

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: September 23, 2013

CLAIM NO. 201069276

WILLIAM HUBBARD

PETITIONER

VS.

APPEAL FROM HON. R. SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE

ADESA  
AND HON. R SCOTT BORDERS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING IN PART  
AND REMANDING

\* \* \* \* \*

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

**RECHTER, Member.** Petitioner, William Hubbard, was injured on December 16, 2010 while working at Adesa, a used auto auction in Lexington (hereinafter, "Adesa"). Adesa's parent company is KAR Auction Services ("KAR"), a publicly-traded company which operates auto auctions in several

states. Hubbard was employed as a manager of Adesa's mechanical department. The injury occurred when a motor vehicle slid out of gear and knocked him to the ground. Hubbard was dragged approximately thirty to forty feet. He was 68 years old at the time, and suffered injuries to his right leg.

In an April 24, 2013 Opinion and Order rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), Hubbard was awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits. In calculating the TTD and PPD benefits, the ALJ first determined Hubbard's average weekly wage ("AWW") in 2010 was \$741.95. The ALJ reached this figure by dividing Hubbard's annual salary of \$38,576.00 by 52 weeks, per KRS 342.140(1)(a). Hubbard challenged the method of calculation of his AWW in a petition for reconsideration, which was denied by the ALJ in an Order dated May 17, 2013.

Hubbard argued before the ALJ, and now to this Board, that his annual salary in 2010 was \$54,091.91 because he received a \$15,431.00 bonus in February 2010. The ALJ rejected this argument. The ALJ noted the fact that, though received in 2010, the bonus was earned as a result of Hubbard's performance in 2009. Further, the ALJ

likened the bonus to a profit-sharing plan, which income is not includable in wages pursuant to Pendygraft v. Ford Motor Co., 260 S.W.3d 788 (Ky. 2008). On appeal, we are asked to determine if the bonus is includable in the calculation of Hubbard's annual salary and, if so, for what year.

The evidence concerning the bonus came primarily from Jeffery Barber, a senior vice president of human resources for KAR. Barber testified Hubbard was a salaried employee who received \$1,483.71 every two weeks from January 2009 through December 2010. He explained Hubbard received the bonus because of his position as a manager, which is "an eligible bonus position under the Adesa annual incentive program" which itself is a "subset program of the KAR Auction Services annual incentive plan." Pursuant to the plan, KAR identifies annual targeted performance levels for each particular auction location. The target performance level is based on projected earnings of that location. If the annual target is achieved, the managers of that particular location receive a bonus. The bonus amounts are calculated as a percentage of the manager's base pay, and increase from 10% to 40% of the manager's base pay depending on how far the annual target is exceeded. The bonus is tied to the earnings of each

particular location, not on KAR's overall, national earnings or profits.

Not every employee of Adesa participated in the program, as it was offered only to managers. In fact, only nine of Adesa's 138 employees received the bonus for the 2009 year's performance. In 2009, Adesa achieved 117% of its target earnings, so Hubbard received the maximum allowable bonus of 40% of his base salary, or \$15,431.00.

During his deposition, Barber emphasized that the program was an incentive plan, not a profit sharing plan. It had not been established as a profit sharing plan under federal law, nor was it tied to KAR's profits in any given year. Also of importance, the bonus was not actually distributed to Hubbard until February 2010, though it was based on Adesa's earnings in 2009. Barber explained the final accounting of the 2009 year had to be performed, and the KAR Board of Directors had to formally approve each bonus in early 2010.

Barber acknowledged Hubbard's eligibility for the bonus depended on the performance of the entire team. However, he likewise conceded the program was designed to incent managers to perform well. In fact, in March 2009, Hubbard signed a form acknowledging the Adesa Lexington's annual targets and estimating his personal bonus if the

target was achieved or exceeded. The form referred to the incentive plan as part of Hubbard's "compensation program." We begin our analysis with KRS 342.140(1)(c), which explains the AWW calculation for a salaried employee: "[T]he average weekly wage shall be the yearly wage so fixed divided by fifty-two (52)." Wages 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). The question before us is whether a bonus such as Hubbard received falls within the definition of "wages" for purposes of a salaried employee.

The parties draw our attention to the case of Pendygraft v. Ford Motor Company, 260 S.W.3d 788 (Ky. 2008). Pendygraft was employed as a tug driver in the stock department when she was injured. At the time, she earned an hourly wage plus a profit-sharing bonus. This bonus was distributed pursuant to a union contract requiring payment during periods the company made a profit. In concluding that such profit-sharing bonus should be excluded from the AWW calculation, the Court reasoned:

We acknowledge that workers sometimes receive profit-sharing in lieu of wages but are not convinced that KRS 342.140(6) requires such payments to be included in the average weekly wage calculation. To the extent that an employee works in exchange for profit-sharing, the employee's actual hourly wage is not fixed or cannot be determined. KRS 342.140(1)(f) bases such an individual's average weekly wage on the usual wage for similar services when rendered by a paid employee, a basis that is independent of a particular employer's profits and that is consistent with the purposes of KRS 342.730(1)(b) and (1)(c)2.

We are not convinced the Court's rationale in Pendygraft applies to the present situation. Unlike Pendygraft, Hubbard is paid an annual salary. KRS 342.140 specifically excludes premium and overtime pay from inclusion in a non-salaried employee's wages, but there is no such exclusion for the employee whose wages are fixed by the year.

Furthermore, Pendygraft concerned a profit-sharing plan. Barber repeatedly emphasized during his deposition testimony Hubbard's bonus was part of an incentive plan. Hubbard did not contract to be paid a fraction of Adesa's annual profits. Rather, Adesa identified a specific earnings goal, and promised Hubbard compensation of a pre-determined amount. If Adesa did not reach its target earnings, Hubbard would not have received

the bonus, regardless of whether the auction was actually profitable.

More importantly, the Court's primary rationale seeks to insulate the worker from income fluctuations due to the employer's profitability, by instead calculating wages based on the usual wage for similar services. That rationale does not apply to an employee in Hubbard's situation, who is guaranteed a salary but also given the opportunity to earn additional compensation if particular goals are met.

Rather, Hubbard received a simple bonus, and such income is encompassed in the definition of wages as that term is defined in KRS 342.140(6). A bonus represents money payments for services rendered. "In computing actual earnings as the beginning point of wage-basis calculations, there should be included not only wages and salary but any thing 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." 5 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 93.01[2][a], at 93-19 (Nov. 2005)(emphasis added)(footnotes omitted).

Adessa argues the payment cannot be characterized as a bonus, because it was not tied directly and solely to

Hubbard's personal performance. See e.g. Denim Finishers, Inc. v. Baker, 757 S.W.2d 215 (Ky. App. 1988)(claimant earned an extra .06¢ per pair of pants pressed in excess of 350 per week; such pay was based on output and should be included in calculation of AWW). While true, this circumstance does not alter our analysis. Hubbard's bonus was tied to the specific targets placed on Adesa's earnings and was received by only the nine members of its management team. Simply by virtue of the program's existence, KAR obviously correlated the local management team's performance directly to earnings. It is immaterial Hubbard worked as a member of this small management team to achieve the target earnings.

Having concluded Hubbard's wages includes his bonus, we must determine whether the bonus should be included in his 2009 or 2010 annual income. Adesa emphasizes the bonus was based on the auction's earnings in 2009, and should be included in that year. However, this calculation is cumbersome. Many employees are paid in early January for work actually performed the preceding December, and it is impractical to require such wages to be parsed out. In light of these practical considerations, this Board has previously noted "it is clear from [KRS 342.140(1)(c)] the legislature intended for a yearly salary

to be divided by fifty-two (52), regardless of when the wage-earner actually works and earns that salary." Halcomb v. Perry Co. Board of Education, WCB 08-87042 (June 11, 2010)(determining teacher's annual salary should be divided by 52 weeks though she only worked 38 weeks). For these reasons, Hubbard's \$15,431.00 bonus must be included in his 2010 wages because it was received in February 2010, notwithstanding the fact his performance in 2009 entitled him to receipt of this benefit.

For the foregoing reasons, those portions of the April 24, 2013 Opinion and Order and the May 17, 2013 Order denying Petition for Reconsideration relating to the calculation of the AWW and the award of income benefits are hereby **VACATED**. This matter is **REMANDED** to the ALJ for recalculation of Hubbard's AWW and award of income benefits in accordance with the views expressed herein.

ALL CONCUR.

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