

RENDERED: SEPTEMBER 5, 2003; 10:00 a.m.  
TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-001547-WC

THE GAP

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-01-01163

CHERYL CURTIS; HON. ROGER D. RIGGS,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

### OPINION AFFIRMING

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BEFORE: GUIDUGLI AND JOHNSON, JUDGES; AND HUDDLESTON, SENIOR  
JUDGE.<sup>1</sup>

JOHNSON, JUDGE: The Gap, Inc. has petitioned for review of an  
opinion of the Workers' Compensation Board entered on June 19,  
2002, which reversed the opinion and award of the Administrative  
Law Judge (ALJ), granting Cheryl Curtis permanent partial

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of  
the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution  
and KRS 21.580.

disability benefits for a period of 425 weeks and calculating her average weekly wage at \$346.15. Having concluded that the Board has not overlooked or misconstrued controlling statutes or precedent in ruling that Curtis was entitled to have her award calculated based upon an average weekly wage of \$362.25, we affirm.<sup>2</sup>

Curtis began working for The Gap as a material handler at one of its distribution centers in Erlanger, Kentucky, in July 1998. Curtis worked the night shift and she was paid \$11.25 per hour, which included shift-differential pay of \$0.50. The day-shift employees earned only \$10.75 per hour.

In August 2000 Curtis suffered work-related injuries to her lower back, right leg and hip when she attempted to lift a box off a conveyor belt. Curtis immediately reported the accident to her supervisor and promptly sought medical treatment. Curtis subsequently returned to work and her duties were modified due to her restrictions. Curtis continued her employment with The Gap until July 2001, at which time she suffered a flare-up of her back condition. Curtis informed her employer that she was unable to perform her duties and she requested lighter work. According to Curtis, The Gap refused to accommodate her restrictions and informed her that she would be

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<sup>2</sup> Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

terminated unless she could return to full duty. Curtis was terminated on July 20, 2001. In November 2001 Curtis obtained a position at another company as a telemarketer, earning \$8.13 per hour.

On September 4, 2001, Curtis filed an application for resolution of her injury claim with the Department of Workers' Claims. A hearing was conducted on January 25, 2002, at which time the ALJ ordered both parties to submit briefs on the issue of whether Curtis's shift-differential pay should be included in calculating her average weekly wage. Curtis argued that the \$0.50 shift-differential pay she received for working the night shift should be considered in her average weekly wage calculation as the applicable statute, KRS<sup>3</sup> 342.140(1)(d), only mandates the exclusion of "overtime or premium pay." Curtis cited Denim Finishers, Inc. v. Baker,<sup>4</sup> for the proposition that "overtime or premium pay" only refers to payment which is "in excess of the employee's regular hourly rate because of the extra hours worked" [emphasis original].<sup>5</sup> Curtis contended that since her \$0.50 shift-differential pay was not based on her

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<sup>3</sup> Kentucky Revised Statutes.

<sup>4</sup> Ky.App., 757 S.W.2d 215 (1988).

<sup>5</sup> Id. at 216 (citing R. C. Durr Co., Inc. v. Chapman, Ky.App., 563 S.W.2d 743 (1978)).

working any extra hours, it could not possibly be construed as "overtime or premium pay."

The Gap, however, claimed the \$0.50 shift-differential pay that Curtis received for working the night shift was in fact premium pay, which is expressly excluded from the average weekly wage calculation pursuant to KRS 342.140(1)(d). The Gap argued that premium pay and overtime pay are two distinct concepts; and in support of this argument, it cited the following language from a treatise on Kentucky Workers' Compensation:

[S]hift premiums paid to an employee working the second or third shift are not includable in determining the average weekly wage. The rationale is simply that the employee's work is no different regardless of which shift is worked; the employee is simply paid an incentive for working a different shift or longer hours.<sup>6</sup>

The Gap further argued that since the work Curtis performed was no different than the work performed by the day-shift employees, the extra \$0.50 per hour she received was simply an incentive for working the night shift. The Gap claimed that Curtis's average weekly wage should be set at \$346.15.

On March 14, 2002, the ALJ entered an opinion awarding Curtis permanent partial disability benefits in the amount of \$42.90 per week beginning on July 20, 2001, and continuing

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<sup>6</sup> Norman Harned, Kentucky Workers' Compensation, § 12.3, p. 169 (1998).

thereafter for a period of 425 weeks.<sup>7</sup> In calculating Curtis's benefits, the ALJ concluded that Curtis's shift-differential pay was analogous to premium pay, which is expressly excluded from the average weekly wage calculation pursuant to KRS 342.140(1)(d). The ALJ reasoned that, "[i]f one were not to exclude the fifty cent shift differential then one would not be giving consideration to the additional term 'premium pay' which is included within the statute."<sup>8</sup> Consequently, the ALJ set Curtis's average weekly wage at \$346.15.

On March 25, 2002, Curtis filed a petition for reconsideration pursuant to KRS 342.281, arguing that the ALJ erred as matter of law in calculating her average weekly wage. Curtis's petition for reconsideration was denied on April 15, 2002, and she appealed to the Workers' Compensation Board. The Board reversed, concluding that any shift-differential pay received by Curtis was part of her regular hourly pay and not premium pay. The Board based its decision primarily on Denim Finishers, supra,<sup>9</sup> which it read as limiting the definition of

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<sup>7</sup> The \$42.90 award was calculated by applying the formula for permanent partial disability benefits set forth in KRS 342.730(1)(b).

<sup>8</sup> The ALJ attempted to distinguish Denim Finishers, supra, on the grounds that "the Court was addressing the matter of additional pay for overtime," as opposed to premium pay.

<sup>9</sup> The Board also appears to have relied upon two of its own opinions in its analysis. Although the Board is free to cite its own opinions as authority, we are not at liberty to do so and we will not consider any unpublished cases in our analysis. See CR 76.28(4)(a).

premium pay to "pay in excess of the employee's regular hourly rate because of the extra hours worked."<sup>10</sup> The Board reasoned that since Curtis's shift-differential pay was not premised upon the amount of hours she worked, it was part of her regular hourly pay and should have been included in her average weekly wage calculation. This petition for review followed.

The Gap claims the Board erred as a matter of law in concluding that the extra \$0.50 an hour Curtis received for working the night shift was not "overtime or premium pay," which is expressly excluded from the average weekly wage calculation pursuant to KRS 342.140(1)(d). Our review of a question of law is de novo,<sup>11</sup> and we are required to correct the Board's conclusion of law if it has overlooked or misconstrued controlling statutes or precedent.<sup>12</sup>

As previously discussed, the Board based its decision to include Curtis's shift-differential pay in her average weekly wage calculation primarily on this Court's Opinion in Denim Finishers, which also involved the application of KRS 342.140(1)(d). In Denim Finishers, the appellee, Rosie Baker, worked in a garment factory pressing pants. She worked approximately 40 hours per week and she was paid \$3.45 per hour.

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<sup>10</sup> Denim Finishers, 757 S.W.2d at 216 (citing R.C. Durr Co., supra).

<sup>11</sup> Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116 (1991).

<sup>12</sup> Western Baptist Hospital, 827 S.W.2d at 687-88.

If Baker pressed more than 350 pairs of pants in a given week, she received an additional six cents for each pair of pants she pressed above that amount.<sup>13</sup> During her employment with Denim Finishers, Baker suffered a work-related injury and she filed a claim for workers' compensation benefits. The Board granted Baker's claim for benefits and set her average weekly wage at \$138.00. The Board calculated Baker's average weekly wage based solely on her hourly rate of \$3.45 per hour, reasoning that any compensation she received above this amount constituted premium pay, which is expressly excluded from the average weekly wage calculation pursuant to KRS 342.140(1)(d).

Baker appealed the Board's decision to the Bell Circuit Court, which reversed the Board.<sup>14</sup> The circuit court classified the extra compensation Baker received as output pay rather than premium pay and concluded that Baker's average weekly wage should have been set at \$222.54. Denim Finishers appealed to this Court, claiming that Baker's employment was based on an hourly pay rate plus premium pay for extra pants pressed. Denim Finishers argued that Baker was only entitled to have her average weekly wage set at \$138.00, since any compensation over her regular hourly pay rate constituted

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<sup>13</sup> Denim Finishers, 757 S.W.2d at 216.

<sup>14</sup> Id.

premium pay.<sup>15</sup>

This Court concluded that any amount Baker received over her hourly pay rate constituted output pay, as opposed to premium pay. In distinguishing output pay from premium pay, this Court cited R.C. Durr Co., supra, for the proposition that, “[t]he exclusion of overtime or premium pay in KRS 342.140(1)(d) refers to pay in excess of the employee’s regular hourly rate because of the extra hours worked.”<sup>16</sup> Since all of the extra money received by Baker was earned during her 40-hour work week, this Court concluded that any payment she received for extra pants pressed did not fall within the definition of “overtime or premium pay.”<sup>17</sup>

The Gap attempts to distinguish Denim Finishers by arguing that in Denim Finishers this Court addressed the matter of additional pay for overtime, as opposed to premium pay. We reject this assertion since the sole issue in Denim Finishers involved the question of whether the additional compensation received by Baker constituted premium pay.<sup>18</sup> Thus, the holding in Denim Finishers and the definition of “overtime or premium pay” adopted therein is applicable to the case sub judice.

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<sup>15</sup> Id.

<sup>16</sup> R.C. Durr Co., 563 S.W.2d at 745.

<sup>17</sup> Denim Finishers, 757 S.W.2d at 216.

<sup>18</sup> Id.

Consequently, since the extra \$0.50 per hour Curtis received for working the night shift was not compensation for any "extra hours worked," it does not fall within the definition of "overtime or premium pay" that this Court adopted in Denim Finishers.<sup>19</sup> The extra \$0.50 per hour Curtis received for working the night shift was part and parcel of her hourly pay rate. Thus, she is entitled to have her average weekly wage calculated based upon an hourly pay rate of \$11.25 per hour.

The Gap further argues that this Court's definition of "overtime or premium pay" in Denim Finishers cannot be reconciled with the plain language of KRS 342.140(1)(d). The Gap claims that by including the term premium pay in the language of the statute, the Legislature clearly intended to exclude more than just overtime pay from the average weekly wage calculation. In support of its argument, The Gap quotes from the ALJ's opinion that, "[i]f one were not to exclude the fifty cent shift differential then one would not be giving consideration to the additional term 'premium pay' which is included within the statute." Although the ALJ has raised a valid concern, we disagree with his interpretation of KRS 342.140(1)(d) as a matter of statutory construction.

For whatever reason, the Legislature chose not to define "overtime or premium pay." When the Legislature chooses

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<sup>19</sup> Id.

not to define a term in a statute, courts should interpret the term in accordance with the legislative intent surrounding the particular statute.<sup>20</sup> Furthermore, statutes should be construed within their context and we should strive to give consistent meaning to related statutory provisions.<sup>21</sup> Thus, the term "overtime or premium pay" should be defined within the context of the Workers' Compensation Act, and, more precisely, in accordance with the legislative intent surrounding the enactment of KRS 342.140.

The primary purpose of the Workers' Compensation Act is to compensate disabled workers for any decrease in their wage earning capacity which has resulted from a work-related injury.<sup>22</sup> "The purpose of KRS 342.140 is to determine a given worker's wage-earning capacity so that the resulting income benefit will be based upon a realistic estimation of what the worker would have expected to earn had the injury not occurred."<sup>23</sup> In the case sub judice, Curtis suffered a work-related injury which resulted in a decrease in her wage earning capacity, while she was earning and expected to continue to earn \$11.25 per hour.

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<sup>20</sup> Floyd County Board of Education v. Ratliff, Ky., 955 S.W.2d 921, 925 (1997).

<sup>21</sup> Manies v. Croan, Ky.App., 977 S.W.2d 22, 23 (1998) (citing Combs v. Hubb Coal Corp., Ky., 934 S.W.2d 250 (1996)).

<sup>22</sup> Newberg v. Weaver, Ky., 866 S.W.2d 435, 436 (1993).

<sup>23</sup> Desa International, Inc. v. Barlow, Ky., 59 S.W.3d 872, 875 (2001).

Consequently, we conclude that an hourly rate of \$11.25 is a realistic estimation of what Curtis could have expected to earn had the injury not occurred. Accordingly, the Board was correct in concluding that Curtis was entitled to have her average weekly wage calculated based upon an hourly rate of \$11.25 per hour.

Based on the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Otto Daniel Wolff  
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BRIEF FOR APPELLEE, CHERYL  
CURTIS:

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