

# alert

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ATTORNEYS AT LAW

## A NEW APPROACH TO OVERTIME WAGES

In the recent case of *Edward Don Company v. Industrial Commission*, the appellate court had occasion to consider the claim of Bart J. Amato, a delivery truck driver, who testified that on January 31, 1996, he sustained an injury to his right foot and ankle while making a delivery to St. Mary of Nazareth Hospital. After emergency room treatment at the hospital, he was seen by several physicians who supplied conflicting opinions as to the existence of an avulsion fracture of the lateral cuboid. The claimant was released for light duty on March 17, 1996 and on restricted full duty on July 12, 1996.

The case presented three issues for the appellate court. The first involved the enforcement of a subpoena, the second, the requirements of an impeachment, and third and, perhaps the most important, the calculation of wages when including overtime. This Alert will review the court's decision as it relates to the calculation of wages. All other issues will be covered in the Quarterly Newsletter.

### Calculation of Overtime Wages

On the issue of overtime wages, the court felt the information supplied was not sufficient to include overtime wages in the compensation rate, stating:

*Here, the claimant introduced into evidence a wage summary sheet which demonstrated that he had only worked for Edward Don during the 16 weeks immediately preceding his accident. The wage summary sheet further showed that, during those 16 weeks, the claimant worked a total of 624 "regular hours," varying from 28 to 48 hours of regular time per week, for which he earned a total of \$8,237.40. This reflects a "regular" rate of pay of \$13.20 per hour. The wage summary sheet also reflects that, during the 16 week period preceding the claimant's accident, he worked a total of 77 hours of overtime, varying from 0 to 7.8 hours per week, for a total of \$1,550.83 of overtime pay. This reflects a rate of \$20.14 for overtime work. In calculating the claimant's average weekly wage, the arbitrator included the 77 hours of overtime the claimant worked, and multiplied that number by the claimant's regular rate of pay rather than his overtime rate of pay.*

On the basis of the above wage summary, the claimant relied on *Edward Hines Lumber Co.* to justify his request to have the overtime included in the average weekly wage. The Commission agreed with the claimant but the appellate court reversed, stating:

*In Edward Hines Lumber Co., the claimant presented evidence that the contract between his union and his employer provided that he had to work whatever number of hours the employer demanded of him and that his employer required its employees to work a minimum number of about 60 hours per week. If an employee refused to work the required number of hours, the*

*employer could fire him. Under the contract, the claimant was paid at a regular rate of pay for the first 40 hours per week he worked and at an overtime rate for any additional hours. ... We held that "overtime" as used in section 10 of the Act does not simply mean any time over 8 hours per day or 40 hours per week. Rather, recognizing that "different occupations have different regular hours of employment," we concluded that "overtime" as used in section 10 means "(1) compensation for any hours beyond those the claimant regularly works each week, and (2) extra hourly pay above the claimant's normal hourly wage." As there was evidence that the claimant was regularly required to work overtime and had actually worked at least 60 hours per week, we concluded that the Commission did not err in including the claimant's overtime hours at his regular rate of pay in calculating the average weekly wage.*

...

*In the instant case, unlike in Edward Hines Lumber Co., the claimant presented no evidence establishing the number of hours that he was required to work. Although the wage summary sheet reflects that in 15 out of the 16 weeks that the claimant worked for Edward Don, he worked some amount of overtime, there is no evidence that he was required to work overtime as a condition of his employment or that he consistently worked a set number of overtime hours each week. There is no evidence that the overtime hours the claimant worked were part of his regular hours of employment. As a consequence, we find that the Commission erred in including the claimant's overtime hours at his regular rate of pay in calculating his average weekly wage.*

**EDITOR'S NOTE:** The claimant cannot prevail if he merely shows that he worked overtime for most of the week. The Court noted that the claimant had failed to show 1) that he was required to work overtime as a condition of his employment or that he consistently worked a set number of overtime hours each week; and 2) that the overtime hours worked were part of his regular hours of employment. The facts differed from *Edward Hines Lumber* where an employee who did not work a minimum of 60 hours per week was subject to termination.

### **THREE NEW ARBITRATORS HIRED**

The Industrial Commission is pleased to announce that the following arbitrators have been hired: Kurt Carlson, Paula Gomora and Jennifer Teague. All three are experienced workers' compensation attorneys.

After their training, they will serve at the following locations beginning February 1, 2004: Kurt Carlson - Chicago; Paula Gomora - Woodstock, DeKalb and Kankakee; and Jennifer Teague - Carlyle, Whittington and Mt. Vernon.

Beginning February 1, 2004, Arbitrator Akemann will be assigned to Wheaton, where a second docket will be created; Arbitrator Falcioni will be assigned to Ottawa and Bloomington; Arbitrator Nalefski will be assigned to Collinsville and Carlinville; and Arbitrator Dibble will be assigned to Belleville and Herrin.

Although most status and trial dates will not change, revised calendars will be published shortly. Where new dockets are being created or where there is a change in dates, notices will be sent to the parties.

### **CORRECTION**

Finally, an apology. Our faces are red because we misquoted the maximum compensation rate as \$1,021.01 and it should be \$1,012.01. We appreciate your comments.

Frank J. Wiedner, Editor