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WIEDNER & MCAULIFFE, LTD.
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TO RAMP SERVICE MAN WHERE ACCIDENT OCCURRED IN COLORADO

Dean Jacobs, a United Airlines ramp service man, originally worked for United in temporary positions for intermittent periods between May, 1984 and January, 1986. He applied for a permanent position and was hired by United in Chicago on May 19, 1986. After completing his medical evaluation at O'Hare Airport, he worked continuously for his employer in Illinois for the next five years.

On November 24, 1991, Jacobs voluntarily transferred to Denver, Colorado where he worked until July 31, 1994, first as a line mechanic and then as a ramp service man. During this period, Jacobs purchased a home in Colorado, paid Colorado property taxes and filed his income tax returns in Colorado.

On July 31, 1994, Jacobs transferred back to Chicago to a ramp service position at O'Hare. For the next two and one-half months, he lived with his parents in Illinois but on October 9, 1994, Jacobs voluntarily transferred back to Denver after making a written request upon his employer. He returned to the same Colorado home and continued to pay his taxes as before. He did not undergo separate interviews or medical evaluations at the time of the transfer.

On May 7, 1987, Jacobs was married

ILLINOIS JURISDICTION DENIED

Wiedner & McAuliffe, Ltd
One North Franklin, #1900
Chicago, IL 60606
(312) 855-1105
wmlaw.com

in Colorado and has a daughter from that marriage who attends school in Colorado. Since he is not an American citizen, he did not register to vote in any state. He continued to maintain a bank account in Colorado and during his short stay with his parents in Illinois, he did not change his Colorado driver's license.

On May 7, 1997, Jacobs sustained an industrial accident while working for United in Colorado. In his Colorado application, Jacobs stated that his residence was in Colorado and he received benefits under the Colorado Workers' Compensation Statute. After the Colorado award was paid, Jacobs, on February 10, 1998, filed an Application with the Illinois Commission. When claiming Illinois jurisdiction, Jacobs stated that he had a son who resides in Illinois with his ex-wife that he shares joint legal custody and visits the son in Illinois at least three times per year and that he makes bi-weekly child support payments for his son. Claimant's parents and siblings reside in Illinois. The claimant owns a 1972 Jaguar which is registered in Illinois and stored at his father's barn in Algonquin and continues to service his father's two airplanes during his Illinois visits.

The Industrial Commission denied Illinois jurisdiction contending that the claimant's contacts with Illinois were not significant enough to award jurisdiction. The claimant contended that Section 1(b)(2) of the Act conferred jurisdiction to "persons whose employment is outside of the State of Illinois where the contract of hire is made within the State of Illinois" and that it described his situation.

The appellate court affirmed the Industrial Commission's denial of jurisdiction, stating:

...an employment contract is but

one factor a court must weigh in determining whether Illinois jurisdiction is proper. The Carroll court set out five factors to consider in determining jurisdiction under the Act: (1) the situs of the contract; (2) the continuity of employment between the time of contact and the time of injury; (3) the voluntariness of the employee's transfer from Illinois; (4) the length of time between the employee's departure and the date of injury; and (5) the significance of the employee's contacts with Illinois following his departure from the state.

The court then went on to say:

When each of the five factors outlined in Carroll is considered, the Commission's decision is not against the manifest weight of the evidence. The issue of whether Illinois has jurisdiction over an injured out-of-state employee is a question of fact for the Commission.

Justice Goldenhersh, not surprisingly, dissented, pointing out that in *Carroll* the injury occurred nineteen years after the claimant last resided in Illinois whereas in the instant case, the injury occurred only two and one-half years from the Illinois work. The dissent also noted that the claimant's seniority date remained the date of his Illinois hire and he retained the right to return to Illinois under his Union contract, a right that the *Carroll* claimant did not have. Finally, the dissent noted that in the prior United Airlines case involving the employee, Rogers Walker, the Supreme Court had allowed Illinois jurisdiction where the interval away from

Illinois work was only two years.

EDITOR'S NOTE: Since United pilots and flight attendants do have access to Illinois jurisdiction by virtue of a Collective Bargaining Agreement, other employees have attempted to invoke such jurisdiction when their original hire was Illinois but where, after a voluntary transfer, the accident occurred elsewhere. Ever since the *Carroll* case, these claims have been denied.

It should be pointed out that this *Jacobs* opinion was issued pursuant to Rule 23. As pointed out in past Newsletters, the appellate court has used this Rule to reduce the amount of opinions that are to be printed in the legal volumes. Whenever possible, the court issues a Rule 23 Order which has all the appearance of a regular opinion, except that the Rule 23 opinions are not published. In most cases, they affirm the fact-finding body and, frequently, provide some insight into the thinking of the court on a particular issue.

On January 16, 2004, the Appellate Court, by a 4-1 vote, denied the petitioner's request for a rehearing. The court also noted that none of the Justices had filed a statement that the case involved a substantial question which warranted consideration by the supreme court. Consequently, the Appellate Court decision is now final.

DENIAL OF CONTINUANCE BECAUSE OF LACK OF TRIAL PREPARATION

Our recent "Alert" emphasized the case of *Edward Don Company v. Industrial Commission*, where 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. In our recent "Alert" we discussed only the calculation of wages. The following summarizes the court's position on the other two issues which refer to the employer's preparation for the hearing.

Enforcement of a Subpoena

In requesting an additional continuance on a case that had been pending for four years, the employer informed the arbitrator that Luis Ramirez, a St. Mary of Nazareth employee, had failed to respond to a subpoena to testify. Ramirez allegedly heard an emergency room admission from the claimant to the effect that the injury had actually occurred at a previous stop. The employer requested a continuance to enforce the subpoena. The arbitrator refused the continuance request and the employer appealed. The appellate court held that the arbitrator had correctly refused to even consider the employer's request for a continuance to enforce the subpoena, stating:

Further, it does not appear that Edward Don's counsel ever asked the arbitrator to enforce the November 1, 2000, subpoena, but rather asked for a continuance, stating "we would like to have either an opportunity to serve Mr. Ramirez or an order

from you indicating that he must appear at a later date.” Finally, even if this could be taken as a request for an order enforcing the November 1, 2000, subpoena, the request was not in the proper form. As section 16(a) of the Act provides, only the circuit court, upon application of an arbitrator, can enforce a subpoena issued by the arbitrator. Pursuant to section 7030.50 of the Commission’s rules, the party seeking enforcement of a subpoena issued by an arbitrator must prepare an application to the circuit court of the county in which the claim is pending requesting enforcement of the subpoena pursuant to section 19(a) of the Act and file the application with the arbitrator, who will hold a hearing on the enforcement of the application. If the arbitrator signs the application, the party seeking enforcement of the subpoena may then file the application in the circuit court. Edward Don never followed the procedures necessary to seek enforcement of the subpoena served on Ramirez requiring his appearance on November 1, 2000.

EDITOR’S NOTE: The enforcement process at the Industrial Commission is so laborious that the employer may have regarded it as a final resort. Unfortunately, the court found that he was now too late.

Impeachment

In his testimony, the claimant had testified in a prior arbitration hearing in connection with a civil law suit against St.

Mary’s Hospital for the injuries sustained in the fall. The employer’s counsel attempted to cross-examine the claimant about his testimony at that prior hearing. The arbitrator’s refusal to allow the cross-examination was upheld by the appellate court. The court stated:

In the instant cast, when the claimant’s counsel objected to any questions regarding the claimant’s civil lawsuit against St. Mary of Nazareth Hospital, the arbitrator asked counsel for Edward Don where he was “going with this.” Counsel responded that he was “going to ask [the claimant] what he said during” the arbitration hearing conducted in connection with the civil litigation. Counsel, however, did not make an offer of proof as to what questions he intended to ask the claimant and what responses he expected the claimant to give. Generally, a party who fails to make an offer as to the evidence it intended to introduce waives any claim that the evidence was improperly excluded. ... Counsel for Edward Don stated only that he wished to ask the claimant what he said at the arbitration hearing. He did not specify what particular questions he wished to ask the claimant or demonstrate that the claimant’s anticipated answers to those questions would be inconsistent as to a material issue with his testimony in these proceedings. Accordingly, we find that Edward Don has waived review of the issue.

EDITOR’S NOTE: The court suggested that the

employer should have had more specific information as to the prior testimony to justify the impeachment attempt. This case illustrates the importance of both the employer's representatives and attorney's cooperation in trial preparation.

Overtime Issue Revisited

In view of the reference in the *Edward Don* to the *Edward Hines Lumber* case, your editor reviewed the actual language in the *Hines* decision to determine how the court actually defined overtime. After pointing out that Section 10 did not actually exclude all hours worked over 40 hours per week from the average weekly wage, the *Hines* court made these comments:

Had the legislature intended to exclude from the average weekly wage calculation any time worked over 8 hours per day or 40 hours per week, it could easily have stated this. Instead, the legislature plainly and unambiguously took a more flexible approach, recognizing that different occupations have different regular hours of employment, and excluded only "overtime and bonus." By "overtime" we find that the legislature meant (1) compensation for hours beyond those the claimant regularly works each week, and (2) extra hourly pay above the claimant's normal hourly wage.

The court referred to a similar result in another state:

The Montana Supreme Court held that if the work record showed that the employer hired

the claimant expecting overtime work and the claimant actually worked overtime on a consistent and regular basis, then that overtime became part of the usual hours of employment. However, those extra hours would be included in the wage calculation at the regular hourly rate.

The *Hines* decision concluded:

From our discussion it can be deduced that "overtime" under the Act is a subjective standard. This is important to keep in mind because, in contrast to the petitioner's situation, many people in today's workforce have regular workweeks of less than 40 hours. For those people, overtime under the Act is anything above their regular workweek. If, for example, a person who regularly works 25 hours per week works 35 hours one week, that extra 10 hours would not be included in the average weekly wage calculation.

At the risk of being repetitious, we believe it important to review how *Edward Don* is distinguished from *Hines*.

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.

...

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: Petitioners and respondents are presently in disagreement as to the interpretation of the above paragraph from the *Edward Don* case. The claimant’s attorneys have taken the position that the work must either be mandatory or be a part of the regular hours of employment but that both are not required. We have taken the position that the court had merely stated that neither was proved and that actually both are necessary. In many cases, the distinction between the two will not be completely clear because work performed as a regular part of the employment seems to be considered as mandatory even though it may not appear to begin in that fashion.

OTHER DEFENDANTS PAY MORE WHEN EMPLOYER USES KOTECKI WAIVER

Meredith Casper of our liability department comments on contribution increase by other defendants when the employer claimed the *Kotecki* limitation.

In *Illinois Tool Works, Inc., v. Independent Machine Corporation*, 2003 WL 23149986 (1st Dist. 2003), the Illinois Appellate Court articulated a method for apportioning damages that are “uncollectible” from an employer due to the employer’s ability to limit its liability to the amount of its workers’ compensation lien, i.e., its *Kotecki* cap. This case involved a contribution action brought by the plaintiff, Illinois Tool Works, Inc., (“ITW”), against the defendant, Independent Machine Corporation, (“IMC”), for damages in excess of its pro rata share of liability in an underlying lawsuit.

In the underlying action, an employee of Tapecoat Company, (“Tapecoat”), and his wife sought relief for injuries the employee sustained during his operation of a “hot melt

coating line.” The plaintiffs sued ITW and IMC, the manufacturers of the coating line. ITW and IMC sought contribution from each other and from Tapecoat, the employer. Before trial, ITW and Tapecoat, settled with the plaintiffs. ITW agreed to pay two million dollars and Tapecoat waived its workers’ compensation lien, which amount to 10.5% or \$234,421.97 of the total settlement. The court approved the settlement agreement and dismissed the original action. Accordingly, the only remaining causes of action were ITW’s and IMC’s cross-claims against each other for contribution.

In apportioning fault, the trial court rejected ITW’s argument that it could not find Tapecoat any more than 10.5% at fault under the Illinois Supreme Court’s decision in *Kotecki*. Instead, the trial court apportioned responsibility as follows: Tapecoat Company was 35% at fault; ITW was 35% at fault, and IMC was 30% at fault. The trial court entered judgment against ITW for \$782,047.69 and awarded contribution in favor of ITW and against IMC in the amount of \$670,326.57. As a result, ITW essentially became solely responsible for the amount that was uncollectible from Tapecoat, i.e., the difference between Tapecoat’s liability and the amount at which *Kotecki* capped its liability. In other words, ITW became liable for \$782,047.69 (35% of the common liability), plus the amount that was not collectible from Tapecoat because of its *Kotecki* cap, \$547,625.72, for a total of \$1,329,673.41, or nearly 60% of the common liability.

The Illinois Appellate Court rejected this apportionment of damages. Specifically, the Illinois Appellate Court modified how the lower court apportioned those damages that were uncollectible from Tapecoat based on section 3 of the Contribution Act, which requires that “the remaining joint tortfeasors...share the unpaid portions of the

uncollectible obligation in accordance with their pro rata liability.” 740 ILCS 100/3 (West 2000). The Illinois Appellate Court held that ITW and IMC, the remaining tortfeasors, were jointly and severally liable for Tapecoat’s uncollectible amount and apportioned that amount in accordance with ITW’s and IMC’s pro rata liability. As a result, the Illinois Appellate Court affirmed the lower court’s judgment against IMC in ITW’s favor, but modified the amount of that judgment from \$670,326.57 to \$922,816.28 to compensate for the amount that was uncollectible from Tapecoat.

WHY RESPONDENTS HAVE DIFFICULTY IN OBTAINING DISMISSALS

The recent case of *Gloria Trunek* illustrates the difficulties in obtaining dismissals of cases in arbitration before the Industrial Commission. Gloria Trunek, an employee of Wal-Mart Stores, had a scheduled hearing for June 6, 2000, at which time the case was dismissed for want of prosecution. On June 7, 2000, the parties and the arbitrator made a record which supported the arbitrator’s dismissal of the matter.

On July 31, 2000, the claimant filed a petition to vacate the dismissal for want of prosecution. Wal-Mart objected and the arbitrator denied claimant’s motion to vacate on September 6, 2000. The claimant sought a review of the arbitrator’s decision before the Industrial Commission. At the same time, Wal-Mart moved to dismiss the claimant’s petition for review, arguing that it was untimely. Wal-Mart also argued that the Commission lacked jurisdiction because the claimant failed to perfect its petition for review by timely filing a proper transcript. The Commission denied Wal-Mart’s motion to dismiss but by separate order, affirmed and adopted the arbitrator’s decision denying the

claimant’s motion to vacate the dismissal.

The claimant appealed the Commission’s decision to the Circuit Court of Cook County. On November 20, 2002, the circuit court reversed the Commission’s decision and remanded the case to the Commission with instructions to reinstate the claimant’s case and to proceed with a hearing on the merits. Wal-Mart appealed the circuit court order to the appellate court.

The claimant then contended that the appellate court lacked jurisdiction over this appeal because the act of reversing and remanding the case to the Commission for further proceedings on the merits was interlocutory and not a final judgment. Unfortunately for Wal-Mart, the appellate court agreed. The court stated:

A judgment is final for appeal purposes if it determines the litigation on the merits or some definite part thereof so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment. The Supreme court has repeatedly held that, when a circuit court reverses a decision of the Commission and remands the matter for further proceedings involving the resolution of questions of law or fact, the order is interlocutory and not appealable.

Pursuant to the circuit court’s remand, the Commission would have to resolve a variety of questions involving fact and/or law. Most notably, the Commission must still determine the threshold questions of whether the claimant sustained injuries arising out of and in the

course of her employment. The circuit court's order, therefore, cannot be construed as a final order.

Surprisingly, the appellate court suggested another possible avenue whereby Wal-Mart could have sought review of the circuit court's order by utilizing Supreme Court Rule 306(a)(6), stating:

That rule grants this court the discretion to allow an appeal of an otherwise non-final circuit court order that remands a case for a hearing de novo before an administrative agency. Wal-Mart, however, not only failed to rely on this rule to support its jurisdictional statement, it also failed to follow its requirements for seeking leave to appeal by filing a petition before this court.

Editor's Note: All the attorneys in our firm appreciate the frustration of our clients when we report our difficulty in obtaining dismissals on cases which have no merit. This *Trunek* case exemplifies the failure to obtain such a dismissal after years of litigation. The end result to Wal-Mart is having the case returned to its status on arbitration nearly four years after it was originally dismissed for want of prosecution. The suggested use of the Supreme Court Rule becomes a possibility only after the case has reached the circuit court.

FRANK J. WIEDNER
Editor

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