.*, 474 N.W.2d 162 (Minn. 1991), persuasive. Under facts nearly identical to the case at bar, the Supreme Court of Minnesota concluded profit sharing disbursements should not be calculated in the AWW:

> [S]uch bonus-type payments to all employees at the end of the year, out of the profits of the employer's business, do not represent the individual efforts of the employee on the line. Rather, the profit sharing here is reflective of Ford's annual financial status, not of the employee's earning capacity, because whether Ford realizes a profit depends largely on factors outside the employee's control, e.g., interest rates, supply and demand, sales, and manufacturing costs.

Id. at 164.

We conclude the plain meaning of KRS 342.140(6) does not encompass profit sharing as a form of "money payments for services rendered." Accordingly, we reverse the Board's decision and remand to the ALJ for recalculation of Pendygraft's AWW excluding the profit sharing disbursements.

In its second assignment of error, Ford contends Pendygraft failed to demonstrate what portion of her income was calculable as her AWW. However, in light of our decision, we decline to address this argument, as the ALJ will necessarily review Pendygraft's payroll records on remand.

Finally, Ford's third assignment of error, regarding the calculation of overtime hours, is unpreserved. As such, we decline to address the issue. *Hodges v. Sager Corp.*, 182 S.W.3d 497, 501 (Ky. 2005).

For the reasons stated herein, the decision of the Workers' Compensation Board is reversed and remanded to the ALJ for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth M. Stepien
Wesley G. Gatlin
Louisville, Kentucky

BRIEF FOR APPELLEE

Christopher P. Evensen
Louisville, Kentucky