

Kentucky Supreme Court
Cases of Note
January-[February](#), 2017

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Note: No Court in January

WORKERS COMPENSATION

Commonwealth of Kentucky, Uninsured Employers’ Fund v. Kara Sidebottom, A/K/A Kara Harville, et al.

[2016-SC-000249-WC](#) February 16, 2017

Opinion of the Court by Justice Venters; All sitting; All concur. Workers’ Compensation; Question presented: Whether injured worker’s failure to report tips as income on her income tax returns compels the calculation of her average weekly wage for compensation award to be treated as fixed-income wage earner under KRS 342.140(1)(a), rather than a variable-wage earner under KRS 342.140(1)(d). Sidebottom worked in a diner earning wages of \$100 per week plus tips. Tips formed a substantial part of her take-home pay. She was injured on the job and applied for workers’ compensation benefits. Pursuant to KRS 342.140(6), only tips that are reported to the IRS for tax purposes may be included in an injured employee’s average weekly wage calculation. After excluding unreported tips, the ALJ calculated Sidebottom’s average weekly wage pursuant to KRS 342.140(1)(d) as an employee whose weekly wage may vary because they are paid “by the hour, by the day, or by the output.” Pursuant to that method, the ALJ determined that over the 52-week look back period used to calculate Sidebottom’s most favorable wage captured income during a period in which her employer was reporting tip income for tax purposes. The Uninsured Employer’s Fund argued that because Sidebottom’s tip income was not being reported at the time she was injured, KRS 342.140(6) required that she be treated as a fixed-wage or salaried employee with her compensation benefit based upon her then-current pay of \$100 per week. Held: the Supreme Court agreed with the lower tribunals and held that the unreported wages provision contained in KRS 342.140(6) acted to exclude Sidebottom’s tips from being used in the calculation of her average weekly wage; however, application of that provision did not also convert Sidebottom into a fixed wage employee not entitled to the “wage most favorable to the employee” look-back period contained in KRS 342.140(1)(d).