

Insurance/Tort Newsletter

Inside this issue:

Commission Encourages More Settlement Days 1

First Appellate District Holds That Overtime Earnings Should Not Be Included In Calculating Average Weekly Wage If The Overtime Worked Was Voluntary Even If It Was Regular And Consistent 1-3

Second Appellate District Holds 5(b) Lien Rights Are Not Waived By Failing To Specifically Reserve Them In A Settlement Contract 3

Commission Imposes Penalties Despite Respondent's Reliance Upon The Opinion Of Its Independent Medical Expert 3

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Commission Encourages More Settlement Days

Since the Commission is a high-volume operation and each arbitrator handles approximately 3,000 cases at any time, there are times when a case is set for trial, but cannot be presented, as the arbitrator's trial schedule is full. In addition, it is not uncommon for Petitioner's attorney's to look at their file on the date of the trial, only to realize that it is a case that can and should be settled.

We, along with the Commission encourage Settlement Days. The idea is to informally bring the two parties together to discuss the value of the case, or in the alternative, narrow the issues in dispute.

We have participated in numerous Settlement Days on behalf of our clients. We had an incredible success rate late year of 100%. IN essence, all of the cases we brought to settlement days, settled. For a typical Settlement Day, we will invite opposing counsel on 10-50 cases, to appear at the commission, to see if the issues in dispute can be resolved.

There are no arbitrators or commissioners present at Settlement Day conference(s). However, if the parties reach agreement, an arbitrator is available to review the settlement contracts that day.

Per the Commission, thousands of cases have been resolved through this process. The commission, along with BryceDowney, strongly encourage participation in Settlement Day.

Should you wish to learn more about this process or would like to schedule a Settlement Day, please do not hesitate to contact Richard Lenkov or any member of our Workers' Compensation Team.

First Appellate District Holds That Overtime Earnings Should Not Be Included In Calculating Average Weekly Wage If The Overtime Worked Was Voluntary Even If It Was Regular And Consistent

A March 20, 2007, decision from the Illinois Appellate Court's First District in the case of [Airborne Express, Inc. v. Illinois Workers' Compensation Comm'n](#), --- Ill.App.3d ---, --- N.E.2d ---, No. 1-06-1960 WC (1st Dist. 2007), held that the overtime earnings should not have been included in calculating the average weekly wage of a truck driver as his overtime worked was voluntary rather than mandatory, despite the fact that it was regular and consistent.

In [Airborne Express](#) the arbitrator declined to include overtime earnings in calculating Petitioner's average weekly wage, which he determined to be \$901.41. The Commission,

with one commissioner dissenting, modified the arbitrator's decision to provide for an average weekly wage of \$1,246.86, which included overtime worked, and the trial court confirmed the decision of the Commission.

In Airborne Express Petitioner testified that his regular eight-hour shift was from 7:00 a.m. to 4:00 p.m. Mondays through Fridays. Petitioner testified that it was company policy that a driver was to finish his route and deliver all packages on his truck before returning to Respondent's facility "no matter how long it takes." Two union representatives also testified to this policy. Petitioner, however, could not remember the dates when he was "required" to work overtime due to this policy.

These two union representatives also testified that, pursuant to union contract, overtime was awarded to employees on a seniority basis, but that if the necessary overtime requirements of the company were not met, employees with the least amount of seniority were required to work overtime. Respondent's station manager testified that the drivers who were forced to work overtime fell into the lower 20% to 25% on the seniority list, that Petitioner fell in the upper 30%, and that he was not aware of any instance during the relevant time period that Petitioner was forced to work overtime. The station manager testified that the overtime that Petitioner worked during this period was voluntary overtime for which he bid based on seniority. Petitioner admitted that "most" of his overtime during this period was because he used his seniority and requested overtime from his superiors.

Petitioner worked 32 of the 52 weeks preceding the work injury and grossed \$28,845.09 during that period for working his regular shift and for vacation and holiday pay. This corresponds to an average weekly wage of \$901.41. Petitioner worked 1200 regular hours and 538.70 overtime hours during those 32 weeks, and worked overtime in 31 of those 32 weeks. The Commission calculated Petitioner's average weekly wage of \$1,246.86 by multiplying the 538.70 overtime hours by his regular hourly pay rate of \$21.59, adding that sum to \$28,845.09, and then dividing the total by 32 weeks.

The First District in Airborne Express held that the arbitrator correctly calculated Petitioner's average weekly wage. The Airborne Express court cited, in support of Section 10 of the Act, that "overtime is to be excluded in calculating an employee's average weekly wage," but noted that the Act does not define "overtime." After examining prior First District decisions involving an interpretation of the overtime exclusion in Section 10 of the Act, the Airborne Express court held that "[o]vertime includes those hours in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week."

Moreover, the court in Airborne Express held that "the uncontradicted evidence established that the claimant was not required to work the 538.70 hours of overtime as a condition of his employment." The court further noted that the wage summary sheets reflected that he "did not work any set number of hours in excess of his regular 40-hour work week" and that he "worked an irregular number of overtime hours, ranging from only 0.8 of an hour of overtime in one week and as much as 28.43 hours of overtime in another week."

Thus, the court held that Petitioner's overtime hours must be excluded from the calculation of his average weekly wage because, "[a]lthough the claimant consistently worked overtime, he did not work a set number of overtime hours each week."

The First District's decision in Airborne Express fundamentally changes the analysis for voluntary overtime hours worked in calculating a Petitioner's average weekly wage. Before the Airborne Express decision, voluntary overtime hours worked was usually included in average weekly wage calculations if overtime was worked "regularly", regardless of how many hours of overtime were actually worked in each of those weeks. It would appear that, after Airborne Express, voluntary overtime should only be included if Petitioner is scheduled to work a set number of overtime hours each week.

Practice Tip: In order to minimize average weekly wage exposure, employers should be encouraged to have an overtime policy similar to that in Airborne Express, in which the workers with the most seniority (and, most

likely, with the highest hourly rate) are the least likely to work mandatory overtime, are the most likely to successfully bid on voluntary overtime, and are not scheduled to work a set number of overtime hours each week. **It must be noted that the First District's decision in Airborne Express, however, has not yet been released for publication in the permanent law reports and consequently is still subject to revision or withdrawal.**

Second Appellate District Holds 5(b) Lien Rights Are Not Waived By Failing To Specifically Reserve Them In A Settlement Contract

A January 11, 2007, decision from the Illinois Appellate Court's Second District in the case of Harder v. Kelly, 369 Ill.App.3d 937, 861 N.E.2d 673 (2nd Dist. 2007), held that the employer's failure to specifically reserve its lien rights under Section 5(b) of the Workers Compensation Act in the settlement contract did not constitute a waiver of those lien rights.

In Harder, Petitioner settled his Illinois Workers Compensation claim three months after filing a third-party lawsuit for the underlying motor vehicle accident. The contract failed to mention the employer's lien rights under Section 5(b) of the Act. The workers compensation carrier, thereafter, intervened in the third party lawsuit to protect said lien rights, and the trial court entered an order denying the carrier's claim of a Section 5(b) lien.

The Second District in Harder declined to follow the contrary holding of the Fourth District in Borrowman v. Prastein, 356 Ill.App.3d 546, 826 N.E.2d 600 (4th Dist. 2005) wherein the court hold that failure to explicitly 5 (b) lien rights in the settlement contracts constituted waiver of same. The First Appellate District also rejected the holding in Borrowman in the case of Gallagher v. Lenart, 367 Ill.App.3d 293, 854 N.E.2d 800, (1st Dist. 2006), concluding that the holding in Borrowman was "unsupported by case law, contrary to several principles behind the Act, and at odds with general contract law." *Id.*, 367 Ill.App.3d at 298.

Practice Tip: While we expect that the Illinois Supreme Court will eventually hear a case on this issue in order to resolve the split between the appellate court districts, it is good practice in the meantime to include language in each settlement contract which specifically reserves the employer's lien rights under Section 5(b) of the Act.

Commission Imposes Penalties Despite Respondent's Reliance Upon The Opinion Of Its Independent Medical Expert

A November 21, 2006, decision from the Illinois Worker's Compensation Commission in the case of Keenan v. Chief Construction, No. 05 IL.W.C. 059, 927, affirmed the arbitrator's decision which imposed a \$22,453.07 penalty pursuant to Section 19(k), a \$1,780.00 penalty under Section 19(l) of the Act, and ordered Respondent to pay \$13,471.83 in attorneys' fees under Section 16, despite the fact that Respondent relied upon the report of a Section 12 examiner to deny benefits.

In Keenan, Petitioner suffered an injury to his left knee at work and underwent arthroscopy, a partial medial meniscectomy, chondoplasty of the medial femoral condyle, chondroplasty of the trochlea, and a plica excision. Respondent's expert, Dr. Mukund Komanduri, opined that the direct blow to the inside of the knee would not have caused the medial meniscal tear; however, it would have caused the plica syndrome. Dr. Komanduri also opined that the reason for the arthroscopy was not "primarily" caused by the work injury, that the accident caused a temporary aggravation of his pre-existing knee arthritis that was not related, and that his surgery also caused a temporary aggravation of his arthritis that would not have lasted beyond three months after surgery.

Arbitrator Dollison found that Dr. Komanduri's opinion that the accident caused a temporary aggravation did not "fit the facts" as the medical records did not describe a temporary aggravation. The arbitrator also found that Dr. Komanduri's opinion that the surgery caused an aggravation "describes a compensable claim." The arbitrator concluded that there was no reasonable basis to deny compensation based upon Dr. Komanduri's report as his opinion was not consistent with the medical records and his reasoning was "patently faulty."

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