RENDERED: SEPTEMBER 12, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002039-WC

JULIE CAMPS — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-87801

GARRARD COUNTY FISCAL COURT;
HON. J. LANDON OVERFIELD, CHIEF
ADMINISTRATIVE LAW JUDGE; HON.
ALLISON E. JONES; ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: STUMBO, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Julie Camps appeals from an opinion and order of the Workers' Compensation Board affirming the decision of the Administrative Law

Judge (ALJ) excluding wages from a second employer in calculating her average weekly wage (AWW).

Camps worked as a full time paramedic for the Garrard County Fiscal Court, working two twenty-four hour shifts a week. On May 13, 2011, Camps suffered an acute ankle sprain while working for Garrard County. She required reconstructive surgery for a complete lateral ligament tear. Camps filed a workers' compensation claim based on her AWW from Garrard County and concurrent employment with Clark County EMS.

For almost the entire year prior to her injury, Camps was simultaneously employed by both Garrard County and Clark County. Garrard County was aware of Camps's dual employment. Camps resigned from her position with Clark County effective May 6, 2011, intending to obtain another paramedic position closer to her home. At the time of her injury, she was only employed by Garrard County.

Camps testified she typically had two employers, as did most other paramedics and, in her field, it is easy to obtain employment because there is a high demand for paramedics. Camps explained dual employment was essential for her to achieve a living wage to support her family as a single mom. She submitted wage records from Clark County for her most favorable quarter when she was working full time. Camps testified that a few months before resigning from Clark County she moved from Winchester, in Clark County, to Danville, Kentucky, and found the long commute too difficult to continue. When she resigned, she planned

to obtain a second, closer paramedic job with Boyle County EMS. She had not yet secured that employment before her injury.

Garrard County did not challenge Camps's impairment and entitlement to benefits, but disputed Camps's claim that her AWW should include her wages from Clark County. The ALJ awarded Camps temporary total disability benefits and permanent partial disability benefits based on her AWW from Garrard County and determined she did not retain the capacity to resume work as a paramedic.

In rejecting Camps's claim for AWW to include her Clark County wages, the ALJ reasoned as follows:

> Camps makes a very compelling and rational argument to support her inclusion of wages from Clark County. The ALJ, however, is duty bound to follow published authority from the higher appellate courts. The ALJ finds *Wal-Mart v. Southers*, 152 S.W.3d 242, 246-47 (Ky.App. 2004), controls the case at hand. In this case, the Kentucky Court of Appeals held that: "The statute in question only lists two elements necessary to establish concurrent employment: proof the claimant was working under contract with more than one employer *at the time of injury*, and proof the defendant employer had knowledge of the employment."
>
> In this case, Camps was not working under contracts with more than one employer *at the time of the injury*. Certainly, she had done so in the past and based on her testimony, the ALJ finds that Camps intent was to continue to do so in the future. However, at the time of injury she had terminated her employment with Clark County and had not yet secured a contract for employment with another employer. As such, the ALJ is precluded from including Camps' concurrent wages from Clark County, earned in the weeks prior to her injury.

> In many respects, the ALJ recognizes that this is a harsh result. Again, however, the ALJ finds current authority clear with respect to the requirements for including concurrent wages. Those requirements were not satisfied in this claim with respect to Camps employment with Clark County. Based on the wage records submitted by Garrard County, the ALJ finds that Camps AWW was $470.96.

Camps filed a petition for reconsideration arguing the ALJ failed to make sufficient findings concerning the issue of concurrent employment and the award should reflect her AWW was $1,038.17 based on a concurrent wage. The ALJ denied Camps's petition for reconsideration. Camps appealed and the Board affirmed.

The only issue on appeal is whether Camps's wages from her most favorable quarter as an hourly employer under KRS 342.140(1)(d) should include her wages from Clark County under KRS 342.140(5). "The interpretation to be given a statute is a matter of law, and we are not required to give deference to the decision of the Board." *Wilson v. SKW Alloys, Inc.*, 893 S.W.2d 800, 801-802 (Ky.App. 1995). In interpreting statutes, we seek to "ascertain from their terms, as contained in the entire enactment, the intent and purpose of the Legislature, and to administer that intent and purpose." *Lach v. Man O'War, LLC*, 256 S.W.3d 563, 568 (Ky. 2008) (quoting *Seaboard Oil Co. v. Commonwealth*, 193 Ky. 629, 237 S.W. 48, 49 (1922)). *See* KRS 446.080(1). To the extent words in the statute's definitions are not defined, we give them their common and literal meanings unless to do so

would lead to an absurd result. *Kentucky Unemployment Ins. Co. v. Jones*, 809 S.W.2d 715, 716 (Ky.App. 1991); KRS 446.080(4).

Workers' compensation statutes are to be interpreted consistently with their beneficent purpose. *Wilson*, 893 S.W.2d at 802; *Jewish Hosp. v. Ray*, 131 S.W.3d 760, 764 (Ky.App. 2004). As a form of social welfare legislation, workers' compensation is intended to compensate workers for their loss of wage-earning capacity by replacing some of the income they will lose. *Keith v. Hopple Plastics*, 178 S.W.3d 463, 466 (Ky. 2005); *Adkins v. R & S Body Co.*, 58 S.W.3d 428, 430 (Ky. 2001). However, "we must also keep in mind the duty of the Court to construe the law so as to do justice both to employer and employee." *Fitzpatrick v. Crestfield Farm, Inc.*, 582 S.W.2d 44, 47 (Ky.App. 1978).

KRS 342.140 provides as follows:

> The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:
>
> (1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:
> . . .
> (d) The wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) the wages (not including overtime or premium pay) of said employee earned in the employ of the employer in the first, second, third, or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the injury;
> . . .

> (5) When the employee is working under concurrent contracts with two (2) or more employers and the defendant employer has knowledge of the employment prior to the injury, his or her wages from all the employers shall be considered as if earned from the employer liable for compensation.

The purpose of KRS 342.140 is to realistically estimate an injured worker's earning capacity. *Marsh v. Mercer Transp.*, 77 S.W.3d 592, 595 (Ky. 2002). A worker's earning capacity is generally based upon the worker's pre-injury earnings. *Id.* Pre-injury earnings should generate "a realistic estimation of what the worker would have expected to earn had the injury not occurred." *Desa Int'l, Inc. v. Barlow*, 59 S.W.3d 872, 875 (Ky. 2001). If they do not provide a realistic estimate of earning capacity, such as when previous employment was of short duration, other provisions of KRS 342.140 permit the consideration of other factors. *Marsh*, 77 S.W.3d at 595. An hourly worker's earning capacity, where the worker was employed for more than a year preceding the work injury, is established through the computation of the worker's AWW under KRS 342.140(1)(d). *See Desa Int'l*, 59 S.W.3d at 875.

In *Wal-Mart v. Southers*, 152 S.W.3d 242 (Ky.App. 2004), our Court interpreted whether KRS 342.140(5) allowed Southers, who was injured while working for Wal-Mart, to obtain wage benefits from her most favorable quarter under KRS 342.140(1)(d), which also included wages from H & R Block, where she was not earning wages from H & R Block at the time she was injured. Wal-Mart challenged the ALJ's determination that Southers was under a contract of hire

with H & R Block at the time of the injury where she was not currently receiving wages from H & R Block and her employment was intermittent. The Court upheld the ALJ's finding that Southers was under a contract for hire and determined this was a sufficient basis for using her wages from H & R Block in calculating her most favorable quarter of AWW. *Id.* at 247. In making this determination our Court explained that KRS 342.140(5) "only lists two elements necessary to establish concurrent employment: proof the claimant was working under contracts with more than one employer . . ., and proof the defendant employer had knowledge of the employment." *Id.* at 246.

We believe the *Southers* Court inartfully worded the requirements of the statute and did not intend to preclude an employee who was concurrently employed during the look-back period of KRS 342.140(1)(d) from obtaining an AWW that reflected her relevant earning capacity based on actual past earnings from two employers. We find the reasoning of our sister courts whose workers' compensation provisions allow AWW to be calculated for concurrent employment under similar circumstances, to be persuasive.

In *Lowry v. Industrial Comm'n of Arizona*, 195 Ariz. 398, 401, 989 P.2d 152, 155 (1999), the Arizona Supreme Court held that an employee's workers' compensation benefits for an average monthly wage included earnings from concurrent employment held within thirty days prior to, but not on the date of, a work injury. Similarly to our KRS 342.140, the Arizona Workers' Compensation Act defined an injured worker's monthly wage for the purpose of determining

benefits and A.R.S. § 23-1041(A) provided that employees "shall receive the compensation fixed in this chapter on the basis of such employee's average monthly wage at the time of injury." *Lowry*, 195 Ariz. at 399, 989 P.2d at 153. The Court reasoned that the one month look-back period for determining an employee's average wage should include wages for concurrent employment that ended before the date of the injury but within the look-back period by broadly construing the workers' compensation statute in accordance with its beneficent purpose to realistically reflect a claimant's monthly earning capacity based on the income that the employee actually earned. *Id.* at 400-401, 989 P.2d at154-155. Other sister courts have also construed their workers' compensation statutes to calculate AWW as including concurrent wages even though the employee was not still employed by a second employer on the date of the injury. *Flynn v. Industrial Comm'n*, 211 Ill.2d 546, 561-562, 813 N.E.2d 119, 128-129 (2004); *Kinder v. Murray & Sons Const. Co., Inc.* 264 Kan. 484, 490-495, 957 P.2d 488, 493-496 (1998); *Forrest v. A.S. Price Mechanical*, 373 S.C. 303, 310-311, 644 S.E.2d 784, 787-788 (S.C. App. 2007); *Blind v. It's a Bit Fishy, Inc*., 639 So.2d 703, 704 (Fl.App. 1994). *See also Forsyth v. Staten Island Developmental Disabilities Servs. Office*, 95 A.D.3d 1393, 1394, 942 N.Y.S.2d 907 (2012); *State ex rel. FedEx Ground Package Sys., Inc. v. Indus. Comm.*, 126 Ohio St. 3d 37, 38-40, 930 N.E.2d 296-298 (2010).

We believe the reasoning in *Lowry* is sound and that we can best fulfill the beneficial purpose of our workers' compensation statute by compensating injured

workers for the ongoing loss in their earning capacity as gauged by the economic reality of their past performance. *See Marsh*, 77 S.W.3d at 595; *Desa Int'l*, 59 S.W.3d at 875. In assessing an ongoing loss in earning capacity, courts should credit employees for past performance during a relevant look-back period that includes wages earned in concurrent employment even if the injury occurred while the employee was only employed by one employer. *See Triangle Bldg. Center v. W.C.A.B. (Linch)*, 560 Pa. 540, 547-548, 746 A.2d 1108, 1112 (2000); *Gillen v. Ocean Acc. & Guarantee Corp*., 215 Mass. 96, 97-99, 102 N.E. 346, 347-348 (1913). It would be unjust to deny Camps an AWW calculated from her concurrent employment where "[i]t was merely a fortuitous circumstance that claimant herein was not actually working at both jobs on the date of the accident." *Gomez v. Murdoch*, 520 So.2d 600, 601 (Fl.App. 1987).

We believe the elements necessary to establish concurrent employment are established by interpreting KRS 342.140 as a whole to appropriately compensate an injured worker for the loss of earning capacity.

When the relevant look-back period of KRS 342.140(1) or (2) is incorporated into the wording of KRS 342.140(5), the "is" in the statement "[w]hen the employee is working under concurrent contracts" refers to the period for looking back to establish AWW as set by when the injury occurred, rather than the date of the injury. In this manner, "wages from all the employers shall be considered as if earned from the employer liable for compensation" just as if the employee was merely working a variety of jobs for a single employer, which may or may not

have continued the entire relevant look back period. *See Miller v. Square D Co.*, 254 S.W.3d 810, 813-814 (Ky. 2008).

Therefore, we interpret KRS 342.140(5) as requiring the following two elements as necessary to establish concurrent employment: proof the claimant was working under contracts with more than one employer during the relevant look-back period following an injury and proof the defendant employer had knowledge of the employment. As Camps met both requirements, the ALJ erred by failing to make sufficient findings concerning the issue of concurrent employment and denying Camps benefits based AWW from both employers, and the Board erred in affirming this decision.

Accordingly, we reverse and remand for the ALJ to hold a new evidentiary hearing to develop the record, make additional findings and issue a new award.

STUMBO, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING: Respectfully, I dissent. I believe *Wal-Mart v. Southers*, 152 S.W.3d 242 (Ky.App. 2004), is controlling in this case and I would affirm the Workers' Compensation Board's decision.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Jackson W. Watts Versailles, Kentucky	John S. Harrison Frankfort, Kentucky