OPINION ENTERED: April 12, 2013

CLAIM NO. 201100091

JOSEPH JEWELL — PETITIONER/ CROSS-RESPONDENT

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

FORD MOTOR COMPANY — RESPONDENT/ CROSS-PETITIONER

and

HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Joseph Jewell ("Jewell") appeals and Ford Motor Company ("Ford") cross-appeals from the Opinion and Award rendered November 16, 2012 by Hon. John B. Coleman, Administrative Law Judge ("ALJ") awarding temporary total

disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits, and medical benefits. The parties also appeal from the order on reconsideration issued December 3, 2012.

The issues on appeal concern whether unemployment benefits, and supplemental unemployment benefits (“SUB pay”) received by Jewell in the year prior to his injury are to be included in the calculation of his average weekly wage (“AWW”). Because we determine neither benefit should be included in the AWW calculation, we affirm in part, reverse in part, and remand.

The facts are not in dispute. Jewell filed a Form 101 alleging injuries to both upper extremities, shoulders, neck and low back due to the repetitive nature of his work, with an injury date of December 4, 2009.

Jewell testified by deposition on March 23, 2011, and at the hearing held September 19, 2012. Jewell, a resident of Louisville, was born on July 6, 1971, is a high school graduate, and has vocational training in electricity and electrical wiring. Jewell’s employment history prior to working at Ford includes work as a delivery driver. In September 1994, Jewell began working at the Ford assembly plant in Louisville. During his employment with Ford, he has worked in the body shop, and has also worked as a

radiator installer, windshield installer, repairman and utility worker.

On December 4, 2009, Jewell experienced a pop between his shoulder blades as he was installing a fuel tank. He experienced a sharp pain, and his hands went numb a few months later. On March 23, 2010, he experienced numbness in his hands, and when he awakened the next day, his hands were completely numb. He initially treated with Dr. Sarita Nair who referred him to Dr. David Rouben. He continued working until taken off by Dr. Rouben in April 2010. Dr. Rouben allowed him to return to light duty work on June 29, 2010, and he returned to the utility job. Dr. Rouben also referred him to Dr. Thomas Gabriel, an orthopedic surgeon, who performed surgery on the right wrist on October 6, 2010, and on the left wrist in December 2010.

Dr. Gabriel allowed Jewell to return to one-handed duty until the plant shut down on December 16, 2010, and he was laid off. While he was laid off, Jewell received unemployment benefits and SUB pay which is a contractual benefit supplementing unemployment benefits. In the year prior to September 4, 2010, Jewell stated he received either regular pay, unemployment benefits with SUB pay, or vacation pay for the entire time period. On October 3, 2011, Jewell returned to his regular job with no restrictions when he was

called back to work from being laid off. Jewell stated he continues to have some pain in his shoulders, and would have difficulty performing some of his previous jobs.

Jan Stieff, a human resources associate with Ford, testified by deposition on November 1, 2012. Her job consists of managing personnel records, defining/ interpreting contracts, and dealing with pay issues. She stated Jewell receives a five percent premium because he works on third shift. She also testified his wage records do not reflect or include unemployment benefits, SUB pay, or benefits he may have received pursuant to a short-term disability policy. She explained SUB pay as follows:

> SUB pay is a supplemental benefit if the company lays you off. Back at that time you were entitled to 95 percent of your base rate less all taxes, which just give you a working number, a working gross, and then we would subtract any amount you received from unemployment, and then that would be your net amount.

She noted Jewell received short-term disability payments for fifteen weeks between March 2010 and June 2010, at a rate of $685.00 per week.

The medical evidence was adequately summarized by the ALJ, and will not be reviewed further because it has no bearing on the issues raised on appeal.

Ford submitted a wage certification on March 4, 2011, which does not reflect the payment of unemployment benefits, SUB pay, or short-term disability benefits. The records reflect the AWW for the highest quarter for the year prior to December 4, 2009 was $937.43. In the Form 111 filed February 28, 2011, Ford indicated Jewell's wages after he returned to work were $1,083.51 per week.

A benefit review conference ("BRC") was held July 6, 2012. The parties stipulated Jewell's AWW at the time of the injury was $937.43, and he returned to work at a rate of $1,083.51 per week. The BRC order and memorandum further reflects Jewell's current wages are $1,150.00 per week. The issues preserved for determination were benefits per KRS 342.730; work-relatedness and causation of the carpal tunnel syndrome; unpaid medical benefits; whether Jewell's carpal tunnel condition constituted an injury as defined by the Kentucky Worker's Compensation Act; and, entitlement to TTD benefits.

At the hearing held September 19, 2012, Jewell withdrew his stipulation regarding the AWW calculation. He subsequently submitted unemployment records. In his brief to the ALJ submitted November 9, 2012, Jewell argued his pre-injury wage, inclusive of unemployment and SUB pay, was $996.89. Ford argued the correct AWW was $937.53.

In his opinion issued on November 16, 2012, relevant to this appeal, the ALJ determined the following:

> The next issue to be discussed by the Administrative Law Judge is the issue of average weekly wage. The plaintiff was paid on an hourly basis by the defendant, but also received "sub pay" during any period of time when he was off work and received unemployment benefits. When wages are fixed by the day, hour or by the output of an employee, the average weekly wage shall be the wage most favorable to the employee, computed by dividing by thirteen the wages (not including overtime or premium pay) the said employee earned in the employ of the employer in the first, second, third and fourth period of the thirteen consecutive calendar weeks in the fifty-two weeks immediately preceding the injury. *KRS 342.140(1)(d).* The term "wages" is defined in *KRS 342.140 (6)* as meaning in addition to money payments for services rendered, the reasonable value of board, grant, 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. The term wages does not include unemployment compensation and I agree with the defendant, but there is no indication whatsoever that unemployment compensation was intended to be included in the calculation of wages. However, "sub pay" is a money payment made to the plaintiff for which he receives a W-2 each year indicating the payments are for wages. The benefits are part of the negotiated contract, but are nevertheless wages received by the plaintiff during the 52 weeks

> immediately preceding his injury. They are more like "shift differential" pay them[sic] premium pay as it is clearly recognition of the fact that the plaintiff undergoes periods of unemployment due to plant closure and the benefits are paid to alleviate that undesirable effect of his position. Therefore, I am convinced the "sub pay" should be included in the calculation of average weekly wage. In this particular instance, the plaintiff's best quarter was clearly the quarter beginning on September 6, 2009 and ending on November 29, 2009 wherein the plaintiff received regular wages which would result in an average weekly wage of $937.43. The plaintiff also received additional wage benefits of "sub pay" in the amount of $400.00 for the week of October 11, 2009. Therefore, that $400.00 must be added to the $12,186.61 in other wages to determine average weekly wage. This results in an average weekly wage of $968.20.

Both Jewell and Ford filed petitions for reconsideration. In his petition for reconsideration filed November 21, 2012, Jewell argued the ALJ erred by failing to include both unemployment and SUB pay in his calculation of the AWW. In its petition for reconsideration filed November 27, 2012, Ford asked for the correction of a typographical error, and requested SUB pay be excluded from the AWW determination.

In his order on the petitions for reconsideration issued December 30, 2012, the ALJ stated the following:

> This matter is before the ALJ on Petitions for Reconsideration filed by both the defendant and the plaintiff. The plaintiff believes the ALJ committed error by not including unemployment benefits in the calculation of average weekly wage. The defendant argues the ALJ was correct in not including unemployment benefits but nevertheless erred by including "sub pay" in the calculation of average weekly wage. The defendant argues this "sub pay" is a fringe benefit rather than wages. Additionally the defendant points to a patent error appearing on page 11 which needs to be corrected. After reviewing the arguments of both parties the Petition for Reconsideration filed by the defendant is **GRANTED** in regards to the typographical error in[sic] the Opinion and Award is amended at page 11 to indicate Dr. Goldman's conclusion was actually that he believed the plaintiff did retain the physical capacity to return to the work he was performing at the time of his injury. However, the Petitions for Reconsideration filed by the parties regarding average weekly wage are **DENIED**. While the ALJ understands the arguments of both parties in regards to average weekly wage, he stands by the analysis set forth on pages 13 and 14 of the Opinion and Award dated November 16, 2012.

On appeal, Ford notes the issue regarding SUB pay has never previously been determined, and argues it is a fringe benefit which should not be included in an AWW determination. Ford cites to federal statutes and case law indicating SUB pay benefits are not considered wages despite being reported on W-2’s for federal withholding

purposes. Jewell argues the ALJ correctly included SUB pay benefits in calculating the AWW, but erred in failing to include unemployment benefits in his calculation.

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 342.143 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.

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].

Wages include both monetary payments and 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, 714 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).

Id. at 758.

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.

We next turn to whether SUB pay should be included in calculating AWW benefits. SUB pay is a contractual benefit paid to the employee when he receives unemployment benefits. Again, this benefit is only applicable during periods when the employee is not rendering services to the employer. As noted above, KRS 342.0011(17) and KRS 342.140(6) outline what is to be included as wages. In Rainey, supra, the Court of Appeals found fringe benefits such as employee pension fund contributions, health insurance benefits, and life insurance were not intended to be included under KRS 342.140 as "wages" on the basis that they did not fall within the class of "similar advantages received from the employer" such as board, rent, housing, or lodging. Unlike vacation pay, SUB pay is not earned and is applicable only during periods of unemployment.

In Ohio Farmers Ins. v. Breeding, Not Reported in S.W.3d, 2012 WL 5519284 (Ky. App. November 09, 2012), the Kentucky Court of Appeals stated as follows:

> Under KRS 342.140(1), an employee's "average weekly wage" does not include all amounts earned. Profit sharing bonuses which are earned in addition to regular wages are not to be included in calculating average weekly wages. *Pendygraft v. Ford Motor Co.,* 260 S.W.3d 788, 792 (Ky. 2008). Premium pay, as opposed to output pay, is not part of average weekly wages. *Denim Finishers, Inc. v. Baker,* 757 S.W.2d 215, 216 (Ky.App.1988). Fringe benefits are not part of average weekly wages. *Rainey v. Mills*, 733 S.W.2d 756, 757–758 (Ky. App. 1987).

Because a W-2 is issued for SUB pay is not determinative of whether it is includable in calculating the AWW. SUB pay is an augmentation of unemployment benefits, is paid while the employee is not working, and is not a "shift differential". We conclude, as a matter of law, SUB pay is a fringe benefit, not a monetary payment for services rendered and therefore may not be included in the calculation of AWW. We reverse the ALJ's inclusion of SUB pay for calculation of the AWW. On remand, the ALJ shall calculate the AWW without the inclusion of the SUB pay benefit.

Accordingly, the opinion and award rendered on November 16, 2012 by Hon. John B. Coleman, Administrative Law Judge, and the order ruling on the petition for reconsideration issued December 3, 2012, are hereby **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED** for further findings and entry of an amended opinion and award in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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