

RENDERED: June 5, 1998; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 97-CA-0775-MR

CARDINAL DODGE, INC.

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE DANIEL A. SCHNEIDER, JUDGE  
ACTION NO. 95-CI-7104

JOSEPH NORSWORTHY  
SECRETARY KENTUCKY  
LABOR CABINET

APPELLEE

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: GUDGEL, CHIEF JUDGE; GARDNER and SCHRODER, Judges.

GARDNER, JUDGE: Cardinal Dodge, Inc. (Cardinal) appeals from an opinion and order of the Jefferson Circuit court affirming the findings of fact, conclusions of law, and final order of the Kentucky Labor Cabinet (the Cabinet). We affirm the opinion and order of the Jefferson Circuit Court.

Having closely studied the record, the law, and the arguments of counsel, it is our conclusion that we cannot improve upon the well-written opinion from which Cardinal now appeals. Rather than parrot the language of the lower court by way of separate opinion, we adopt the opinion of the Jefferson Circuit

Court as that of this Court. The Jefferson Circuit Court stated in relevant part as follows:

**BACKGROUND SUMMARY**

Cardinal is an automobile dealership located at 5311 Dixie Highway, Louisville, Kentucky. An employee of Cardinal filed a wage and hour complaint with the Cabinet. William Gibson, an investigator with the Cabinet, conducted an audit and found alleged violations of KRS 337.050, the seventh day overtime statute, and KRS 337.275, the minimum wage statute.

A hearing on the matter was held on June 28, 1995. A hearing officer with the Cabinet issued Findings of Fact, Conclusions of Law and Final Order ('Final Order') on December 1, 1995. The Final Order assessed back wages of \$8,433.23 for unpaid statutory minimum wages for the period of January 1, 1991 through June 8, 1994, and \$21,778.84 in seventh day overtime wages for the same time period. A \$100 penalty was also assessed by the Cabinet.

On December 20, 1995, Cardinal filed a petition for judicial review of the December 1, 1995 Final Order. A certified copy of the record before the Cabinet was filed on January 2, 1996. A briefing schedule was set on May 15, 1996. Cardinal filed its memorandum on June 3, 1996. The Cabinet filed its memorandum on July 2, 1996.

**OPINION**

The scope of judicial review of the Cabinet's Final Order is found in KRS 337.310, which in subsection (2), (prior to the statute's 1996 amendment), specifically limited said review to determining whether or not:

- (a) The secretary or director acted without or in excess of his powers;

- (b) The order or decision was procured by fraud;
- (c) The order or decision is not in conformity to the provisions of KRS 337.020 to 337.405, and
- (d) If findings of fact are in issue, whether they support the order or decision.

Cardinal's first argument is that the Cabinet erred by assessing seventh day overtime pay against it since car salesmen are exempt from KRS 337.050. Cardinal argues that the language of said statute exempts professions licensed under the laws of Kentucky, and Kentucky law mandates that car salesmen obtain a license (KRS 190.030).

The Cabinet argues that KRS 337.050 clearly only exempts stenographers, bookkeepers, or technical assistants of licensed professions, and car salesmen do not fit within said category.

KRS 337.050, reads in relevant part as follows:

(1) Any employer who permits any employee to work seven days in any one (1) workweek shall pay him at the rate of time and a half for the time worked on the seventh day....

(2) (a) Subsection (1) shall not apply in any case in which the employee is not permitted to work more than forty (40) hours during the workweek....

(b) Subsection (1) shall not apply to telephone exchanges having less than five hundred (500) subscribers, **nor to stenographers, bookkeepers, or technical assistants of professions such as doctors, accountants, lawyers, and other**

**professions licensed under the laws of this state**, nor to any employees subject to the Federal Railway Labor Act and seamen or persons engaged in operating boats or other water transportation facilities upon navigable streams, nor to persons engaged in icing railroad cars, not to common carriers under the supervision of the Department of Vehicle Regulation. (Emphasis added).

The interpretation of a statute is a matter of law. White v. McAllister, Ky., 443 S.W.2d 541 (1969). Statutory construction and interpretation require that credence be given to the language used and that it be given its ordinary meaning. Young v. Board of Education of Graves County, Ky. App., 661 S.W.2d 787 (1983).

Based upon the clear language of KRS 337.050(2)(b), the Court finds as a matter of law that the exclusion at issue is limited to stenographers, bookkeepers, or technical assistants of licensed professions. Said exclusion cannot be construed to encompass the licensed profession itself as argued by Cardinal. Such an interpretation would differ from the stated language of the statute. A court may not interpret a statute at a variance with its stated language. Layne v. Newburg, Ky., 841 S.W.2d 181 (1992).

Accordingly, as car salesmen are not exempt from the provisions of KRS 337.050, the Cabinet did not err in assessing seventh day overtime pay against Cardinal.

Cardinal also alleges that the method of calculation used by the Cabinet was inappropriate to determine the amount Cardinal owes in seventh day overtime pay. Cardinal argues that the rate should have been based on a minimum wage rate (i.e., \$6.37 per hour) without

regard to actual earnings. The Cabinet based its rate upon the employees' actual weekly earnings including commissions.

At the administrative hearing, William Gibson, the Cabinet's investigator, testified that he used the same formula he has always used in seventh day overtime cases (Hearing Transcript 'H.T.' at 28-29). Gibson stated that it was the Cabinet's practice and policy to use said formula for any type of overtime pay, based upon 803 KAR 1:060 (H.T. at 29). Cardinal argues that 803 KAR 1:060, however, only mentions overtime pay under KRS 337.285 (the statute providing for time and a half for employment in excess of forty hours).

As stated in Hagan v. Farris, Ky., 807 S.W.2d 488 (1991), '[a] construction of a law or regulation by officers of any agency continued without interruption for a long period of time is entitled to controlling weight.' Given that the Cabinet's method of calculating seventh day overtime pay is one of long standing, it is entitled to substantial deference. As Cardinal has not offered any basis to show that said method is unreasonable, the Court will not substitute the Cardinal's method for the Cabinet's method.

Cardinal further argues that it is exempt from the minimum wage provisions of KRS 337.275, since outdoor salesmen are excluded therefrom via KRS 337.010 and its car salesmen qualify as outdoor salesmen under the definition in 803 KAR 1:070 § 5. Cardinal cites to an Attorney General Opinion dated October 30, 1974 (OAG 74-777), which contends that car salesmen are excluded from the minimum wage requirements since the Cabinet considers them to be outside salesmen, even though some sales are consummated in the building.

The Cabinet argues that Cardinal's car salesmen do not fit within the definition of outdoor salesmen in 803 KAR 1:070 § 5

and thus, they are not covered by the outdoor salesmen exemption category. The Cabinet also argues that OAG 74-777 is advisory only and has been superseded by the subsequently enacted administrative regulation.

The Court agrees with the Cabinet that OAG 74-777 is not controlling in these circumstances. See Commonwealth v. Tarter, Ky. App., 802 S.W.2d 944 (1990) ('Opinions of the Attorney General are merely his interpretation of the law, not the law itself.') and Kennard v. Bracken County Library Board of Trustees, Ky. App., 887 S.W.2d 363 (1994) (courts are not bound by an Attorney General opinion.)

KRS 337.275(1) requires every employer to pay its employees a minimum wage, which is currently the sum of \$4.25 per hour. KRS 337.010(2)(a), however, defines the term 'employee' as used in KRS 337.275, and subsection (2) of KRS 337.010 (2)(a) excludes outside salesmen from the term 'employee.'

Section 5 of 803 KAR 1:070, in relevant part, explains the meaning of the term 'outside salesmen' to be a person:

(1) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in (a) making sales, which shall mean the transfer of title to both tangible and intangible property;...

The Cabinet's Final Order determined that the salesmen of Cardinal Dodge were not outdoor salesmen based upon the following findings and conclusions at pp.7 and 8 thereof;

As previously determined in this decision, Cardinal's salespersons conducted sales primarily on the lot and all

documents required for completion of sales were completed on Cardinal's business premises. Even though salespersons were encouraged to prospect for sales off the lot and vehicles were driven and show [sic] off the lot, the sales employees were not employed for the purpose of customarily and regularly engaging in sales away from Cardinal's business.

Moreover, the regulation requires that outside salesmen be engaged in 'making sales' which means the transfer of title. The evidence demonstrates that all title transfers were completed on Cardinal's business premises. Accordingly, it is concluded that Cardinal's salespersons were not outside salesmen with[in] the meaning of KRS 337.010(2) (a) 2 and were therefore employees covered under the minimum wage requirements of KRS 337.275.

Cardinal argues that three witnesses (i.e., Terry Downs, Winston Pittman and Mary Marlene Goodman) testified at the administrative hearing that salesmen were allowed to and did, in fact, make sales off the facility on a regular and customary basis.

Terry Downs testified that he was a salesman at Cardinal from July of 1991 through November of 1994 (H.T. at 77). He testified that his time spent at work was on the Cardinal lot (H.T. at 85). He further testified that he was encouraged to prospect for sales at other places besides the Cardinal lot, but closing a deal (i.e., to sign the papers) was done on the lot (H.T. at 85-86).

Winston Pittman testified that he was the President of Cardinal (H.T. at 98). He

stated that it was a regular and customary thing for his top salesmen to go out and get customers from other places (H.t. at 111-112). He also stated that Cardinal sold a lot of cars that were not sold at the lot (H.T. at 111). However, he explained that this was arriving at a mutual agreement, not the signing of the papers (H.T. at 112).

Mary Marlene Goodman testified that she was the financial controller/secretary-treasurer for Cardinal (H.T. at 115). She testified that some of Cardinal's top salesmen close some of their sales off the premises of Cardinal (H.T. at 122).

Two other people testified at the hearing on this subject. Ernest Amburgey, a witness for the Cabinet, testified that he had been a salesman for Cardinal for over a year (H.T. at 47). He stated that they sold there at the Cardinal lot by either telephoning prospective customers or catching customers on the lot (H.T. at 61), and the lot was where you had to make your money and where all the cars were sold (H.T. at 61-62).

Earl Conrad, also a witness for the Cabinet, testified that he worked as a salesman for Cardinal during the 1993 year (H.T. at 90). He stated that he worked as a salesman on the lot (H.T. at 93) and spent 'pretty much 100 percent' of an average workday on the Cardinal lot (H.t. at 94).

'The rule in Kentucky is that if there is substantial evidence in the record to support an agency's findings, the findings will be upheld, even though there may be conflicting evidence in the record.' Kentucky Commission on Human Rights v. Fraser, Ky., 625 S.W.2d 852 (1981). In Commonwealth, Department of Education v. Commonwealth [of Kentucky, Kentucky Unemployment Insurance Commission], Ky. App., 798 S.W.2d 464 (1990), the court stated that '[e]vidence is substantial if when taken alone or in the light of all the evidence, it has



sufficient probative value to induce conviction in the minds of reasonable persons.'

Based upon the testimony of Downs, Amburgey, and Conrad, there was substantial evidence to support the Cabinet's finding that Cardinal's salesmen conducted sales primarily on the lot. Also, there was substantial evidence based upon the testimony of Downs and Pittman to support the Cabinet's finding that all title transfers were completed on Cardinal's business premises.

As 803 KAR 1:070 § 5 requires that outdoor salesmen be engaged in sales, which are defined as the transfer of title, away from the business premises, the Cabinet did not err in concluding that Cardinal's salesmen are not outside salesmen within the exemption of KRS 337.010(2)(a)(2), and thus, the minimum wage provisions of KRS 337.275 apply.

Having concluded that the lower court properly affirmed the order of the Cabinet, we find no basis for tampering with the opinion and order from which Cardinal appeals. For the foregoing reasons, the opinion and order of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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