

**VOLUNTARY OVERTIME NOT INCLUDED IN
CALCULATION OF AVERAGE WEEKLY WAGE**

**Jeffrey L. Salisbury
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A recent case from the Workers' Compensation Commission Division of the Appellate Court has left no doubt that voluntary overtime is not to be included in the calculation of average weekly wage. In Airborne Express, Inc. v. Illinois Workers' Compensation Commission, 2007 WL 837246 (Ill.App.1st Dist. 2007), the Court reversed a Commission decision on the issue of average weekly wage. Petitioner Ron Bronke suffered three compensable injuries in the course of his employment for Airborne Express, Inc. Those were not disputed and in a trial pursuant to a Petition for Immediate Hearing, an arbitrator awarded benefits based on an average weekly wage of \$901.41. On review the Commission modified the arbitrator's award and set the average weekly wage at \$1,246.86 based on overtime earnings not included in the calculation of average weekly wage by the arbitrator.

Petitioner testified that he worked as a driver/dock worker. He regularly worked an eight hour shift, Monday through Friday. He testified that company policy required him to finish his route and deliver all packages before returning the truck to Airborne's facility, "no matter how long it takes." He acknowledged that he normally completed his route during the scheduled eight hour shift. Overtime was available on a seniority basis by union contract. Petitioner admitted that most of the overtime he worked in 2001 was based on his request to his supervisors and due to his seniority. The station manger for Airborne testified that petitioner's seniority was sufficiently high such that it was doubtful petitioner would have been forced to work any overtime. Typically only lower seniority drivers were forced to do so.

Payroll records demonstrated that petitioner worked 32 weeks during the 52 weeks preceding the injury on 10-8-01. He had total regular earnings, vacation and holiday pay of \$28,845.09 resulting in the average weekly wage calculated by the arbitrator of \$901.41 per week. Additionally, he worked 538.7 hours of overtime in 31 of the 32 weeks. The Commission included those hours at the straight time rate to reach the higher average weekly wage.

The Appellate Court began its analysis by noting that Section 10 of the Act explicitly states that overtime is to be excluded in calculating average weekly wage. However, the statute fails to define "overtime." Reviewing several prior appellate decisions, the Court concluded it has been consistent in its interpretation of the overtime exclusion. "Overtime 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." Cases cited by the Appellate Court included Edward Hines Lumbar Co. v. Industrial Commission, 215 Ill.App.3d 659, 575 N.E.2d 1234 (1990) and Ogle v. Industrial Commission, 284 Ill.App.3d 1093, 673 N.E.2d 706 (1996), in both of which the testimony established that the claimant was required to work mandatory overtime and that the normal hourly work week regularly consisted of more than 40 hours. The Court also referenced Edward Don Co. v. Industrial Commission, 344 Ill.App.3d 643, 801 N.E.2d 18 (2003) in which the evidence showed that claimant had worked some

overtime in 15 of the 16 weeks prior to his injury, but there was no evidence that he was required to work overtime as a condition of employment or that he consistently worked a set number of overtime hours each week.

In this case the Court concluded it was evident the Commission's decision was against the manifest weight of evidence. "The 538.7 hours of overtime which the Commission included in this calculation of the claimant's average weekly wage were not part of the claimant's regular hours of employment and they were not hours the claimant was required to work as a condition of his employment." The Commission's decision was reversed with instructions to calculate the average weekly wage excluding the overtime hours.

This opinion leaves no room for argument that overtime is not included in the calculation of average weekly wage where it can be shown the overtime is worked on a voluntary basis. The Court also focused on the regularity of the work week and consistency of hours worked in excess of 40 hours to determine whether those hours would be includable in the calculation. That aspect of the decision may be more difficult to apply in any given case, but will provide a basis for limiting the inclusion of hours over 40 in any given week where there is no pattern or regularity. Occasional or sporadic hours beyond the "regular" work week (whether 40 hours, 45 hours or whatever else might be the case) should not be included in the calculation of average weekly wage.