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OVERTIME WAGE INCOME REQUIRES THAT IT BE BOTH REGULAR AND MANDATORY

Our firm represented Dominick's Finer Foods in a very important case involving the question of overtime hours being included in the claimant's average weekly wage. The Commission found:

Petitioner earned a total of \$50,220.04 for the 52 weeks prior to the accident, including overtime, yielding an average weekly wage of \$965.77. Petitioner worked approximately 10 hours per week in overtime hours. The Arbitrator finds that petitioner's overtime was regular, mandatory and a condition of employment. Thus, the Arbitrator finds Petitioner earning in the year preceding the injury to be \$50,220.04, with an average weekly wage of \$965.77.

The circuit court has reversed the Commission based on the language in the appellate court *Airborne Express, Inc.* case where the requirements for overtime are discussed. In the *Dominick's Finer Foods* case, the employer argued that overtime should not be included because the claimant's overtime was neither regular nor mandatory.

DID THE CLAIMANT PROVE THE

OVERTIME WAS REGULAR?

The court stated:

An examination of Claimant's payroll history, Employer's Exhibit 8, reveals that although Claimant worked overtime on a regular basis, his overtime hours varied substantially from a low of 0 or 2 hours per week to a high of 31.5 hours per week. There is no pattern of consistency in Claimant's overtime hours; rather, his overtime hours ebbed and flowed substantially depending on Employer's needs. Claimant indeed acknowledged that he did not consistently work a set number of overtime hours. Because it is undisputed that Claimant did not work a set number of overtime hours consistently each week, the Commission's finding that his overtime was 'regular' is against the manifest weight of the evidence.

WAS THE CLAIMANT'S OVERTIME MANDATORY?

The court stated that the Commission's finding that claimant's overtime was mandatory is not against the manifest weight of the evidence, stating:

Claimant testified that he moved containers containing food, including fresh and other perishable foods. Because of the nature of the perishables he worked with, Claimant was often required to work overtime to finish his work. In addition, Claimant was also required to work overtime if another employee was absent. Claimant also testified that because

he did not have seniority Employer would choose him to work overtime. Although Claimant at one point acknowledged that Employer sometimes offered overtime to those employees with seniority, he testified that Employer preferred employees with less seniority, like him, because they did more work. No evidence was offered to rebut Claimant's testimony regarding his mandatory nature of his overtime. Though certain aspects of Claimant's testimony regarding his overtime hours were ambiguous, the Commission's finding that the overtime Claimant worked was mandatory is not against the manifest weight of the evidence.

SO LONG AS THE OVERTIME HOURS WERE MANDATORY, WAS THE CLAIMANT REQUIRED TO ESTABLISH THAT HIS OVERTIME HOURS WERE PART OF A SET NUMBER OF HOURS CONSISTENTLY WORKED EACH WEEK FOR HIS OVERTIME TO BE INCLUDED IN THE CALCULATION OF HIS AVERAGE WEEKLY WAGE?

The court stated:

If there were any doubt that a claimant is required to show that his overtime is both mandatory and part of a set number of hours consistently worked each week for it to be included in the calculation of average weekly wages, one need only consider a subsequent passage in Airborne Express: '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.’ In other words, if overtime is ‘regular,’ it may only be included in the calculation of average weekly wages if it is also mandatory. Thus, Airborne Express makes clear that the exception to the general rule that overtime is excluded in the calculation of average weekly wages is a narrow - overtime may only be included when it is both a condition of employment and part of a set number of hours consistently worked each week. (emphasis supplied)

Since the average weekly wage found by the Commission needed to be revised, the circuit court could have referred the matter back to the Commission for the correct figures. Instead, the circuit court revised the average weekly wage from \$965.77 to \$751.24, with the appropriate TTD and PPD benefits of \$583 and \$450.74, respectively.

EDITOR’S NOTE: In a very well-reasoned opinion, the circuit court noted that the appellate court had not yet addressed a case where claimant’s overtime is mandatory or part of a set number of hours consistently worked each week, but not both. Erica Rogina, of our firm, is to be commended in obtaining a reversal of the Commission’s interpretation of the overtime requirement for the average weekly wage.

PETITIONER RECEIVES SPECIFIC LOSS AWARD FOR BOTH ARMS IN ADDITION TO TWO-MEMBER

PERMANENT DISABILITY BENEFITS BASED ON LOSS OF BOTH LEGS

On April 19, 1995, Jack Carson, a truck driver employed by Beelman Trucking, was involved in a serious motor vehicle accident resulting in severe and permanent injuries. He suffered a burst fracture at C5-6 resulting in a complete loss of use of both legs and the near complete paralysis of the left arm. He also sustained an injury to the right arm which ultimately resulted in an above-elbow amputation of the arm. The spinal injury resulted in a complete loss of sensation below the level of his mid chest and paralysis of his left arm below the shoulder level. The right arm amputation did not permit him to utilize a prosthesis of that arm.

The Commission award included the following:

1. Total disability of both legs resulting in two-member permanent disability award, pursuant to Section 8(e)(18);
2. Total loss of use of the right arm for the right arm amputation, including inability to utilize any prosthesis, resulting in an award of 300 weeks, pursuant to Section 8(e)(10);
3. Total loss of use of the left arm because of paralysis resulting in an award of 235 weeks, pursuant to Section 8(e)(10);
4. Medical benefits of \$12,674 for the acquisition of a voice-activated computer environmental control unit which resulted in additional safety and security and permitted

him to operate his telephone, television set and lamp; and

5. \$708 for a handicapped modification endorsement of his automobile insurance premium.

The circuit court confirmed the decision of the Commission and the employer appealed.

The first issue is whether the Commission erred in awarding specific loss benefits under Section 8(e)(10) in conjunction with the statutory permanent disability award under Section 8(e)(18) where the injuries were incurred in a single accident. The court summarizes the two pertinent sections as follows:

The number of weeks of compensation varies depending on the specific loss suffered by the worker. Applicable to this case is subsection (10) of section 8(e), under which the Commission awarded Carson benefits for the loss of each of his arms. Section 8(e)(10) provides in part:

*Arm-235 weeks. *** Where an accidental injury results in the amputation of an arm above the elbow, compensation for an additional 15 weeks shall be paid, except where the accidental injury results in the amputation of an arm at the shoulder joint, or so close to shoulder joint that an artificial arm cannot be used, *** in which case compensation for an additional 65 weeks shall be paid.*

Not every subsection of section 8(e) provides for compensation based on a single lost member. The other

subsection at issue in this case provides for certain combinations of losses. Section 8(e)(18) of the Act provides:

The specific case of loss of both hands, both arms, or both feet, or both legs, or both eyes, or of any two thereof, or the permanent and complete loss of use thereof, constitutes total and permanent disability, to be compensated according to the compensation fixed by paragraph (f) of this Section. These specific cases of total and permanent disability do not exclude other cases.

The court emphasized that the two-member total disability award would not prevent the claimant from obtaining employment without disturbing the award. The court recognized the particular non-literal meaning of “total” and “permanent” disability, stating:

Disability under section 8(e)(18), by contrast [to ‘complete disability’], is ‘permanent and total’ only by legislative pronouncement; it is not inconsistent with a continuing ability to work, and in that event the pension mandated for it is not to be affected by the employee’s return to work.

The court added further:

The loss of Carson’s legs immediately entitled him to compensation under section 8(e)(18). Had that been the extent of his injuries, Carson would have retained at least some earning capacity. Carson may have even

*found further employment ...
However, Carson's earning
capacity was further reduced when
his workplace accident also caused
the loss of his right arm and the
loss of use of his left arm.*

As to whether the worker could choose to itemize his lost members as cases of specific loss rather than limit his compensation to the statutory total and permanent disability lifetime benefit provided by Section 8(e)(18), the court answered in the negative and added:

In this case, Carson does not seek to bypass recovery under section 8(e)(18) and recover for three specific losses. Nor does he seek a double recovery for the loss of his legs under both section 8(e)(18) and section 8(e)(12) (providing 200 weeks of compensation for the loss of a leg). Instead, Carson contends that he is entitled to recover under section 8(e)(18) for the loss of both legs, and recovery under section 8(e)(10) for the loss of earning capacity as a result of the loss of each arm.

With reference to issues 4 (acquisition of a voice-activated computer environmental control unit) and issue 5 (additional insurance premium) the supreme court affirmed the appellate court finding in favor of the claimant, stating:

The arbitrator here in part relied on evidence from Carson's primary physician, which indicated the computer system would be set up for therapeutic purposes. According to the arbitrator, the physician 'emphasized the importance of this device as it

relates to the [Carson's] mental health and general wellbeing.' Thus, the arbitrator concluded that '[Carson] has lost almost complete use of his body and is totally dependent on others for all movement and activity. The computer system provides his only vestige of autonomy. When so much is taken away, the psychological value of any remaining independence is obviously magnified.

...

Carson did not seek expenses for fuel, repair of total of the vehicle. Nor did Carson seek an award which covered the entirety of his van's insurance premium. Instead, Carson sought only the difference between what an owner of an unmodified van would pay and what the insurance company charged for insuring the modifications to Carson's van that his disability requires. Based on the record, we cannot say that the Commission's factual determination that the insurance premium is a necessary and reasonable medical expense is against the manifest weight of the evidence.

EDITOR'S NOTE: The decision of the supreme court in permitting a two-member permanent total based on Section 8(e)(18) and the specific losses to both arms based on Section 8(e)(10) is not surprising. The law had been clear that a two-member permanent total disability award provided in Section 8(e)(18) did not prevent the claimant from returning to work even if it were the same job. The return to work did

not in any way reduce the two-member permanent total disability award.

However, the reference to the insurance on the claimant's vehicle is important because it suggests that the employer need not purchase the vehicle but only the required modifications to permit the claimant's use. The Commission has in the past actually required the employer to purchase the van, as well as paying for the modifications.

RETALIATORY DISCHARGE EVIDENCE PRESENTED A GENUINE ISSUE FOR THE JURY TO DECIDE

Plaintiff, William T. Herman, brought a tort action against Power Maintenance & Constructors for discharging him, or refusing to call him, in retaliation for his filing a workers' compensation claim. The trial court entered a summary judgment in defendant's favor but the appellate court reversed.

Defendant laid plaintiff off because of medical restrictions resulting from a work-related injury. Later, after plaintiff recovered from the injury and sought re-employment, defendant refused to recall him stating that the plaintiff's prior work had been unsatisfactory.

The defendant argued that it had not discharged the plaintiff and that it should not be subject to the statutory claim of "wrongful discharge." The court, in finding for the plaintiff, stated that the defendant's alleged reason for refusing to recall the plaintiff, that is the substandard performance, was a pretext for retaliating against him because of his workers' compensation claim. The court stated:

Plaintiff need not present direct evidence of a retaliatory motive; he

can carry his burden of proof by showing that defendant's explanation for refusing to recall him is not believable or that it raises a genuine issue of fact as to whether defendant was retaliating against him.

...

In a letter to the local union, defendant declined to recall plaintiff. By way of explanation, the letter said that plaintiff had done poor work. The performance evaluations tell a different story: plaintiff's supervisors gave him mostly good or excellent ratings and no rating below average.

EDITOR'S NOTE: The appellate court concluded that the trial court should hear the evidence to determine a factual dispute. The plaintiff will have his day in court.

RETALIATORY DISCHARGE ACTION CAN BE AVAILABLE TO BORROWED EMPLOYEE

Carrie Hester was assigned to work for Gilster by her employer, Manpower, Inc. During her entire time at Gilster, Hester had no contact with Manpower. In her suit against Gilster, she alleged as follows:

4. On September 13, 2006, under threat of subpoena, Hester gave testimony in the workers['] compensation case of Barba v. Gilster-Mary Lee Corporation, Case No. 06-WC-34548;

5. On the next day, September 14, 2006, Gilster-Mary Lee, by and through its agents, Greg Wright and Mike Phillips, informed Hester that [it] would not be using her

services and that if she wanted other employment she would have to return to Manpower, Inc.;

...

7. On September 14, 2006, Hester was refused work by [Gilster] in retaliation for her giving testimony in a proceeding authorized by the Illinois Workers['] Compensation statutes;

8. Hester was damaged as a result of Gilster's refusal in that she was deprived of gainful employment and she suffered mental anguish and distress[.]

The trial court dismissed Hester's complaint "because it fails to state facts sufficient to support allegation that she was an employee of the defendant and that she was discharged from the defendant."

The appellate court reversed pointing out, quite logically, that borrowing employer liability for eventual payment would most certainly rest with the borrowing employer, stating:

During the time she worked for Gilster, Hester was confined to her workers' compensation remedies for any injuries she might have sustained. We agree with Hester's assertion that if Gilster was allowed to shield itself from liability other than for workers' compensation benefits, then it should not be able to assert immunity from this retaliatory discharge suit by claiming it was not Hester's employer and did not discharge her but merely sent her back to Manpower, the employment agency.

EDITOR'S NOTE: The relationship between Hester and the borrowing employer was certainly sufficient to satisfy the court that the borrowing employer would have liability for this action. The discharge of an employee for testifying in a co-worker's compensation claim here would certainly provide the basis of such action.

A NURSING HOME PATIENT BARRED FROM PURSUING INJURY CLAIM BECAUSE OF FEDERAL PREEMPTION BASED ON THE ARBITRATION AGREEMENT

Marie Fosler alleged wrongful injuries suffered during her stay at Fair Oaks Long-Term Care Facility. As part of the admission to Fair Oaks, Fosler, through her daughter Janice Saxton, entered into a written agreement which contained a provision stating that any dispute arising from Fosler's stay, would be resolved through arbitration as governed by the Federal Arbitration Act (FAA). Fosler argued that the provisions of the Nursing Home Care Act nullified a resident's waiver of the right to commence such an action in the circuit court and to a trial by jury. The appellate court agreed with the nursing home that Section 2 of the FAA preempted the provisions of the Nursing Home Care Act.

On the date of admission, Saxton, acting as her mother's authorized representative, executed the Admission Agreement, which contained the contractual terms for Fosler's stay. The Agreement states that "any dispute between you and us and any dispute relating to services rendered for any condition, and any dispute arising out of the diagnosis, treatment, or care of the Resident ... shall be resolved by binding arbitration by the National Arbitration Forum under the Code of Procedure then in effect ... This agreement shall be governed by and interpreted under the Federal

Arbitration Act.” The arbitration section also states in bold text that a “**Resident understands that the result of this arbitration agreement is that claims, including malpractice claims that Resident may have against the facility or its employees, cannot be brought as a lawsuit in court before a judge or jury, and agrees that all such claims will be resolved as described in this section.**”

Fosler contended that the Nursing Home Care Act nullified the arbitration provisions of the admission agreement, in which she purportedly waived her right to institute an action in circuit court and to have her claims heard by a jury. The defendant noted that in 1925, Congress enacted the FAA “to reverse the long-standing judicial hostility under arbitration agreements that had existed at English common law and had been adopted by American courts ... and to place arbitration agreements upon the same footing as other contracts. The court noted that by enacting Section 2 “Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”

In conclusion, the court stated:

We hold that plaintiff’s claims are subject to arbitration under the FAA. The Supreme Court has declared “only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration Act: they must be part of a written maritime contract or a contract ‘evidencing a transaction involving commerce’ and such clauses may be revoked upon ‘grounds as exist at law or in equity for the revocation of any contract.’ We see nothing in the Act indicating that the broad principle of enforceability is

subject to any additional limitations under State law.” First, plaintiff has forfeited the issue of whether the nursing home admission agreement is a contract evidencing a transaction involving commerce. Second, we hold that the judicial forum provisions of sections 3–606 and 3–607 of the Nursing Home Care Act are not grounds as exist at law or in equity for the revocation of any contract. For these reasons, the order of the circuit court of Winnebago County is reversed and the cause is remanded for proceedings consistent with this opinion.

EDITOR’S NOTE: This appellate court decision will undoubtedly be appealed to the state supreme court. In addition, the impact of this case may be eliminated by recent congressional legislation purporting to eliminate the right of the federal judiciary from preempting state statutes. But, for the moment, the federal statute prohibits the patient from proceeding with a malpractice claim against the nursing home based on the arbitration agreement, which purports to resolve all disputes between the parties.

FRANK J. WIEDNER
Editor