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CONTENTS

1 **ALL OVERTIME EARNINGS EXCLUDED FROM AVERAGE WEEKLY WAGE AS OVERTIME WAS NOT MANDATORY**
Airborne Express, Inc. v. Industrial Commission
No. 1-06-1960WC, decided March 20, 2007

5 **MARINE SHIPPING WAREHOUSE MANAGER ELECTS WORKERS' COMPENSATION INSTEAD OF LONGSHOREMEN'S BENEFITS - PERMANENT DISABILITY AWARD AFFIRMED**
Federal Marine Terminals v. Industrial Commission,
No. 1-06-1738WC, decided March 6, 2007

6 **CLAIMANT CANNOT OBTAIN "ODD LOT" PERMANENT TOTAL DISABILITY AWARD WITHOUT SUPPORTING EVIDENCE FROM A REHABILITATION OR VOCATIONAL COUNSELOR**
Westin Hotel v. Industrial Commission,
No. 1-06-1728WC, decided March 27, 2007

7 **TRUCKING COMPANY'S ATTEMPT TO ESTABLISH CLAIMANT AS INDEPENDENT CONTRACTOR FAILS - CLAIMANT HELD TO BE AN EMPLOYEE**
Roberson v. Industrial Commission
No. 102723, decided March 22, 2007

8 **APPELLATE COURT REVERSES TRIAL COURT'S DISMISSAL OF COMPLAINT BASED ON SHOOTING OF ONE EMPLOYEE BY ANOTHER**
Martinez v. Gutmann Leather
No. 1-06-2346, decided March 27, 2007

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ALL OVERTIME EARNINGS EXCLUDED FROM AVERAGE WEEKLY WAGE AS OVERTIME WAS NOT MANDATORY

A most significant case has just been decided by the Special Appellate Court and will frequently be cited as the *Airborne Express* case. Ron Bronke, a delivery driver for Airborne Express, was involved in three accidents, two in 2000 and one in 2001. The three cases were consolidated for hearing and decisions rendered in all three. Airborne objected to only one decision, that being the accident of October 8, 2001, not because of the finding of disability but **only for the fact that overtime was included by the Commission when deciding the average weekly wage, leading to increased amounts for temporary total disability and maintenance.**

Bronke began working for Airborne in 1994 on a regular eight-hour shift extending from 7:00 a.m. to 4:00 p.m., Monday through Friday. It was company policy to have the driver finish all of the packages on his truck before returning to Airborne's facility, *no matter how long it takes*. The driver was not to bring back undelivered freight unless he had permission to do so from a supervisor or manager. Over and above completion of a driver's own route, overtime may be compulsory at Airborne but only if the driver has not obtained seniority status. Most of the claimant's

overtime occurred in 2001 because he used his seniority and requested overtime from his supervisors.

Joseph Yates, an Airborne manager, testified that the claimant had sufficient seniority so that he would not be forced to work overtime in 2001. The drivers who were forced to work overtime fell into the lower 20% to 25% on the seniority list, whereas, the claimant fell in the upper 30%. *According to Yates, the overtime that the claimant worked in 2001 was voluntary overtime for which he bid based on seniority.*

The claimant worked only 32 weeks during the 52-week period prior to his injury on October 8, 2001. His regular wages for that period amounted to $901.41 per week. Additionally, the claimant worked 538.70 hours of overtime in that same 32-week period. As a result, the Commission added the straight time rate for the 538.70 hours of overtime, which was calculated at $21.59 per hour, thereby increasing his average weekly wage of $901.41 to $1,246.86 per week. Consequently, the TTD and maintenance rates were increased from $600.94 per week to $843.24 per week and formed the basis for Airborne's appeal.

Section 10 of the Act provides that "average weekly wage" means:

> *the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of his injury, illness, or disablement excluding **overtime**, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted.*

However, as the court noted, Section 10 of the Act stated that overtime is to be excluded in calculating an employee's average weekly wage but the Statute fails to define "overtime." The court utilized *Webster's Third New International Dictionary* to define overtime as ***working time in excess of a minimum total set for a given period***. On that basis, the court reluctantly reversed the Commission decision on a factual basis. The reversal is necessary because the clearly, evident, plain and indisputable weight of the evidence compels an opposite conclusion.

The court explained:

> *The 538.70 hours of **overtime** which the Commission included in its calculation of the claimant's average weekly wage were not part of the claimant's regular hours of employment and they were not hours that the claimant was required to work as a condition of his employment. Although the claimant consistently worked **overtime**, he did not work a set number of **overtime** hours each week. The Commission correctly noted that Airborne's operational needs required **overtime** work by its drivers. However, the claimant's seniority ensured that he would not have been required to work **overtime** if he did not request to do so. These uncontradicted*

facts lead us to conclude that the Commission's calculation of the claimant's average weekly wage and its dependent calculations of the weekly TTD and maintenance benefits to which the claimant is entitled are against the manifest weight of the evidence.

It is interesting to note that the unanimous opinion written by Judge Hoffman states that the court's prior decisions involving an interpretation of the overtime exclusion of Section 10 of the Act are consistent with this definition. Certainly, in each and all of the prior cases, beginning with the *Edward Hines Lumber Company* case, the overtime was mandatory, but the calculation of the overtime rate excluded only the premium portion of the overtime rate. The significant part of this decision involves the court's exclusion of any portion of the time payment even the straight-time portion thereof. In the explanation, the court noted:

> *Section 10 of the Act explicitly states that* ***overtime*** *is to be excluded in calculating a claimant's average weekly wage. No rule of construction authorizes this court to declare that the legislature did not mean what the plain language of section 10 imports. We are simply not at liberty, by forced or subtle construction, to alter the plain meaning of the words employed by the legislature. If merely working* ***overtime*** *on a regular, voluntary basis were sufficient to include the* ***overtime*** *hours worked in the calculation of an employee's average weekly wage, the* ***overtime*** *exclusion in section 10 of the Act would be rendered meaningless.*
>
> ***The 538.70 hours of overtime which the claimant worked in the 32 weeks prior to his accident were overtime within the meaning of section 10 of the Act and should not have been included in the Commission's calculation of the claimant's average weekly wage.***

EDITOR'S NOTE: Since this decision does not involve any change in the Statute and since the court is actually clarifying the Statute rather than finding the prior cases inconsistent, this elimination of overtime wages should be applicable to all cases presently pending. If an overpayment has been made because of the inclusion of the overtime wages, that overpayment should be utilized as a credit in the pending case. I have been informed that the claimant has filed a petition for rehearing and a request that the court certify that the case should be granted leave to file an appeal to the supreme court. The success of this request for certification is questionable because the appellate court was unanimous in its decision. But, at this moment, the decision represents the law in Illinois. We will keep you advised as this matter progresses.

Your Editor believes that while this decision is important we must keep in mind the various lessons that the court provides.

1. In *Airborne Express*, the facts were undisputed. Both the claimant and his supervisor described the claimant as requesting the overtime and both acknowledged that claimant's seniority exempted him from compulsory overtime.
2. Often a factual dispute exists as to whether the overtime was mandatory as opposed to voluntary. If the Commission would decide in

favor of the claimant on that question of fact, the appellate court would be unlikely to reverse the Commission on its finding.

In a somewhat similar situation, Section 11 was amended to eliminate injuries caused at company outings and other recreational activities. To protect the employers, the legislature provided that the injuries would not be compensable unless the employees were "ordered" or "assigned" to attend. Since that time, the Commission has found compensability in cases where the employee's attendance was questionably ordered or assigned and yet found to be compensable.

Both company outings and overtime cases have similar issues. Was the overtime "mandatory" or "voluntary?" Was the employee at the company outing "ordered or assigned?" The clarification by the employee is paramount. Testimony by knowledgeable witnesses will be necessary. Documents concerning employer's policy may help decide the case.

3. In the *Airborne Express* opinion, the court noted that the claimant did not work a set number of hours each week. However, that factor does not seem to be controlling if the overtime is mandatory. The argument may be made that "a set number of hours per week" would actually be a description of "regular hours." The difference between "regular" hours and "mandatory" hours, may be difficult to ascertain.

4. If the overtime is mandatory, the court will follow the language in the *Hines* decision which includes only the straight-time hourly rate of the overtime and does not include the premium time.

5. As stated by the appellate court, the term "overtime" as used in Section 10 of the Act, does not simply mean any time over eight hours per day. Different occupations have different regular hours of employment. The appellate court further stated:

   The fact that it was mandatory for claimant to work up to eight hours of overtime, coupled with the contents of the wage statement, leads us to conclude that claimant's work week was 48 hours per week. ... We hold that overtime hours should be included in the average weekly wage calculation at straight time, so as to reflect overtime earnings.

Conclusion

As stated previously, the very nature of the voluntary overtime in *Airborne Express* is quite clear. An employer must be prepared to provide proof when the issue is contested.

MARINE SHIPPING WAREHOUSE MANAGER ELECTS WORKERS' COMPENSATION INSTEAD OF LONGSHOREMEN'S BENEFITS -

PERMANENT DISABILITY AWARD AFFIRMED

Vincent Buza, a 52 year old marine shipping warehouse manager, was supervising the unloading of cargo and when he entered into the warehouse to take inventory, he tripped over a piece of wood, falling on his hands and knees. The following morning, he was seen at the Trinity Hospital, complaining of pain in his left knee and left shoulder, together with a burning sensation in his fingers and left hand.

The claimant had a preexisting condition of paralysis of the right hand and a right-legged limp resulting from a childhood accident. While the claimant was essentially left handed, he used his right hand to hold or lift objects although a physician described the claimant's right hand as functionally limited to a large extent.

On April 3, 1999, the claimant began a course of treatment with multiple physicians which treatment continued for several years. Such treatment included surgical procedures to the left knee and back. The treating physicians presented conflicting opinions as to when and if the claimant could return to regular work.

Both parties obtained vocational rehabilitation consultant reports with significantly different conclusions. Edward Rascati, who was retained by Federal Marine, concluded that the claimant possessed transferrable skills which permitted him to operate the sedentary duties of a security guard, a dispatcher, or a field clerical worker for a township assessor. Susan Entenberg, retained by the claimant, concluded that based on the claimant's age, education, work experience and physical limitations that the claimant was not capable of gainful employment and was not a candidate for vocational rehabilitation. The Commission found that the claimant was permanently and totally disabled and the appellate court has now affirmed.

JURISDICTION

Federal Marine contended that the Longshoremen's Act preempted the workers' compensation jurisdiction and that the Longshoremen's Act limited the recovery to 104 weeks of compensation after which the Federal Second Injury Fund would make all subsequent payments. The court reviewed the legislative history of the two statutes and concluded that the claimant had a right to select the appropriate statute. The court stated:

> *The legislative history of the 1972 amendments does not mention preemption of state remedies and does not suggest that Congress intended to exclude state workers' compensation statutes from applying. Concurrent jurisdiction over land-based injuries, such as the one at issue in this case, does not frustrate Congress' intent to aid injured maritime workers.*

Federal Marine then argued that the injuries sustained by the claimant as a result of his fall on March 30, 1999, coupled with the pre-existing condition of his right hand, resulted in the ultimate finding that the claimant was totally and permanently disabled. On that basis, Federal Marine argued that the argument was based on Section 8(f) of the Compensation Act which provides that if the employee had previously incurred the total loss of the use of one member and then sustains the additional loss

of another member, then the finding of permanent total disability will be partially paid by the Second Injury Fund. However, the court felt that there was evidence that the claimant's right hand was paralyzed as a result of a childhood injury but that there was no evidence that the paralysis resulted in the prior complete loss of use of that hand.

Finally, Federal Marine argued that the record indicated some evidence that the claimant might return to some type of work if he had the benefit of vocational rehabilitation. Various medical opinion disagreed as to whether the claimant was capable of performing sedentary work. In response, the court stated:

> *The Commission's finding that the claimant is permanently and totally disabled is supported by competent evidence and an opposite conclusion is not clearly apparent. We, therefore, reject Federal Marine's argument that the Commission's determination in this regard is against the manifest weight of the evidence.*

EDITOR'S NOTE: Federal Marine was in a difficult position in attempting to establish that the previously injured hand would enable the claimant to perform sedentary work. If that were true, that previously injured hand could not have been totally disabled.

CLAIMANT CANNOT OBTAIN "ODD LOT" PERMANENT TOTAL DISABILITY AWARD WITHOUT SUPPORTING EVIDENCE FROM A REHABILITATION OR VOCATIONAL COUNSELOR

On October 5, 1998, Theodoros Vakalidis, a hotel painter, was attempting to prevent a heavy cart from tipping over as it dropped six inches from the sidewalk. Consequently, he experienced injuries to his back and left knee resulting in treatment by eight orthopedic surgeons over the next four years. He never returned to work. The arbitrator awarded four years of TTD benefits and also found that claimant was permanently and totally disabled under the "odd lot" theory. Except for a reduction in the weekly wage finding, the Commission and the circuit court affirmed.

The appellate court concluded that the claimant had not carried his burden of establishing that he fell into the odd-lot category. In describing the requirements, the court stated:

> *The claimant ordinarily satisfies his burden of proving that he falls into the odd-lot category in one of two ways: (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of his age, skills, training, and work history, he will not be regularly employed in a well-known branch of the labor market. Whether a claimant falls into the odd-lot category is a factual determination to be made by the Commission, and that determination will not be set aside unless it is against the manifest weight of the evidence.*
>
> ...
>
> *Claimant did not present any evidence that he conducted any job search. Moreover, the only witness to testify regarding claimant's unemployability was Dr. Coe, a*

specialist in occupational medicine. Dr. Coe testified that, to a reasonable degree of medical certainty, claimant is permanently and totally disabled from gainful employment. Dr. Coe's opinion was based on the history he took from claimant, claimant's symptoms, claimant's medical records, and Dr. Coe's physical examination of claimant. However, merely proffering medical evidence of permanency is insufficient to shift the burden to the employer. Indeed, the most recent cases making an odd lot determination on the basis that there is no stable job market for a person of the claimant's age, skills, training, and work history have required evidence from a rehabilitation services provider or a vocational counselor.

EDITOR'S NOTE: The decision is unusual because of the reversal of the odd lot permanent total award by an appellate court. This opinion differs from the *Federal Marine* case, described herein, which did include supporting evidence from the claimant's vocational rehabilitation consultant that the claimant's age, education, work experience and physical limitation rendered the claimant incapable of gainful employment.

TRUCKING COMPANY'S ATTEMPT TO ESTABLISH CLAIMANT AS INDEPENDENT CONTRACTOR FAILS - CLAIMANT HELD TO BE AN EMPLOYEE

For obvious reasons, trucking companies have for years attempted to utilize documentary evidence to establish it's drivers as independent contractors. In most cases, the attempt fails. In the recent Supreme Court case, the Supreme Court noticed that many of the facts pointed to Donald Roberson as an independent contractor but that since the evidence was contradicted, the Supreme Court held that the Industrial Commission's finding that Roberson was an employee was not against the manifest weight of the evidence.

The Commission decision had been reversed by the trial court which in turn was reversed by the appellate court which reinstated the Commission decision. Regarding the issue of whether Roberson was an employee, the appellate court noted that this determination is fact specific. In its summary, the appellate court stated:

> *[t]he parties' relationship contained elements of both independent contractor and employment status. Factors such as the manner in which claimant was paid; the parties' labeling of their relationship; claimant providing his own tractor and trailer; claimant paying for his own expenses, such as insurance and fuel; and the fact that claimant could refuse loads and choose his own routes indicate an independent contractor status.*
>
> *On the other hand, there were significant elements of control present here. Most importantly, the contract gave employer [sic] exclusive possession, use, and control of the equipment. Although the contract contained a caveat that such exclusive possession did not affect the parties' legal*

relationship, the caveat is merely a labeling provision, which is a factor of lesser weight. The fact of exclusivity and control remained.

A review of the 23-page opinion of the Supreme Court would seem to supply every possible argument used by both the trucking company and the driver that could exist in this type of business. Professor Larson, in his treatise on Workers' Compensation law, pointed out *there is a growing tendency to classify owner-drivers of trucks as employees when they perform continuous service which is an integral part of the employer's business.*

EDITOR'S NOTE: Our Commission is clearly following the trend described by Professor Larson. This policy is commonly known as the "relative nature of the work" test. In this case, P.I. & I. Motor Express utilized every method possible to establish an independent contractor relationship. The court stated quite clearly that the Commission need not necessarily be bound by the terms of the documents but was entitled to ignore the terms of the lease when they seem to contradict the parties' course of conduct.

APPELLATE COURT REVERSES TRIAL COURT'S DISMISSAL OF COMPLAINT BASED ON SHOOTING OF ONE EMPLOYEE BY ANOTHER

In the Maria Martinez case, the appellate court had occasion to consider a civil action by the estate of a deceased employee. Miguel Pena, an employee of Gutmann Leather, was allegedly killed by a fellow employee, Ramon Hernandez on the employer's premises when Hernandez was still "on the clock." In her complaint, the estate administrator alleged that Pena and Hernandez had repeated quarrels for personal reasons <u>unrelated to work</u>. Apparently, the employer denied liability because a dispute was not work related. There is no evidence that an application was ever filed.

The employer contended that the tort case was barred under Section 5(a) of the Compensation Act which provides, in relevant part:

*No common law or statutory right to recover damages from the employer, his insurer, his broker *** or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available***.*

The court reviewed a number of workers' compensation cases where the claimant sought benefits under the Act from injuries resulting from a physical altercation. In the *Castaneda* case, a co-worker and her sister, with whom the claimant had previously quarreled, joined together and assaulted the claimant as a result of a dispute from the previous day. It was held that the injuries resulted from a purely personal dispute. In the *Huddleston* case, a dispute about a parking space led to an assault of the claimant in the place of employment but the court stated that the employment did not increase the risk or cause the altercation. The trial court dismissed the complaint and the appellate court reversed stating:

Turning to the case at hand, we find the trial court erred in concluding there was no set of facts which would allow plaintiff to recover. Plaintiff attested that she lived with Pena prior to his death and had personal knowledge of the quarrel between him and Hernandez. She attested that the

relationship had been deteriorating for some time and had nothing to do with Pena's employment at Gutmann Leather. She further attested that over a period of at least a year prior to the incident, Hernandez had come to her home looking for Pena and threatened to cause him harm. We note that at the hearing on defendant's motion to dismiss, plaintiff represented that Hernandez could not be deposed by the parties because his criminal case was still pending.

Based upon the guidance from our supreme court in the above cases, and viewing the pleadings in the light most favorable to plaintiff, we find it cannot be said, as a matter of law, that the dispute which ended in Pena's death arose out of and in the course of his employment at Gutmann Leather. As our supreme court has explained: "[e]ven though a fight occurs on the employee's premises, resulting injuries are not compensable if the underlying dispute is not connected with the work." Accordingly, we reverse the circuit court's order dismissing plaintiff's first amended complaint and remand for further proceedings consistent with this opinion.

EDITOR'S NOTE: The finding is consistent with the language in the 2005 opinion by the appellate court in *MacDon6ald v. Hinton*, which has a somewhat similar factual situation. In that decision, the court stated:

Ordinarily, a party owes no duty of care to protect another from the harmful or criminal acts of third persons (citing cases). However, the law recognizes at least four exceptions to this rule (1) when the parties are in a special relationship and harm is foreseeable; (2) when an employee is in imminent danger and this is known to the employer; (3) when a principal fails to warn his agent of an unreasonable risk of harm involved in the agency; and (4) when any party voluntarily or contractually assumes a duty to protect another from the harmful acts of a third party.

FRANK J. WIEDNER
Editor