OPINION ENTERED: February 15, 2013

CLAIM NO. 201090583

LARRY E. RILEY, II PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

LOUISVILLE METRO GOVERNMENT
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

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

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

STIVERS, Member. Larry E. Riley, II ("Riley") appeals from the October 1, 2012, opinion, order, and award of Hon. Douglas W. Gott, Administrative Law Judge ("ALJ") in which the ALJ awarded temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and

medical benefits. No petition for reconsideration was filed.

On appeal, Riley asserts the ALJ erred as a matter of law by excluding his clothing and equipment allowance and his Kentucky Law Enforcement Foundation Program Fund ("KLEFPF") payments as forms of income in calculating his average weekly wage (“AWW”).

The Form 101, filed February 13, 2012, alleges Riley injured his head, neck, left shoulder, and upper, mid, and lower back on April 24, 2010, while working for the Louisville Metro Police, a division of the Louisville Metro Government ("Louisville Metro"). Riley was injured in the following manner: "Plaintiff was parked in his police cruiser on the entrance ramp from I-264 to I-64 East, when he was rear-ended by another driver."

Louisville Metro's Form 111, Notice of Claim Denial or Acceptance, filed April 2, 2012, indicates the claim was accepted as compensable but a dispute existed concerning the amount of compensation owed. The Form 111 listed Riley's AWW as $894.95 and indicated an AWW-1 was to be provided upon receipt and after verification. On April 2, 2012, Louisville Metro also filed the wage records for the four quarters preceding Riley’s April 24, 2010, accident.

On June 13, 2012, in two separate filings, Louisville Metro filed pre and post-injury wage records and wage certifications. Louisville Metro offered to stipulate a pre-injury AWW of $896.71.

The August 1, 2012, benefit review conference ("BRC") order lists the following contested issues: benefits per KRS 342.730 and vocational rehabilitation. Under stipulations is the following: "Plaintiff's average weekly wage (AWW) was $896.71."

On August 14, 2012, Riley filed a Notice to Submit Paystubs, Wage Records and Corrected Average Weekly Wage Calculation. Riley calculated an AWW of $1,058.62.

On August 14, 2012, Riley filed a Motion for Relief of Pre-Injury Average Weekly Wage Stipulation in which he moved the ALJ for relief from the stipulation at the BRC of an AWW of $896.71. Riley asserted the correct AWW is $1,058.62 after including payment for "Court Appearances, Clothing Allowance, Equipment Allowance and KLEFPF."

In his brief to the ALJ, Riley asserted the employer's calculation of AWW should have included payment for court appearances, clothing allowance, equipment allowance, and KLEFPF pay. Riley asserted nothing in KRS 342.140 "precludes inclusion of these forms of payment in

the calculation of a proper AWW." Riley noted his calculations of AWW included these forms of payment, and the correct AWW is $1,058.62.

In Louisville Metro's brief to the ALJ, it conceded court pay should be included in the calculation of AWW. Regarding inclusion of the clothing and equipment allowance, Louisville Metro argued this is merely reimbursement for money Riley spent on clothing and equipment and should be viewed as a fringe benefit pursuant to Rainey v. Mills, 733 S.W.2d 756 (Ky. App. 1987). Regarding KLEFPF payments, Louisville Metro asserted Riley receives this pay in addition to TTD benefits; thus, to include it in the calculation of his AWW for purposes of calculating TTD benefits is error. Louisville Metro submitted an amended pre-injury wage certification which included court pay resulting in an AWW of $935.42.

In the October 1, 2012, opinion, order, and award concerning the inclusion of the clothing and equipment allowance and KLEFPF payments in calculating AWW, the ALJ determined as follows:

> Plaintiff argues for an average weekly wage of $1,058.62. The Defendant argues for an AWW of $935.42. The disagreement is whether clothing and equipment allowances, and KLEFP (Kentucky Law Enforcement Foundation Program Fund) pay should be considered in calculating

Riley's AWW. The Defendant concedes that Riley's "court pay" should be added to his regular wages for purposes of calculating AWW.

Riley's argument for including the clothing/equipment allowance and KLEFP pay is that "Nothing in the statue [sic] (KRS 342.140) precludes inclusion of these forms of payment." (Brief, p. 12). The ALJ agrees with the Defendant that these items are not included for calculating AWW.

The money Riley received for clothing and equipment was simply reimbursement for what he spent on those items. (HT, p. 32). As such, it is not income but at most a fringe benefit, which is a category of pay or benefits not included in calculating AWW. *Rainey v. Mills*, 733 S.W.2d (Ky.App. 1987).

KLEFP pay is addressed at 503 KAR 5:100 § 2(3)(f), and provides that "a Police Officer, provided he is qualified to participate in the fund during the period, shall be paid a salary supplement for that period of time during which he is not receiving a salary but is receiving Workers' Compensation benefits." Riley receives KLEFP pay in addition to TTD. It would therefore be improper to include such pay in calculating AWW because that would only serve to increase his TTD rate while at the same time receiving the additional KLEFP pay.

The finding of an AWW of $935.43 results in a temporary total and permanent total disability rate of $623.61 per week. Any alleged underpayment overpayment of TTD shall be handled pursuant to Article 32, Section 6 of the Collective Bargaining Agreement attached to the Hearing transcript.

As noted, Riley failed to file a petition for reconsideration. On appeal, Riley argues his clothing and equipment allowance should have been included in calculating his AWW for purposes of computing his TTD and PTD benefits as he pays income taxes on the allowance. Thus, his allowance is not a fringe benefit.

Riley also argues the KLEFPF payments should be factored into the calculation of his AWW for purposes of computing his PTD benefits but not his TTD benefits. Riley maintains the Board addressed the inclusion of KLEFPF payments in calculating AWW in City of Taylorsville v. Stevens, Claim No. 00-65151 (April 7, 2006). Riley asserts in Taylorsville, "the Board affirmed ALJ Grant S. Roark's decision to include KLEFPF payments as wages to be included in the injured police officer's AWW calculation." In a footnote, Riley alleges the Board also affirmed the inclusion of the injured officer's uniform allowance in the AWW calculation. Riley argues as follows:

> It is also clear that the legislature intended the payments received by police officers pursuant to the KLEFPF fund to be treated as wages per KRS 15.460(2), which provides that '[t]he supplement paid to a police officer shall be in addition to his or her regular salary.' This position is bolstered by the language of KRS 15.460(3)(a) which prohibits sheriffs who are already receiving the maximum

> salary allowed by the Kentucky Constitution from receiving the salary supplement provided by the fund.

Riley contends the correct AWW for computing his PTD benefits is $1,058.62, and the correct AWW for computing TTD benefits is $998.98.

Although Riley did not file a petition for reconsideration, on questions of law, or mixed questions of law and fact such as in the case *sub judice*, this Board's standard of review is *de novo*. *See* Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009). "When considering questions of law, or mixed questions of law and fact, the reviewing court has greater latitude to determine whether the findings below were sustained by evidence of probative value." Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 117 (Ky. 1991).

Regarding the issue of Riley's clothing and equipment allowance, we turn to KRS 342.0011(17) and 342.140(6) which are the applicable statutory provisions. 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.

At the hearing, Riley testified as follows regarding the clothing and equipment allowance:

> Q: The clothing and equipment allowance that you receive, how much is that per week or month?
>
> A: It's a- I think it's quarterly. Yeah. That's-
>
> Q: And, is that meant-
>
> A: That's quarterly.
>
> Q: Is that meant to reimburse you for money that you would spend on clothing and equipment?
>
> A: Yes, sir.

Riley's clothing and equipment allowance must be considered a "similar advantage" as "board, rent, housing, lodging, and fuel" received from the employer and should be included in the calculation of AWW for purposes of

computing his TTD and PTD benefits. KRS 342.0011(17); KRS 342.140(6). 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 are not persuaded by the ALJ's determination the allowance "was simply reimbursement for what [Riley] spent on those items," as there is no testimony indicating Riley submitted receipts for his expenditures and received a dollar-for-dollar reimbursement. In fact, Riley's testimony supports the fact that he received the allowance on a quarterly basis. Similarly, we are unconvinced by Louisville Metro's argument the clothing and equipment allowance is a fringe benefit, as it simply does not fall

in same class as health insurance benefits, life insurance, and other such benefits. As Riley's clothing and equipment allowance is a "similar advantage" that is "of the same class" as "board, rent, housing, lodging, and fuel," it should be included in the calculation of AWW for the purposes of computing his TTD and PTD benefits. Id.; KRS 342.0011(17); KRS 342.140(6).

Additionally, Riley's paystubs, filed in the record on August 14, 2012, establish Riley's clothing and equipment allowance was included in his earnings. We acknowledge the last sentence of KRS 342.140(6) in discussing the income tax reporting requirement appears to modify only “gratuities received from third parties.” However, the logical extension of the sentence is that when a certain payment such as a clothing and equipment allowance is subject to federal income tax, the payment should, particularly when it is a "similar advantage" that is "of the same class" as "board, rent, housing, lodging, and fuel," be considered a "wage" pursuant to KRS 342.0011(17) and KRS 342.140(6). Since the record indicates Riley's clothing and equipment allowance was subject to federal income tax; Riley's clothing and equipment allowance, being a “similar advantage” that is “of the same class” as “board, rent, housing, lodging, and fuel” and

subject to federal income tax, should be included in the calculation of AWW for purposes of computing TTD and PTD benefits. Id.; KRS 342.0011(17); KRS 342.140(6).

Regarding the inclusion of KLEFPF payments, this Board previously dealt with the same issue in City of Taylorsville v. Tony Stevens, Claim No. 00-65151, entered April 7, 2006. In Taylorsville, we were called upon to determine whether the ALJ erred by concluding KLEFPF payments are "wages" pursuant to KRS 342.140(6). In affirming the ALJ's decision, we held:

> With respect to the ALJ's inclusion of KLEFP payments in Stevens' AWW, Taylorsville offers no specific exception to the ALJ's analysis of the facts or the law. Taylorsville simply quotes the relevant statutory provisions – KRS 342.140 and KRS 342.0011(17) – and asserts that the KLEFP payments "do not fall under the statutory definition of 'wages' and therefore should not have been included by the ALJ in determining that Stevens post-injury average weekly wage was less than his average weekly wage at the time of injury." That is the sum and substance of Taylorsville's argument on this issue. Taylorsville offers no citation to any judicial precedent or other legal authority as support for its assertion. Consequently, we are unable to discern precisely why Taylorsville believes the KLEFP payments do not constitute "wages" within the meaning of the statute. [footnote omitted]. In any event, we believe the ALJ's

determination is supported by substantial evidence and legally sound.

The stipend received by Stevens for participating in in-service training qualifies as "wages" in the manner of "money payments for services rendered." The attainment of further education in the field of law enforcement by Stevens was plainly a benefit to Taylorsville. Stevens could not have qualified for payments under the KLEFP program without the consent of and participation by Taylorsville in the program. *See* KRS 15.440. Moreover, Stevens' participation in the program provided a direct and tangible economic benefit to Taylorsville. In addition to the stipend paid to Stevens, participation in the program entitled Taylorsville to receive "an amount equal to the required employer's contribution on the supplement to the defined benefit pension plan to which the officer belongs. . . ." KRS 15.460. In other words, Stevens' participation in the program was plainly a "service" to Taylorsville.

That the legislature intended the payments received by police officers pursuant to the KLEFP fund to be treated as wages is evidenced by KRS 15.460(3), which provides that sheriffs who are already receiving the maximum salary allowed by law shall not be entitled to receive the KLEFP supplement. The statute expressly provides that the KLEFP supplement paid to a police officer "shall be in addition to his regular salary." KRS 15.440(2).

Kentucky's attorney general, likewise, has advised that payments made to officers from the KLEFP fund are to be treated as earnings. An

opinion rendered by the attorney general in 1983 sets out the following history of the KLEFP program, which provides some illumination of the subject:

> The Kentucky Law Enforcement Foundation Program Fund resulted from the Federal Crime in the Streets Act, in which federal monies were given to the states for programs which would strengthen law enforcement and, hopefully, result in reduced crime.
>
> The KLEFPF program involved the granting of additional pay (originally 15%) incentives to police officers who took additional training of specified hours and content. This money originally came from the federal government to the state agency which administered the program. Federal financing has since been discontinued, and the program is now carried on by state funding.
>
> KLEFPF has adopted various regulations dealing with administration of the funds. 503 KAR 5:010, § 1(10), defines "base salary" as:
>
> [T]he minimum annual salary including longevity, paid to a police officer for a standard work year by the local unit, but shall not include any incentive monies paid by the fund, expenses

for uniforms or equipment paid by a police officer as a condition of employment which may reduce the officer's salary, or any other remuneration directly related to employment by the local unit. Base salary does not include any compensation for time worked in excess of forty (40) hours per week. (Emphasis supplied).

Further 503 KAR 5:050, § 2, provides:

Upon acceptance for participation in the fund, the local unit shall be eligible to receive a percentage of each qualified officer's salary from the fund to be paid to each officer in addition to his base salary. The award to the local unit shall be based upon the total base salaries to all qualified full-time, sworn police officers employed by the local unit. (Emphasis supplied.)

Since the money is based on base salary and that excludes pay over 40 hours per week, overtime is not included in computing KLEFPF money to a local unit of government.

The 1982 Kentucky General Assembly enacted KRS 15.460 which provides:

(1) Beginning July 1, 1982, an eligible local unit of government shall be entitled to receive annually a

supplement of two thousand five hundred dollars ($2,500) for each qualified police officer it employs.

(2) Each qualified police officer, whose local government receives a supplement pursuant to subsection (1) of this section, shall be paid by the local government the supplement which his qualifications brought to the government. The supplement paid each police officer shall be in addition to his regular salary.

After July 1, 1982, all full-time police officers (who have the additional training) receive an additional $2,500 per year or $208.33 per month. The aforesaid regulations are presently undergoing revisions to reflect that statute. Your letter refers to the incentive pay as a "bonus." That is not an accurate description. A bonus is, in fact, a gift from an employer given out of his largesse. The incentive pay is earned, not a gift. It is earned by the officer attending certain training courses required by the Kentucky Law Enforcement Council and the KLEFPF program. Were it a bonus, it would be illegal under Kentucky Constitution, Section 3, as a grant of exclusive, separate public emolument or privilege--not

> in consideration of public service.
>
> KRS 337.285 requires employers to pay one and one-half the hourly wage rate of pay for affected employees who work over 40 hours per week.
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> Department of Labor Regulation 803 KAR 1:060, dealing with overtime pay requirements in Section 8 excludes from computing the hourly rate (for overtime purposes) sums paid as gifts, Christmas bonuses, which are not measured or dependent upon hours worked (Subsection 1). The KLEFPF incentive pay is not such a "bonus," so, it would not be excluded under that subsection.
>
> Subsections 5 and 6 of that labor regulation exclude extra premium compensation for hours worked in excess of eight hours per day or over the maximum work week for normal working hours, and for holiday, Saturday, Sunday, or the sixth and seventh day of work, but it does not exclude the type of compensation which comes to the police officer by reason of KLEFPF. Therefore, the KLEFPF money would be considered in determining an officer's overtime pay.

Ky. OAG 83-432, 1983 WL 166196 (Ky.A.G.).

The attorney general had earlier concluded that KLEFP payments must be taken into account in computing pension and retirement fund contributions by cities and their police officers, stating "[KLEFP sums] and the officers' regular salaries are to be considered together as their total salaries for purposes of computing deductions for pension fund purposes." Ky. OAG 81-306, 1981 WL 142116 (Ky.A.G.).

We find ample support for including the KLEFP payments in "wages" from other jurisdictions and scholarly treatises on the subject, as well. It is widely accepted that payments above and beyond an employee's regular salary that are based on productivity, attendance or some other measurable goal are included in determining average wages. *See* 82 Am.Jur.2d, Workers' Compensation § 436 ("Regularly paid bonuses are also counted in establishing a worker's average earnings. A bonus may also be included if it is related to productivity or other employee and employer accomplishments, or based on other measurable employee goals." [footnotes omitted]); 100 C.J.S., Workers' Compensation § 539 ("The value of education, training and experience which can be estimated in money may be considered as part of an employee's remuneration."); 84 A.L.R.4th 1055 § 7 (citing Moss v. Aluminum Co. of America, 152 Tenn 249, 276 S.W. 1052 (1925), which held that employer's denomination of payments as "bonuses" was not dispositive and payments would be included in wage calculation where they were guaranteed by employer based on weekly attendance).

In sum, while we have not been directed to any precedent on point, we

> believe our conclusion is in accordance with the plain language of the statute and the weight of authority from secondary sources. Thus, we believe the ALJ was correct to include Stevens' KLEFP payments in calculating his AWW for purposes of determining the amount of permanent income benefits to which he is entitled.

Based on the logic set forth above, the KLEFPF payments should have been included in calculating AWW for purposes of determining Riley's PTD benefits. As Riley concedes the KLEFPF payments should not be included in calculating his TTD benefits, we will not address that issue.

Accordingly, the ALJ's decision to exclude Riley's clothing and equipment allowance payments from the calculation of his AWW for purposes of determining Riley's TTD and PTD benefits is **REVERSED**. The ALJ's determination to exclude Riley's KLEFPF payments from the calculation of AWW for purposes of determining his PTD benefits is also **REVERSED**. The awards of TTD and PTD benefits are **VACATED** and this claim is **REMANDED** for recalculation of Riley's AWW, TTD and PTD benefits, and entry of an amended opinion, order, and award. On remand, the award of TTD benefits shall be based on an AWW calculation which includes Riley's clothing and equipment allowance. The award of PTD

benefits shall be based on an AWW calculation which includes Riley's clothing and equipment allowance and KLEFPF payments.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON DEREK P O'BRYAN
600 W MAIN ST STE 500
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON DENIS S KLINE
333 GUTHRIE GREEN #203
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON DOUGLAS W GOTT
400 E MAIN ST STE 300
BOWLING GREEN KY 42101