STATE OF MICHIGAN
IN THE COURT FOR THE COUNTY OF WAYNE

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WILLIE JACKSON, JR., et al.,

Claimants-Appellants,

- against -

Case No. 01-119168 AE

GENERAL MOTORS CORPORATION,

Employer-Appellee,

Hon. JOHN A. MURPHY

- and the -

STATE OF MICHIGAN, UNEMPLOYMENT AGENCY, DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES

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ORDER REVERSING BOARD

37470.1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

----------X

WILLIE JACKSON, JR., et al.,

Appellants,

- against -

Docket No. 01-119168 AE
Hon. JOHN A. MURPHY

GENERAL MOTORS CORPORATION, and STATE OF MICHIGAN, UNEMPLOYMENT AGENCY, DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES

Appellees.

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ORDER REVERSING BOARD

At a session of said Court held on July 8th, 2002

PRESENT: HON. JOHN A. MURPHY
CIRCUIT COURT JUDGE

IT IS HEREBY ORDERED, in accordance with this Court's Opinion of June 27, 2002, that the decision of the Board of Review be and hereby is reversed and that Appellant - Claimants shall not be required to repay their Unemployment Compensations.

HON. JOHN A. MURPHY
Circuit Court Judge

Approved as to Form:

Jordan Rossen, Attorney for Appellants

David M. Davis

David M. Davis, Attorney for General Motors

Mark F Davidson

Mark F. Davidson, Asst. Attorney General

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CATHY M. GARRETT
WAYNE COUNTY CLERK
BY _____ DEPUTY CLERK

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STATE OF MICHIGAN
IN THE CIRCUIT CURT FOR THE COUNTY OF WAYNE

WILLIE JACKSON, JR., FRANK MOULTRIE, ELINDA DANISH, MELVIN BRANTLEY, and KEVIN MARTIN, ET AL.,
Claimant-Appellants,
-vs-
GENERAL MOTORS CORPORATION,
Employer-Appellee,
and
STATE OF MICHIGAN, UNEMPLOYMENT AGENCY

NO. 01-119168-AE
HON. JOHN A. MURPHY

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OPINION REVERSING BOARD OF REVIEW

At a session of said Court, held in the City of Detroit, County of Wayne, State of Michigan, on June 27, 2002
PRESENT: THE HONORABLE JOHN A. MURPHY

The question at the heart of this unemployment-compensation appeal is whether money Appellant-Workers received from Appellee-Employer disqualifies these workers from receiving compensation

for a period of time--June 28, 1998, through July 3, 1998, "Independence Week 1998"--that they were laid off. The money in question was paid pursuant to a strike settlement--a July 28, 1998, "Memorandum of Understanding" between Appellee General Motors ("GM") and the UAW International Union. The settlement "allocated" the payments to the June 28-July 3 period according to the following language:

> Employees who were on strike or layoff status at General Motors locations due to the labor dispute at the Flint Metal Center and Delphi E Flint East and who did not receive Independence Week Shutdown and Holiday Pay as a result of being on said layoff or strike and were otherwise entitled to those pay provisions as stipulated in the GM-UAW National Agreement, shall receive a one time special payment in the amount they would have been entitled to had they not been on strike or layoff.
> This payment will be made in an expeditious manner and taxed as a regular wage payment in accordance with Document 81 of the GM-UAW National Agreement.
>
> . . . .
>
> Further, the parties recognize that these payments may result in employees being ineligible for unemployment compensation already received. Employees impacted by such overpayment of unemployment compensation will be responsible to repay the State that provided the unemployment compensation.

Record at 90.

The payment was designed to compensate workers, Appellants included, who had been laid off because of work stoppages that hindered the flow of parts and the like; that's why the payment was part of the July 28 Strike Agreement. Workers like Appellants were used to receiving wages for the period around

July 4; but their collective-bargaining agreement provided that they had to be active, not laid-off, workers to receive such pay.

For many purposes, the one-time payments were treated as wages. To begin with, the amount of the payment per worker was determined by the worker's wage rate for Independence Week 1998. As the excerpt from the Strike Agreement indicates, the payment was taxed as regular wages would have been. Auto workers like Appellants receive wage increases according to how long they have worked for GM, and the one-time payments counted toward the time accrued for wage hikes. GM also uses a worker's work history to determine his or her entitlement to vacation; the week for which the one-time payments were allocated was treated as a week worked for purposes of vacation entitlement.

These last two items--wage increases and vacation time--were not addressed in the Strike Agreement. They were determined in a directive that GM issued and that had been approved by the UAW.

Appellants stress that the one-time payments were a bonus in the sense that they were not mandated by the collective-bargaining agreement. Appellants and other workers who were entitled to the money received it because the Strike Agreement bestowed it on them.

Appellants would contest Appellee's characterization of the payments as "allocations" for Independence Week. Appellants

point out they did not receive the money until the middle of August 1998. Their pay stubs for the check including the payments were designated as "August 13 and 14 for the pay week ending August 9, 1998." Appellants argue that GM attempted belatedly to assign the payments to Independence Week.

PROCEDURAL HISTORY

After the payments had been made, the Michigan Unemployment Agency determined that the one-time payments pursuant to the July 28 strike agreement constituted "remuneration" under section 27(c) of the Act and thus had to be paid back.

On appeal by claimants through their union, Administrative Law Judge Robert D. Coon reversed the Agency decision. Mr. Coon focused on section 44 of the Act, and its definition of "remuneration." Judge Coon held that section 44 was dispositive of the question; if the payments were to disqualify the workers, then they had to qualify as remuneration under section 44. Record at 243. Noting that subsection (5) lists payments that, though received by the worker, do not count as compensation, Judge Coon held that the mere fact the payments went to the workers did not mean they were remuneration. Record at 243. Turning to subsection (1), Judge Coon concluded that remuneration under the Act meant payments for services rendered. Thus, because Appellants had not performed any services for the payments, they did not count as remuneration and did not

disqualify Appellants.

Judge Coon also concluded, Record at 11, that the Strike Agreement's characterization of the payments was not controlling. Nor did the union's approval of the strike agreement serve to estop Appellants.

Upon appeal by GM, the Board of Review reversed Judge Coon. Record at 254.

The Board held that section 48 of the Act sets forth an exception to the general rule that remuneration must be for services performed. Under section 48, retroactive pay counts as remuneration. The Board held that the one-time payments to Appellants qualified as "retroactive pay" that, by definition, was to be allocated to a period in the past--not to the period in which it was received.

The Board held that section 48 also overrode Administrative Rule 121(5)'s allocation of retroactive payments to the period in which payments were actually made.

Appellants appealed from the Board's decision.

LEGAL ANALYSIS

At issue here is a question of law, not of fact. As the opinions from the administrative law judge and from the Board of Review make clear, to resolve the instant dispute we need to interpret the governing statutory language. See Robertson v. DaimlerChrysler Corp., 465 Mich. 732, 739 (2002). We may reverse

the Board if its decision is unsupported by law, MCLA 421.28, and, ordinarily, we review issues of statutory interpretation de novo. However, in the context of an agency's interpretation of a statute speaking to an issue within its area of expertise, we will defer to the agency's interpretation unless it is "clearly wrong." Rangel v. Ralston Purina Co., 248 Mich. App. 128, 136 (2001), lv. app. denied, (June 14, 2002).

At the outset we note that the language in the strike settlement is of only limited utility here, To be sure, the language sets forth features of the payment and as such is relevant when we assess the payment's characteristics infra. The agreement also indicates how the parties themselves viewed the payment, which is some evidence of its nature.

But the language cannot be dispositive of our inquiry. Were we to find it so, we would be allowing the parties to substitute their judgment for that of the Board. Thus, we would be treading on the Unemployment Agency's decision-making provenance. See Smith v. Review Bd., 428 N.E.2d 88, 91-92 (Ind. Ct. App. 1981) (holding that parties cannot usurp Employment Division's authority by determining for themselves the claimant's eligibility); Sill-Hopkins v. Commonwealth, 563 A.2d 1288, 1289-90 (Pa. Commw. Ct. 1989) (similar argument under Pennsylvanian law). Accordingly, the strike agreement is evidence here, but not dispositive evidence. See also Facello v. Dep't of Econ. &

Employment Dev., 657 A.2d 363, 371 (Md. 1995) (refusing to be bound by pension agreement's characterization of payment).

Two sections of the Unemployment Security Act are relevant here: section 44, MCLA 421.44, and section 48, MCLA 421.48. Section 44 is the general section setting forth the definition of what counts as "remuneration" under the Act. Section 48 also defines, but has a narrower scope: it addresses how to count so-called lost remuneration; that is, remuneration that seem to fall outside the course of ordinary pay, such as vacation pay, severance allowances, and "bonuses."

In particular, section 48(2) sets forth the following criteria for counting "lost remuneration," or retroactive remuneration, as remuneration proper:

> All amounts paid to a claimant by an employing unit for a vacation or a holiday, and amounts paid in the form of retroactive pay, or in lieu of notice, shall be deemed remuneration in determining whether an individual is unemployed under this section and also in determining his or her benefit payments under section 27(c), for the period designated by the contract or agreement providing for the payment, or if there is no contractual specification of the period to which such payments shall be allocated, then for the period designated by the employing unit or former employing unit. However, payments for a vacation or holiday made, or the right to which has irrevocably vested, after 14 days following such vacation or holiday, and payments in the form of termination, separation, severance or dismissal allowances, and bonuses, shall not be deemed wages or remuneration within the meaning of this section.

MCLA 421.48(2).

According to the preceding language, bonuses do not qualify as remuneration under section 48.

We believe that the one-time payments were bonuses under the Act. Both sides agree that nothing in the collective-bargaining agreement governing the parties provided for the payments.[1] The source of entitlement here is the agreement resolving the strike; without it, Appellants had no expectation of receiving payments for the relevant period.

The collective-bargaining agreement here is comprehensive; it sets forth in detail the terms of the employer-employee relationship, including wages. Surely any compensation received outside it has to be considered unexpected and out of the course of ordinary compensation. The American Heritage Dictionary defines bonus as "[s]omething given or paid in addition to the usual or expected." American Heritage Dictionary of the English

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[1] Normally, of course, we refrain from interpreting provisions of a collective-bargaining agreement. Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 260-61 (1994). However, when a state-law claim involves rights independent of the contract, the claim is not pre-empted. Moreover, "when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not allow the claim to be distinguished." Id. at 261 n.8 (quoting Livadas v. Bradshaw, 512 U.S. 107, 124 (1994)) (internal quotation marks omitted).

Neither party argues here that the collective-bargaining agreement answers the question at issue. Any resort to the agreement being minimal or nearly so, the instant case is not pre-empted under section 301 of the LMRA. Cf. Smith v. Hayes Albion, 214 Mich. App. 82, 91 (1995), lv. app. denied, 453 Mich. 912 (1996); id. ("We note that this State has a long history of deciding the eligibility of employees to collect unemployment benefits in conjunction with their collective bargaining agreements."); Multiple Stimson Employees v. Stimson Lumber Co., 21 P.3d 613, 617 (Mont. 2001) (where "matter implicates state rule which establish rights and obligations independent of the labor contract" section 301 preemption does not apply).

Language 150 (1975). Indeed, if anything, the collective-bargaining agreement created the opposite impression: it provided for payments for the period of time around Independence Day--"Independence Weeks"--not only if the workers were "active," i.e., non-laid-off, workers.

The very fact that these are one-time payments and that there was no history of reimbursing workers like Appellants for forced layoffs speaks to the discretionary, out-of-the-ordinary nature of the distribution. Vanderlaan v. Tri-County Cmty. Hosp., 209 Mich. App. 328, 333 (1995) (holding that while the absence of a contractual right to payment does not automatically mean that payments are severance pay or a bonus, the board may consider the presence of such a right, along with the "employer's custom or policy of giving notice and the employee's expectation of payment"); cf. United Steelworkers of Am. v. NLRB, 405 F.2d 1373, 1375 (D.C. Cir. 1968) (testimony that Christmas bonuses had been paid "for at least seven years" was sufficient to deem them "part of the wage structure"); Facello v. Dep't of Econ. & Employment Dev., 657 A.2d 363, 369-70 (Md. 1995) (contrasting a "stream of income" with a one-time payment).

Section 48(2), quoted supra, excludes from the definition of remuneration payments that vest after 14 days. While this exclusion is confined to vacation or holiday pay, its presence

indicates a legislative intent to allocate compensation, if not precisely to the period in which it was received, then to a period not to far off. GM argues that the one-time payments were for June 28, 1998, to July 3, 1998; but the earliest date the payments could be deemed "vested" would seem to be July 28, 1998, the date of the Strike Agreement, more than 14 days past July 3. Classifying the one-time payments as bonuses, then--and, thus, as not disqualifying Appellants under section 48--furthers the statutory intent to limit the interval between the point in time a particular payment vests and the point in time to which the payment is allocated.[2]

Thus, the payments were bonuses. As such, the payments may not be "deemed wages or remuneration within" section 48. The Board's conclusion that the payments qualified as remuneration under section 48, thereby allowing the Board to trump section 44 and conclude that the Appellants were disqualified, was clearly wrong such that we must override its interpretation.

Section 44

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[2] Indeed, using the 14-day limit as a rough measure of the allocation time for bonuses is particularly apt in light of the courts' tendency to define "bonus" in terms of the employee's right to choose vacation. See Smith v. Hayes Albion, 214 Mich. App. 82, 91 (1995) (quoting with approval Brown v. LTV Aerospace Corp., 394 Mich. 702, 710 (1975)), lv. app. denied, 453 Mich. 912 (1996), and its conclusion that where the "employee possesses the option to take payment in lieu of vacations, then the employer's allocation of funds will be treated as a "bonus"). In other words, courts define certain types of vacation payments as bonuses, thus making it all the more appropriate to extend the vesting criterion to bonuses, if not as a dispositive criterion, at least as one to weigh.

Having determined that the one-time payments do not qualify as remuneration under section 48, we now determine if they qualify as remuneration under section 44.[3]

By the section's plain language, bonuses like the instant payments qualify as remuneration presumably to be included as income in determining eligibility for benefits: "'Remuneration' means all compensation paid for personal services, including commissions and bonuses . . . ."

Two considerations compel caution, however.

First, as stated supra, section 48 sets forth how and when to count retroactive payments as income, while section 44 speaks to remuneration in general. Arguably, then, allowing section 44 to include retroactive pay, like the payments at issue here, that does not qualify under section 44 would improperly extend section 44's scope.[4]

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[3] Section 44 reads in relevant part:

> (1) "Remuneration" means all compensation paid for personal services, including commissions and bonuses, and except for agricultural and domestic services, the cash value of all compensation payable in a medium other than cash. Any remuneration payable to an individual that has not been actually received by that individual within 21 days after the end of the pay period in which the remuneration was earned, shall, for the purposes of subsections (2) to (5) and section 46, be considered to have been paid on the twenty-first day after the end of that pay period.

MCLA 421.44(1).

[4] Indeed, somewhat confusingly, section 44 includes "bonuses" as remuneration, while section 48 excludes them. Herein lies the flaw in the Board's reasoning, Record at 253, that section 48 creates an exception to section 44.

One way to determine which bonuses fall under which provision is by separating bonuses

that are paid for services actually performed--which would be section 44 bonuses–from bonuses that are not paid for services actually performed–section 48 bonuses.

This leaves us with the problem of deciding when pay is for services actually performed. At first glance, Appellants would have the better of the argument here, since Appellants and workers like them did not perform any services for the Independence Week pay; indeed, they could not have, since their plant was closed on account of the strike.

But as Appellee points out, some cases seem to hold that readiness to perform is all that is required, not actual performance. In particular, Appellee points out that in General Motors Corp. v. Unemployment Compensation Commission, 331 Mich. 303 (1951), the Supreme Court held that holiday pay received pursuant to a collective-bargaining agreement constituted wages for determining eligibility for unemployment benefits even though no services had been performed for the pay. Now, of course, holiday pay is expressly deemed compensation under section 48.

But the case of holiday pay is easier than the case of bonuses. For one thing, bonuses are both deemed compensation and not deemed compensation; section 44 includes them; section 48 excludes them.

Looking at the surrounding statutory language to aid us in interpretation, see People v. Vasquez, 465 Mich. 83, 89 (2001) (articulating principle of *noscitur a sociis*), we see that, in section 48, "bonuses" is lumped with terms like "severance" and "termination" payments. The implication seems to be that bonuses are akin to payments that workers receive outside of their normal wage structure. See Black's Law Dictionary 1232 (5th ed. 1979) (defining "severance pay" in similar manner).

The problem with applying this definition here is that the one-time payments were both outside and inside the regular wage structure: they were outside the regular wage structure in that the workers had no expectation of being paid for times when they were laid off because of strike-related shortages; yet they were inside the wage structure in that they were tied to the worker's prevailing wage.

One way out of the dilemma lies in the language concerning which holiday/vacation pay is included and which is excluded. Note that included in the enumeration of bonuses, severance pay, etc. is the following:

> [P]ayments for a vacation or holiday made, or the right to which has irrevocably vested, after 14 days following such vacation or holiday, and payments in the form of termination, separation, severance or dismissal allowances, and bonuses, shall not be deemed wages or remuneration within the meaning of this section.

MCLA 421.48(2). Thus, the statute distinguishes holiday/vacation pay by when the right to it accrues. Because this criterion focuses on whether a worker has an expectation of receiving pay at the time the relevant event occurs, it links up with the sense of severance and termination pay being something "extra" in the sense that the worker did not expect to receive the money in his or her normal course of work. This accords with General Motors, supra; in that case, the collective-bargaining agreement providing for holiday pay was from May 29, 1948; the holiday in question was the week concluding December 25, 1948, 331 Mich. at 305. In General Motors, in other

Second, section 44 allocates "[a]ny remuneration payable to an individual that has not been actually received by that individual within 21 days after the end of the pay period in which the remuneration was earned" to "the twenty-first day after the end of that pay period."

As the dissenting member from the Board's decision noted, Record at 261-62, the payments here did not appear in paychecks until August 9, 1998. Since this was more than 21 days after Independence Week 1998, the payments cannot be allocated to Independence Week 1998, at least not under section 44.

Appellee complains that Appellants are being allowed a double recovery here: the pay they would have received under the terms of their contract plus unemployment compensation. There is some justice to Appellee's stance. Certainly, given how the payments were to be taxed here and allocated per worker, the intent of the parties appears to have been to replace the wages lost when the workers were involuntarily laid off. Broadly speaking, then, the payments may be considered to be a species of

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words, the workers had a reasonable, vested expectation of receiving the pay when they went on their Christmas holiday.

In sum, even if the payments had been received within 21 days, see infra text, they should be excluded in determining eligibility: Appellants had no expectation of receiving such money in the event of a strike; in fact, no reasonable expectation formed until well after Independence Week, when the strike settlement agreement was signed, and the payments thus fall under section 48 "bonuses" rather than under section 44 "bonuses."

"back pay."[5] The consensus of the states is that back pay disqualifies the claimant. See Griggs v. Sands, 526 S.W.2d 441, 445 (Tenn. 1975) (listing cases); Bettcher v. Wyo. Dep't of Employment, 884 P.2d 635, 641 (Wyo. 1994) (noting that consensus remained the same as of mid-90s).

Yet the language of the statute, as set forth supra, argues otherwise. As one court said in interpreting the Act, "[t]he statute speaks for itself." Bullerman v. Employment Sec. Comm'n, 25 Mich. App. 242, 245 (1970).[6]

Thus, the decision of the Board of Review rests on a reading of the statutory scheme that is clearly wrong.

Accordingly, the decision of the Board of Review ordering Appellant-Claimants to make restitution is reversed.

Appellants shall submit an order within ten (10) days.

HON. JOHN A. MURPHY

JOHN A. MURPHY
CIRCUIT COURT JUDGE

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WAYNE COUNTY CLERK
BY _____ DEPUTY CLERK

[5] The dissenting Board member distinguished the instant payments from back pay by pointing out that they were not for services performed, they were not to correct wrongs committed in the course of the employment relationship, and so on. Record at 258-59. Maybe so, but certainly the one-time payments had the same purpose as back pay: to make the Appellants whole for loss of earlier pay. The dissenter appears to elevate form over substance.

[6] Actually, the Legislature recently amended section 48 of the Employment Security Act, dropping the reference to "bonuses." See 2002 Mich. Pub. Acts 192.

Because the effective date of the amendment--April 26, 2002--is subsequent to the date the payments vested here, we need not consider the effect of the new language.