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*372 Ill. App. 3d 549, *; 865 N.E.2d 979, **;*
*2007 Ill. App. LEXIS 244, ***; 310 Ill. Dec. 259*

AIRBORNE EXPRESS, INC., Appellant, v. ILLINOIS **WORKERS' COMPENSATION** COMMISSION, et al., (RON BRONKE, Appellee).

No. 1-06-1960WC

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, **WORKERS' COMPENSATION** COMMISSION DIVISION

372 Ill. App. 3d 549; 865 N.E.2d 979; 2007 Ill. App. LEXIS 244; 310 Ill. Dec. 259

March 20, 2007, Filed

SUBSEQUENT HISTORY: [*1]**
Released for Publication May 3, 2007.

PRIOR HISTORY: APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. No. 05 L 50965. HONORABLE SHELDON GARDNER, JUDGE PRESIDING.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant employer sought review of a decision of the Circuit Court of Cook County (Illinois), which confirmed a decision of the Illinois **Workers' Compensation** Commission that awarded appellee claimant benefits under the **Workers' Compensation** Act, 820 Ill. Comp. Stat. Ann. 305/1 et seq. (2000).

OVERVIEW: In setting temporary total disability (TTD) and maintenance benefits on a 2001 injury, an arbitrator used only his base salary to determine his average weekly wage. The Commission ruled that **overtime** earnings should have been included in the calculation. The circuit court confirmed that decision. The appellate court reversed. Under 820 Ill. Comp. Stat. Ann. 305/10 (2000), the **overtime** hours should not have been included in the calculations. The hours of **overtime** included by the Commission 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. While the claimant consistently worked **overtime,** he did not work a set number of **overtime** hours each week. While the employer's operational needs required **overtime** work by its drivers, the claimant's seniority ensured that he would not have been required to work **overtime** if he did not request to do so. Those uncontradicted facts led the appellate court to conclude that the Commission's calculation of the claimant's average weekly wage, and thus its benefit calculations, were against the manifest weight of the evidence.

OUTCOME: The circuit court's confirmation of the Commission's calculation of the claimant's average weekly wage, TTD and maintenance benefits was reversed. The circuit court was otherwise affirmed. The court reversed the Commission's calculation of the claimant's average weekly wage, TTD and maintenance benefits. The case was remanded to the Commission for further proceedings and with instructions on how to make the proper calculations.

CORE TERMS: claimant, overtime, average weekly wage, calculation, regular, earnings, weekly, seniority, work overtime, calculating, driver, required to work, arbitrator, work week, number of hours, confirmed, route, arbitrator awarded, arbitrator's decisions, weeks prior, consisted, sheets, supervisor's, packages, manager, hours per week, union contract, injured employee, per week, disability

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Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities
HN1 Section 10 of the Illinois **Workers' Compensation** Act, 820 Ill. Comp. Stat. Ann. 305/10 (2000), provides that the weekly benefits to which an injured employee is entitled for temporary total disability and maintenance under § 8 of the Act shall be computed on the basis of his or her average weekly wage. More Like This Headnote

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities
HN2 See 820 Ill. Comp. Stat. Ann. 305/10 (2000).

Workers' Compensation & SSDI > Benefit Determinations > Temporary Total Disabilities
HN3 Section 10 of the Illinois **Workers' Compensation** Act, 820 Ill. Comp. Stat. Ann. 305/10 (2000), explicitly states that **overtime** is to be excluded in calculating an employee's average weekly wage. However, the statute fails to define "**overtime.**" More Like This Headnote

Governments > Legislation > Interpretation
HN4 In all cases of statutory construction, a court's function is to ascertain and give effect to the intent of the legislature. In

determining legislative intent, courts first look to the statutory language. Where the language of the statute is clear, courts will give it effect as written. In interpreting a statute, courts give undefined terms their ordinary meaning. More Like This Headnote

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Workers' Compensation & SSDI > Benefit Determinations > General Overview
HN5 "**Overtime**" consists of **compensation** for hours beyond those the employee regularly works each week and extra hourly pay above the employee's normal hourly wage. More Like This Headnote

Labor & Employment Law > Wage & Hour Laws > Coverage & Definitions > Overtime & Work Period
Workers' Compensation & SSDI > Benefit Determinations > General Overview
HN6 **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. More Like This Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > Clear Error Review
Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review > Substantial Evidence
HN7 The determination of a claimant's average weekly wage for purposes of calculating temporary total disability and maintenance benefits under section 8 of the Illinois **Workers' Compensation** Act, 820 Ill. Comp. Stat. Ann. 305/1 et seq. (2000), is a question of fact. The Illinois **Workers' Compensation** Commission's resolution of the question will not be disturbed on appeal unless it is against the manifest weight of the evidence. Although courts are reluctant to set aside the Commission's decision on a factual question, courts will not hesitate to do so when the clearly evident, plain, and indisputable weight of the evidence compels an opposite conclusion. More Like This Headnote

Governments > Legislation > Interpretation
Workers' Compensation & SSDI > Benefit Determinations > General Overview
HN8 Section 10 of the Illinois **Workers' Compensation** Act, 820 Ill. Comp. Stat. Ann. 305/10 (2000), explicitly states that **overtime** is to be excluded in calculating a claimant's average weekly wage. No rule of construction authorizes an Illinois court to declare that the legislature did not mean what the plain language of section Courts are simply not at liberty, by forced or subtle construction, to alter the plain meaning of the words employed by the legislature. More Like This Headnote

COUNSEL: For Appellant: Galliani, Doell & Cozzi, of Chicago. Robert J. Cozzi, of counsel. Chicago, IL.

For Appellees: Cullen, Haskins, Nicholson & Menchetti, of Chicago. Charles G. Haskins, Jr., of counsel. Chicago, IL.

JUDGES: Honorable Thomas E. Hoffman, J., with Honorable John T. McCullough, P.J., Honorable R. Peter Grometer, J., Honorable William E. Holdridge, J., and Honorable James K. Donovan, J., concur. JUSTICE HOFFMAN delivered the opinion of the court.

OPINION BY: Thomas E. Hoffman

OPINION

[980]** **[*549]** JUSTICE HOFFMAN delivered the opinion of the court:

Airborne Express, Inc. (Airborne) appeals from an order of the Circuit Court of Cook County which confirmed a decision of the Illinois **[*550]** **Workers' Compensation** Commission (Commission) awarding benefits to Ron Bronke (claimant) under the **Workers' Compensation** Act (Act) (820 ILCS 305/1 *et seq.* (West 2000)). For the reasons which follow, we reverse that portion of the circuit court's order which confirmed the Commission's calculation of the claimant's **[***2]** average weekly wage and the weekly temporary total disability (TTD) and maintenance benefits to which he is entitled.

The claimant filed three applications for adjustment of claim pursuant to the Act, seeking benefits for injuries he claimed to have received while in the employ of Airborne on March 13, 2000 (case No. 00 WC 55154), July 10, 2000 (case No. 00 WC 64343), and October 8, 2001 (case No. 01 WC 66111). Following a consolidated hearing held pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2000)), an arbitrator issued three decisions in which he found that the claimant suffered accidental injuries on March 13, 2000, July 10, 2000, and October 8, 2001, arising out of and in the course of his employment with Airborne. In his decision in case No. 00 WC 55154, the arbitrator awarded the claimant TTD benefits under the Act at the rate of $ 660.62/week for a period of 2 1/7 weeks. In case No. 00 WC 64343, the arbitrator awarded the claimant TTD benefits at the rate of $ 660.62/week for a period of 28 1/7 weeks. In case No. 01 WC 66111, the arbitrator awarded the claimant TTD benefits at the rate of $ 600.94/week for a period of 74 4/7 weeks and maintenance benefits **[***3]** at the rate of $ 600.94/week for a period of 76 weeks. Additionally, the arbitrator ordered Airborne to pay $ 1,474.74 for medical services provided to the claimant. In computing the TTD and maintenance awards in case No. 01 WC 66111, the arbitrator declined to include **overtime** earnings in the calculation of the claimant's average weekly wage and fixed his average weekly wage at $ 901.41.

[981]** The claimant filed petitions before the Commission seeking reviews of all three of the arbitrator's decisions. The Commission declared that he had filed a "protective review" only in cases 00 WC 55154 and 00 WC 64343 and affirmed and adopted the arbitrator's decisions in both cases. Finding that the claimant's **overtime** earnings should have been included in the calculation of his average weekly wage in case No. 01 WC 66111, the Commission, with one commissioner dissenting, modified the arbitrator's decision to provide for an average weekly wage of $ 1,246.86 and set his TTD and maintenance awards at $ 843.24/week for 74 4/7 weeks and 76 weeks, respectively. The Commission remanded the case back to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980). **[***4]**

Airborne sought a judicial review of the Commission's decision in **[*551]** case No. 01 WC 66111 in the Circuit Court of Cook County. The circuit court confirmed the Commission's decision, and this appeal followed.

Airborne does not dispute the fact that the claimant suffered an injury arising out of and in the course of his employment on October 8, 2001, nor does it contest the nature and extent of the claimant's injuries or his period of disability. Airborne only asserts as error the Commission's inclusion of **overtime** earnings in calculating the claimant's average weekly wage for purposes of determining the weekly benefits to which he is entitled for TTD and maintenance. Consequently, we will only present those facts necessary to an analysis of the issue.

The claimant began working for Airborne in 1994 as a driver/dock **worker.** His duties consisted of loading overnight packages on to a truck and then delivering the packages. According to the claimant, his regular eight-hour shift began at 7 a.m. and ended at 4 p.m., Monday through Friday. However, it was company policy that a driver was to finish his route and deliver all of the packages on his truck before returning to Airborne's facility, **[***5]** "no matter how long it takes." The claimant testified that he 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** is available at Airborne on a seniority basis. However, the claimant testified that regulations prohibited a driver from working more than eight hours of **overtime** in one day and more than 20 hours of **overtime** in a week. The claimant acknowledged that he normally completed his route during his scheduled eight-hour shift. According to the claimant, there were occasions when he was forced to work **overtime** to "run a route," but he couldn't remember the dates. He admitted, however, that he worked most of the **overtime** in 2001 because he used his seniority and requested **overtime** from his supervisors.

Scott Meier, the union steward at Airborne, testified that **overtime** is necessary to fulfill Airborne's operational needs. He stated that, pursuant to the union contract, **overtime** is awarded to employees on a seniority basis. However, if the necessary **overtime** requirements of the company are not met, employees with the least amount of seniority are required to work **overtime. [***6]** He also acknowledged Airborne's policy that a driver could not return to the facility with undelivered freight without a supervisor's permission. Neil Messio, another union representative, also testified to Airborne's **overtime** policies.

Joseph Yates worked for Airborne as a station manager at various location in the Chicago metropolitan area. In 2002, he became the district manager at the Schaumburg facility where the claimant worked. Yates testified that the claimant's **[**982]** seniority was sufficiently **[*552]** high such that it was doubtful he was forced to work **overtime** in 2001. Yates was also not aware of any instance in 2001 when the claimant was forced to work **overtime.** Yates testified that 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 record reflects that the claimant worked 32 weeks during the 52 week period prior to his injury on October 8, 2001. During that period, he was paid $ 25,142.40 for working his regular shift and $ 3,702.69 for vacation and holiday pay. **[***7]** The total of these sums is $ 28,845.09 or an average of $ 901.41/week. Additionally, the claimant worked 538.70 hours of **overtime** in that same 32 week period.

In fixing the claimant average weekly wage at $ 1,246.86, the Commission noted that, for the 32-week period prior to his injury on October 8, 2001, the claimant worked 1200 regular hours and 538.70 hours of **overtime.** The **overtime** was worked in 31 of the 32 weeks at issue. The Commission multiplied the claimant's **overtime** hours by his regular pay rate of $ 21.59/hour, added his regular earnings for that period of $ 28,845.09, and then divided the total, $ 40,475.62, by 32 to arrive at an average weekly wage of $ 1,246.86. Based upon an average weekly wage of $ 1,246.86, the commission fixed the claimant's TTD and maintenance benefits at $ 843.24/week.

Airborne argues that the Commission erred in including the claimant's **overtime** earnings in calculating his average weekly wage and, as a result, erred in its computation of the weekly TTD and maintenance benefits to which the claimant is entitled. According to Airborne, the arbitrator in case No. 01 WC 66111 correctly calculated the weekly TTD and maintenance benefits to which **[***8]** the claimant is entitled, and his award should be reinstated. We agree.

HN1 Section 10 of the Act provides that the weekly benefits to which an injured employee is entitled for TTD and maintenance under section 8 of the Act shall be computed on the basis of his or her average weekly wage. 820 ILCS 305/10 (West 2000). The statute provides that HN2 "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 the employee's last full pay period immediately ceding 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 **[*553]** thereof remaining after the time so lost has been deducted." 820 ILCS 305/10 (West 2000).

HN3 Section 10 of the Act explicitly states that **overtime** is to be excluded in calculating an employee's average weekly wage. However, the statute fails to define "**overtime.**"

As HN4 in all cases of statutory **[***9]** construction, our function is to ascertain and give effect to the intent of the legislature. *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205*, 216 Ill. 2d 455, 473, 837 N.E.2d 1, 297 Ill. Dec. 221 (2005). In determining legislative intent, we first look to the statutory language. Where the language of the statute is clear, we will give it effect as written. *Comprehensive Community Solutions, Inc.*, 216 Ill. 2d at 473-74. In interpreting a statute, we give undefined terms their ordinary meaning. *Comprehensive Community* **[**983]** *Solutions, Inc.*, 216 Ill. 2d at 473.

Overtime is commonly defined as "working time in excess of a minimum total set for a given period." Webster's Third New International Dictionary 1611 (1981). This court's prior decisions involving an interpretation of the **overtime** exclusion in section 10 of the Act are consistent with this definition.

In ***Edward Hines*** *Lumber Co. v. Industrial Comm'n*, 215 Ill. App. 3d 659, 575 N.E.2d 1234, 159 Ill. Dec. 174 (1990), this court held that HN5 "**overtime**" consists of **compensation** for hours beyond those the employee regularly works each week and extra **[***10]** hourly pay above the employee's normal hourly wage. ***Edward Hines*** *Lumber Co.*, 215 Ill. App. 3d at 666. In that case, the evidence established that the claimant was required to work whatever hours the employer demanded and that the minimum number of hours he worked was 10 per day, six days per week. ***Edward Hines*** *Lumber Co.*, 215 Ill. App. 3d at 663-64. Finding that the claimant actually averaged 67 hours of work per week, we held that the calculation of the claimant's average weekly wage under section 10 of the Act should be based on his earnings for 67 hours per week. ***Edward Hines*** *Lumber Co.*, 215 Ill. App. 3d at 666-67.

In *Ogle v. Industrial Comm'n*, 284 Ill. App. 3d 1093, 673 N.E.2d 706, 220 Ill. Dec. 562 (1996), we held that the claimant's average weekly wage should have been based upon his earnings for a 48 hour work week. *Ogle*, 284 Ill. App. 3d at 1097. Our holding was based upon evidence which established that the claimant's normal work week consisted of 48 hours, his union contract made **overtime** work mandatory, and it was not until the claimant had worked 48 hours or more that he was not required **[***11]** to work any additional **overtime**. The evidence also established that the claimant was only able to work less than 48 hours per week at the employer's discretion. *Ogle*, 284 Ill. App. 3d at 1096.

In ***Edward** Don Co. v. Industrial Comm'n*, 344 Ill. App. 3d 643, **[*554]** 801 N.E.2d 18, 279 Ill. Dec. 726 (2003), this court concluded that the Commission erred in including the claimant's earnings for 77 hours of **overtime** when calculating his average weekly wage pursuant to section 10 of the Act. ***Edward** Don Co.*, 344 Ill. App. 3d at 657. Although the wage summary sheets introduced in evidence reflected that the claimant had worked some **overtime** in 15 of the 16 weeks prior to his injury, there was 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." ***Edward** Don Co*, 344 Ill. App. 3d at 657.

In *Freesen, Inc. v. Industrial Comm'n*, 348 Ill. App. 3d 1035, 811 N.E.2d 322, 285 Ill. Dec. 81 (2004), although the claimant presented evidence that he worked some **overtime** in 22 of the 45 weeks in which he worked prior to his accident, **[***12]** there was no evidence that 1) he was required to work **overtime** as a condition of his employment, 2) he consistently worked a set number of hours of **overtime** each week, or 3) the **overtime** hours he worked were part of his regular hours of employment. *Freesen, Inc.*, 348 Ill. App. 3d at 1042. We found, therefore, that the Commission had erred in including the claimant's **overtime** hours in calculating his average weekly wage. *Freesen, Inc.*, 348 Ill. App. 3d at 1042.

This court has been consistent in its interpretation of the **overtime** exclusion **[**984]** in section 10 of the Act. HN6 **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.

In this case, the claimant testified that his regular work week consisted of daily eight-hour shifts beginning at 7 a.m. and ending at 4 p.m., Monday through Friday. In the 32-week period prior to his injury, the claimant worked 1200 hours during his regular shifts and 538.70 hours of **overtime**. The **overtime** was worked in 31 of the 32 weeks at **[***13]** issue. The uncontradicted evidence established that the claimant was not required to work the 538.70 hours of **overtime** as a condition of his employment. Rather, he used his seniority and requested to work **overtime**. In addition, the wage summary sheets which were admitted in evidence reflect that the claimant did not work any set number of hours in excess of his regular 40-hour work week. The wage summary sheets reflect that the claimant worked an irregular number of **overtime** hours, ranging from only .8 of an hour of **overtime** in one week and as much as 28.43 hours of **overtime** in another week.

HN7 The determination of a claimant's average weekly wage for purposes of calculating TTD and maintenance benefits under section 8 of the Act is a question of fact. ***Edward** Don Co.*, 344 Ill. App. 3d at **[*555]** 655. The Commission's resolution of the question will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Ogle*, 284 Ill. App. at 1096. Although we are reluctant to set aside the Commission's decision on a factual question, we will not hesitate to do so when the clearly evident, plain, and indisputable weight of the evidence compels an **[***14]** opposite conclusion. *Montgomery Elevator Co. v. Industrial Comm'n*, 244 Ill. App. 3d 563, 567, 613 N.E.2d 822, 184 Ill. Dec. 505 (1993).

[985]** 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.

HN8 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 **[***15]** this court to declare that the legislature did not mean what the plain language of section 10 imports. *Cardwell v. Rockford Memorial Hospital*, 136 Ill. 2d 271, 278, 555 N.E.2d 6, 144 Ill. Dec. 109 (1990). We are simply not at liberty, by forced or subtle construction, to alter the plain meaning of the words employed by the legislature. *People ex rel. Pauling v. Misevic*, 32 Ill. 2d 11, 15, 203 N.E.2d 393 (1964). 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. *Freesen, Inc.*, 348 Ill. App. 3d at 1042-43; ***Edward** Don Co.*, 344 Ill. App. 3d at 655-57. Consequently, we: 1) reverse that portion of the circuit court's order which confirmed the Commission's calculation of the claimant's **[***16]** average weekly wage and its dependent calculations of the weekly TTD and maintenance benefits to which the claimant is entitled and affirm the order in all other respects; 2) reverse the Commission's calculation of the claimant's average weekly wage in case No. 01 WC **[*556]** 66111 and its dependent calculations of the weekly TTD and maintenance benefits to which the claimant is entitled; and 3) remand this cause to the Commission with instructions to calculate the claimant's average weekly wage, excluding therefrom the 538.70 hours of **overtime** which the claimant worked in the 32 weeks prior to his accident, and based thereon recalculate the weekly TTD and maintenance benefits to which the claimant is entitled. Additionally, we remand this matter back to the Commission for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

Circuit court order affirmed in part and reversed in part; Commission's decision reversed in part; and the cause remanded to the Commission with instructions.

McCULLOUGH, P.J., GROMETER, HOLDRIDGE, and DONOVAN, JJ., concur.

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*2005 Ill. Wrk. Comp. LEXIS 780, **

RON BRONKE, PETITIONER, v. **AIRBORNE EXPRESS,** INC., RESPONDENT

Nos. 00 WC 55154; 00 WC 64343; 01 WC 66111; 05 IWCC 0743

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

2005 Ill. Wrk. Comp. LEXIS 780

September 27, 2005

CORE TERMS: overtime, driver, seniority, route, arbitrator, freight, average weekly wage, earning, regular, temporary total disability, union contract, left knee, required to work, work overtime, calculation, undeliverable, supervisor, disabling, delivery, mandatory, inclusion, temporary, dockworker, ill-being, causally, station, memo, petitioner testified, present condition, volunteer

JUDGES: Susan O. Pigott; James F. DeMunno

OPINION:

[*1] DECISION AND OPINION ON REVIEW

Timely Petitions for Review under § 19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue(s) of average weekly wage/rate and penalties and being advised of the facts and law, affirms and adopts the Decisions of the Arbitrator in case numbers 00WC55154 and 00WC64343, which are attached hereto and made a part hereof; and modifies the Decision of the Arbitrator in case number 01WC66111 as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands these cases to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission notes that Petitioner filed a protective review only in cases 00 WC 55154 and 00 WC 64343. The Commission affirms and adopts the Arbitrator's Decisions issued in cases and 00 WC 55154 and 00 **[*2]** WC 64343.

The Commission modifies the Arbitrator's Decision in case 01 WC 66111 and finds that overtime earnings should have been included in the calculation of Petitioner's average weekly wage. The Commission finds Petitioner's wage records for the period of February 18, 2001 through October 7, 2001, indicate that Petitioner worked 1200 regular hours and 538.70 overtime hours during that period. Petitioner's regular earnings totaled $ 25,142.40 and other earnings totaled $ 3,702.69 leaving total regular earnings of $ 28,845.09. The overtime hours of 538.70 multiplied by the straight time rate of $ 21.59 per hour yields overtime earnings of $ 11,630.53. When added to the total regular earnings of $ 28,845.09, the new total earnings, including overtime is $ 40,475.62, which yields an average weekly wage of $ 1,264.86, when divided by the 32 weeks Petitioner worked during the relevant period at issue. PX 1, RX 2, RX 4.

Petitioner testified that his normal work day started at 7:00 a.m. and that his work day ended at 4:00 p.m. T. 16. Petitioner further testified that during his initial job training with Respondent in 1994, he was told by the supervisor that "overtime is expected." T. **[*3]** 24. Per Federal regulations, overtime was restricted to 20 hours per week or 8 hours in one day. T. 25. Respondent assigns overtime by seniority, which allows its more senior employees the flexibility of deciding when to work the necessary overtime. T. 25-26. In that regard, Petitioner specifically testified, "I worked my overtime Monday through Thursday to get my overtime done with so I wouldn't be forced to work on Thursdays and Fridays." T. 27. The overtime work covers the packages on Petitioner's truck and also "for anything else." The overtime work is work "over and above his normal route. Petitioner testified that ". . . we finish our own routes, and then we help out other routes or we do another route that's open to pick up the slack so there's no open routes." T. 26.

Petitioner further testified that Respondent had an **express** company policy that drivers could not return to the shop with freight in the trucks. T. 19. He received a written warning for violating this policy in 1994 when he returned with freight in his truck at the end of his shift. T. 16-17. With regard to the policy, Petitioner testified that ". . . We stay, we finish our routes no matter how long it takes. We **[*4]** don't bring back undelivered freight." T. 24. This policy was expressed in a memo dated July 29, 2002 wherein Respondent expressed, "The intent of this notice is to reinforce a long-standing policy in the cluster. That policy is that no driver employee has the authority to return to the facility with any portion of their dispatched delivery load not delivered or without a valid attempt to deliver any portion of their dispatched delivery load. The only exception shall be is if the driver secures permission PRIOR to returning to the facility from a Supervisor or Manager." PX 2. Petitioner testified that in the event of a personal commitment preventing him from working longer than his shift, Petitioner advised a supervisor at the start of his shift that he must be off at 4:00 p.m. If he had remaining freight, it was distributed to other drivers at the start of the shift for delivery during the shift. Petitioner has also had occasion to deliver the freight of other drivers under the same circumstances. T. 27-29.

Finally, Petitioner testified that under the union contract, vacation pay is based on a 50 hour work week. T. 20. PX 3.

Between February 2001 and October 2001, Petitioner worked **[*5]** a p.m. shift in addition to his regular 8 hour shift. Petitioner would advise his supervisor that he wanted to work the p.m. route that day and that he was available to work the route. Petitioner testified that he requested this route "on a number of occasions throughout the year when he wanted to work overtime." Petitioner consistently picked up 6 hours per day on these p.m. routes. However, the number of hours varied depending on the number of

pickups required. T. 64. Again, Petitioner's ability to request the PM route was determined based on seniority and his number was 280-somewhere "in the middle." T. 64. Petitioner agreed that his number was sufficient enough to enable him to work overtime "when he wanted to." Petitioner also testified that he was "forced" to work overtime many times by his supervisors. T. 69.

Scott Meier testified in his capacity as a driver for Respondent and a union representative. Mr. Meier is familiar with company overtime policy through this position as union steward, his knowledge of the contract and his work for 19 years as a driver for Respondent. T. 33. With regard to the company overtime policy he testified that, "Basically, exactly overtime works **[*6]** is by seniority. If you want overtime, it starts at the top of the seniority list, works it way down. If you are on the bottom of the seniority, you will get forced, if not enough people want the overtime above you, they need to fill the positions for operational needs." T. 38. Again, the policy is to discipline the driver who returns with undelivered freight. T. 39. The exception to the policy against bringing back undelivered freight as expressed in the memo at PX 2 works in a few ways. If the driver calls with a family emergency or has a doctor's appointment then it can be arranged to have someone meet the driver on the route to deliver the remaining freight or it will go out the next day. If someone takes over the route the same day he conceded that the work could result in overtime. T. 42. Finally, he testified that vacation pay is based on a 50 hour work week. T. 47.

Neil Messino testified in his capacity as a union representative employed by the union. T. 57-59. He also testified that "overtime is offered in seniority order and its offered up from the top of the seniority list. And you are forced from the bottom of the list, forced, meaning if no one in the seniority order **[*7]** takes it, the bottom people left, if there is work to be done, are forced into the position of overtime." T. 62. He further testified that drivers work overtime on a "regular basis" and that it is very consistent. . . "overtime is part of some of the people's income." T. 64. Mr. Messino also testified that a driver can be "forced" to work overtime regardless of seniority ". . . if the amount of freight you have on your truck forces you to extend your eight hours." T. 66.

Joe Yates, district manager at Respondent's Schaumburg station, testified that overtime is not mandatory for drivers under the contract. However, those with high seniority can chose when they want to work the available overtime and that it was necessary to have the routes completed in order to service its customers. T. 19,57. In 2001, there were enough overtime routes available to allow Petitioner with his seniority number up to 20 hours of overtime per week. T. 18. Mr. Yates also testified to RX 3 which is a group of wage records for all of the station workers for the period of February 2001 through October 2001. A total of 148 employees worked out of the station and 90 drivers worked through every pay period. All **[*8]** 90 drivers worked overtime in every pay period with overtime hours representing 17% of the total hours worked. Petitioner alone worked 541.50 hours of overtime during the 8 month period. None of the overtime hours were Saturday hours. T. 52.

The Illinois Appellate Court in the case of Edward Hines Lumber Company v. Industrial Commission, (1991), 215 Ill. App.3d 659, 575 N.E.2d 1234,159 Ill.Dec.1974, adopted the holding of the Montana Supreme Court in the case of Coles v. Seven Eleven Stores, (Montana, 1985) 704 P.3d 1048, 217 Mont. 343. In doing so, the Illinois Court allowed for the inclusion of overtime at the straight time rate in the calculation of average weekly wage if the record showed that the employer expected overtime work and the injured worker worked overtime on a consistent and regular basis such that the overtime became part of the usual hours of employment. Thereafter, overtime was included at a straight rate in cases where Petitioner showed overtime worked in a majority of the pay weeks at issue. The Commission finds that Petitioner in the instant action clearly worked overtime **[*9]** in 31 of the 32 pay weeks at issue, clearly meeting the test of Edward Hines calling for the inclusion of regularly and consistently worked overtime in the calculation of Petitioner's average weekly wage.

The Commission's decision is not contrary to the holdings of the Illinois Courts in the cases Edward Don Co., v. Industrial Commission, (2003), 344 Ill.App3d 643,801 N.E.2d 18, 279 Ill.Dec.726, or Freesen v. Industrial Commission, (2004), 348 Ill.App.3d 1035, 811 N.E.2d 322, 285 Ill.Dec 81. In Edward Don, the court found that the inclusion of overtime (15 out of 16 weeks) was against the manifest weight of the evidence as there was *no evidence* showing that the employee was required to work overtime as a condition of his employment or that overtime hours were a part of the regular hours of employment. The Illinois Appellate Court in Freesen again found that Petitioner *failed to prove* entitlement to overtime by failing to show 1) that he was required to work overtime as a condition of his employment, 2) he consistently worked a set number of overtime hours each week *or* **[*10]** 3) the overtime hours he worked were part of the regular hours of employment. In short, the foregoing cases are easily distinguished from the instant matter as cases where Petitioner failed to meet his burden to prove the inclusion of overtime. The Commission further notes that the holdings of these cases do not sound the death knell for the inclusion of overtime in the calculation of average weekly wage in every case. Furthermore, the Courts did not overrule the holding in Edward Hines.

Moreover, Petitioner in this current matter successfully met the standards of proof enunciated in Freesen. The evidence overwhelmingly supports the Commission's inference that Petitioner was required to work overtime as a condition of his employment for Respondent and that his overtime hours were worked as a part of his regular hours of employment for Respondent. Respondent had a clear objective to complete timely deliveries for its customers. Without overtime, this objective could not be met as evidenced by the fact that overtime was worked by all 90 drivers during the pay period at issue. Petitioner alone worked overtime in 31 of the 32 weeks. Overtime was worked consistenly every week. **[*11]** In addition, the "long-standing" policy of pleasing its customers and delivering all freight on the trucks was reiterated in writing via the July 2002 memo. Petitioner could not return to the freight yard with freight in his truck without risking another reprimand. As Mr. Yates testified, overtime routes were available and necessary in order to service Respondent's customers in a timely manner. Finally, Petitioner testified that his seniority number allowed him the choice of when to work the required overtime. Overtime work cannot be termed "voluntary" and thus not required simply because an employee is allowed the flexibility to determine when the overtime is worked.

Despite the fact that Petitioner worked varied hours of overtime each week, the fact remains that Petitioner was required by Respondent's company objective to work some overtime every work week in order to complete either his deliveries or the deliveries of other drivers and service Respondent's customers. Again, of the 90 drivers who drove during the relevant pay period, all 90 drivers worked overtime. It can be reasonably inferred that overtime *work* was consistently worked each week. Further, the fact that the union **[*12]** contract calls for vacation pay based on a 50 hour work week lends compelling support to the fact that Petitioner's "regular" hours of employment exceeded 40 hours per week. Overtime was a part of the regular hours of daily and weekly work for Respondent's freight drivers in order to meet its operational needs.

The Commission notes its recent decision in the case of Hultin v. **Airborne Express**, 05 IIC 0322, wherein the Commission also found that overtime is a required condition of employment for a freight delivery driver at the same Respondent, **Airborne Express,** and included Mr. Hultin's overtime earnings in his average weekly wage calculation. Mr. Hultin also testified to Respondent's policy against returning with undelivered freight and that he regularly worked overtime to complete his deliveries to avoid reprimand. In both cases, it was proven that overtime is necessary for the operation and success of Respondent's business as evidenced by the fact that all drivers worked overtime on a regular and consistent basis. It is inequitable to include overtime in the average weekly wage of

the driver who fails to complete his shift deliveries but exclude it from the wage of the more **[*13]** efficient driver who completes a co-worker's deliveries in furtherance of Respondent's business. In the instant case, although Petitioner was allowed flexibility in scheduling his overtime, it was still a required condition of its employment as it was for the Petitioner in Hultin. Based on the foregoing, the Arbitrator's Decision is so modified.

Finally, the Commission denies Petitioner's Petition for Penalties filed on Review of this matter based on Respondent's failure to re-adjust Petitioner's average weekly wage to include overtime following the Commission's issuance of its decision in Hultin v. **Airborne Express**, 05 IIC 0322. Respondent's failure to do so was neither so unreasonable nor vexatious so as to justify the imposition of penalties or attorneys' fees in this matter. Respondent's refusal to adjust the rate was based on a good faith defense given the facts of this case.

The Commission affirms and adopts all else. Remand per Thomas.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decisions of the Arbitrator in case numbers 00WC55154 and 00WC64343 filed December 21, 2004 are hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that in case number **[*14]** 01WC66111 Respondent shall pay to the Petitioner the sum of $ 843.24 per week for a period of 74-4/7 weeks, that being the period of temporary total incapacity for work under § 8(b), and that as provided in § 19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that in case number 01WC66111 Respondent shall pay to the Petitioner the sum of $ 843.24 per week for a period of 76 weeks that being the period of maintenance as provided in Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that in case number 01WC66111 Respondent pay to Petitioner the sum of $ 1,487.74 for medical expenses under § 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that these cases be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such **[*15]** a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Petition for Penalties filed August 23, 2005 on Review is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under § 19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 10,800.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: September 27, 2005

ATTACHMENT I:

19(b) ARBITRATION DECISION

RON BRONKE
Employee/Petitioner
v.
AIRBORNE EXPRESS, INC.
Employer/Respondent

Case # 00 WC 55154

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Joseph Reichart, arbitrator of the Industrial **[*16]** Commission, in the city of Chicago, on 9/14/04, 10/6/04, 11/15/04. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues circled below, and attaches those findings to this document.

DISPUTED ISSUES
* F. Is the petitioner's present condition of ill-being causally related to the injury?
* K. What amount of compensation is due for temporary total disability?

FINDINGS
. On 3/13/00, the respondent **Airborne Express** Inc. *was* operating under and subject to the provisions of the Act.
. On this date, an employee-employer relationship *did* exist between the petitioner and respondent.
. On this date, the petitioner *did* sustain injuries that arose out of and in the course of employment.
. Timely notice of this accident *was* given to the respondent.
. In the year preceding the injury, the petitioner earned $ 51,528.36; the average weekly wage was $ 990.93.
. At the time of injury, the petitioner was 40 years of age, *married* with 2 children under 18.
. Necessary medical services *have* been provided by the respondent.
. To date, $ 1,321.24 has been paid by the respondent on account **[*17]** of this injury.

ORDER
. The respondent shall pay the petitioner temporary total disability benefits of $ 660.62 /week for 2 1/7 weeks, from 3/14/00 through

3/28/00, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.
. The respondent shall pay $ for medical services, as provided in Section 8(a) of the Act.
. The respondent shall pay $ in penalties, as provided in Section of the Act.
. The respondent shall pay $ in penalties, as provided in Section of the Act.
. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE [*18] If the Commission reviews this award, interest of 2.46 % shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

Date December 21, 2004

CAUSAL CONNECTION

The petitioner testified that on March 13, 2000, he was employed by the respondent as a driver/dockworker. On that date, he slipped on a wet spot and twisted his left knee. He first received medical attention at the Concentra Medical Center where he was diagnosed with a left knee strain. (Pet. Ex. 8) He was thereafter seen by orthopedic surgeon Dr. Sigmond who ordered an MRI which revealed degenerative changes but no meniscal tear. He released the petitioner to return to work on March 29, 2000 with a final diagnosis of synovitis of the left knee. (Pet. Ex. 9)

After returning to work, the petitioner was seen on three subsequent occasions, April 11, 2000, May 2, 2000 and May 23, 2000. When last seen on May 23, 2000, the physical examination revealed that he could walk without a limp; there was no residual synovitis or boggy swelling; and minimal tenderness of the **[*19]** medial joint line. Dr. Sigmond diagnosed "resolved knee synovitis." (Pet. Ex. 9)

The petitioner thereafter injured his left knee on July 10, 2000 and October 8, 2000 after which time he underwent surgical procedures. These cases are the subject of worker's compensation claims docket numbers 00WC 94343 and 01WC 66111.

The Arbitrator finds that the petitioner's present condition of ill-being is not causally related to the accident of March 13, 2000. The Arbitrator bases this finding on the fact that the petitioner returned to full duty work approximately two weeks after the accident after which time his treating physician documented no objective findings and stated that his condition of ill-being (synovitis) had resolved. The petitioner's present condition of ill-being is causally related to a subsequent work injury occurring on October 8, 2001 which is the subject of another worker's compensation claim (See Arbitrator's Decision for case 01 WC 66111).

TEMPORARY TOTAL DISABILITY

After sustaining an injury to his left knee on March 13, 2000, the petitioner's treating physician, Dr. Sigmond, took him off of work until March 28, 2000. (Pet. Ex. 9) The petitioner continued working his **[*20]** regular job duties until he re-injured his left knee at work on July 10, 2000.

The Arbitrator finds that the petitioner was temporarily totally disabled from March 14, 2000 through and including March 28, 2000. The respondent shall pay the petitioner temporary total disability benefits of $ 660.62 per week for 2 1/7 weeks as provided in Section 8(b) of the Act because the injuries sustained caused a disabling condition of the petitioner, the disabling condition is temporary and has not yet reached permanent condition, pursuant to Section 19(b) of the Act.

ATTACHMENT II:

19(b) ARBITRATION DECISION

RON BRONKE
Employee/Petitioner
v.
AIRBORNE EXPRESS, INC.
Employer/Respondent

Case # 00 WC 64343

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Joseph Reichart, arbitrator of the Industrial Commission, in the city of Chicago, on 9/14/04, 10/6/04, 11/15/04. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues circled below, and attaches those findings to this document.

DISPUTED ISSUES
* F. Is the petitioner's **[*21]** present condition of ill-being causally related to the injury?
* K. What amount of compensation is due for temporary total disability?

FINDINGS
. On 7/10/00, the respondent **Airborne Express** Inc. *was* operating under and subject to the provisions of the Act.
. On this date, an employee-employer relationship *did* exist between the petitioner and respondent.
. On this date, the petitioner *did* sustain injuries that arose out of and in the course of employment.
. Timely notice of this accident *was* given to the respondent.
. In the year preceding the injury, the petitioner earned $ 51,528.36; the average weekly wage was $ 990.93.

. At the time of injury, the petitioner was 40 years of age, *married* with 0 children under 18.
. Necessary medical services *have* been provided by the respondent.
. To date, all TTD due and owing has been paid by the respondent on account of this injury.

ORDER
. The respondent shall pay the petitioner temporary total disability benefits of $ 660.62 /week for 28 1/7 weeks, from 7/11/00 - 9/5/00 & 9/25/00 - 2/11/01, as provided in Section 8(b) of the Act, because the injuries sustained caused the **[*22]** disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.
. The respondent shall pay $ for medical services, as provided in Section 8(a) of the Act.
. The respondent shall pay $ in penalties, as provided in Section of the Act.
. The respondent shall pay $ in penalties, as provided in Section of the Act.
. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 2.46 % shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature **[*23]** of arbitrator

Date December 21, 2004

CAUSAL CONNECTION

The petitioner testified that on July 10, 2000 he was employed by the respondent as a driver/dockworker. On that date, he slipped and fell landing on his left knee. He returned to Dr. Sigmond who recommended surgery which was performed on October 18, 2000 consisting of a three compartment synovectomy and chondroplasty of the patella and medial tibial plateau. (Pet. Ex. 10) Thereafter he underwent physical therapy and was released to return to work on February 12, 2001. (Pet. Ex. 9)

The petitioner continued working his regular job duties, albeit with occasional pain in the left knee, until he re-injured the left knee at work on October 8, 2001. This injury is the subject of another worker's compensation filing docketed as case 01 WC 66111. The Arbitrator finds that the petitioner's present condition of ill-being is not causally related to the accident of July 10, 2001 but rather is the result of the petitioner's re-injury on October 8, 2001. (See Arbitrator's Decision on case 01 WC 66111)

ATTACHMENT III:

19(b) ARBITRATION DECISION

RON BRONKE
Employee/Petitioner
v.
AIRBORNE EXPRESS, INC.
Employer/Respondent

Case # 01 WC **[*24]** 66111

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Joseph Reichart, arbitrator of the Industrial Commission, in the city of Chicago, on 9/14/04, 10/6/04 & 11/15/04. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues circled below, and attaches those findings to this document.

DISPUTED ISSUES
* F. Is the petitioner's present condition of ill-being causally related to the injury?
* G. What were the petitioner's earnings?
* J. Were the medical services that were provided to petitioner reasonable and necessary?
* K. What amount of compensation is due for temporary total disability?
* L. Should penalties or fees be imposed upon the respondent?

FINDINGS
. On 10/8/01, the respondent **Airborne Express,** Inc. *was* operating under and subject to the provisions of the Act.
. On this date, an employee-employer relationship *did* exist between the petitioner and respondent.
. On this date, the petitioner *did* sustain injuries that arose out of and in the course of employment.
. Timely notice **[*25]** of this accident *was* given to the respondent.
. In the year preceding the injury, the petitioner earned $ 46,873.32; the average weekly wage was $ 901.41.
. At the time of injury, the petitioner was 41 years of age, *married* with 2 children under 18.
. Necessary medical services *have in part* been provided by the respondent.
. To date, $ 117,368.77 has been paid by the respondent on account of this injury.

ORDER
. The respondent shall pay the petitioner temporary total disability benefits of $ 600.94 /week for 74 4/7 weeks, from 11/29/01-8/5/02 & 9/4/02-6/2/03, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner, the disabling condition is temporary and has not yet reached a permanent condition, pursuant to Section 19(b) of the Act.
. The respondent shall pay petitioner maintenance benefits of $ 600.94/ week for 76 weeks, from 6/3/03 through 11/15/04 as provided in Section 8(a) of the Act.
. The respondent shall pay $ 1,487.74 for medical services, as provided in Section 8(a) of the Act.

. The respondent shall pay $ in penalties, as provided in **[*26]** Section of the Act.
. The respondent shall pay $ in penalties, as provided in Section of the Act.
. In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of temporary total disability, medical benefits, or compensation for a permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE IF the Commission reviews this award, interest of 2.46 % shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

Date December 21, 2004

CAUSAL CONNECTION

The petitioner testified that on October 8, 2001 he was employed by the respondent as a driver/dockworker. On that date, while in his delivery truck, his left foot became caught in freight causing him to twist his left knee. He was seen at the Concentra Medical **[*27]** Center on that same date where he was diagnosed with a left knee strain. (Pet. Ex. 8)He thereafter came under the care of Dr. Eric Sigmond, an orthopedic surgeon. An MRI was performed on November 2, 2001 which Dr. Sigmond interpreted as showing diminution of the unity of the ACL. He referred him to his partner, Dr. Hora, who is more experienced in ACL deficiencies. (Pet. Ex. 15)

On January 7, 2002, Dr. Hora performed arthroscopic surgery which included reconstruction of the ACL and multicompartment synovectomy with lysis of adhesions. (Pet. Ex. 15) He thereafter underwent physical therapy but continued to notice pain and popping in the left knee. On January 2, 2003, Dr. Sigmond performed arthroscopic surgery on the left knee consisting of an incision of the adhesions and chondroplasty of the left femoral chondyle. (Pet. Ex. 15) He thereafter underwent post-operative physical therapy, work hardening, and a functional capacity evaluation. He was found capable of returning to heavy work, with lifting between 50 - 100 pounds. (Pet. Ex. 21) On April 8, 2003, Dr. Sigmond found that he had should be permanently restricted from squatting, climbing and kneeling. Otherwise, he was capable of **[*28]** functioning in a heavy work mode. (Pet. Ex. 15)

The petitioner testified that he continues to experience pain, stiffness and weakness in the left knee. He is currently undergoing Synvisc injections to the left knee administered by Dr. Hora.

The Arbitrator finds that the petitioner's present condition of ill-being is causally related to his accident of October 8, 2001. The Arbitrator bases his finding on the testimony of the petitioner that he worked his regular job full duty up until the accident of October 8, 2001 and the records of Drs. Sigmond and Hora which found that the petitioner was incapable of performing his work duties thereafter. (Pet. Ex. 15)

MEDICAL BILLS

The petitioner offered into evidence three medical bills: Sherman Hospital in the amount of $ 342.74 (Pet. Ex. 5); HealthSouth in the amount of $ 125.00 (Pet. Ex. 6); and Northwest Orthopedic Surgery in the amount of $ 1,018.00 (Pet. Ex. 7). Based on the Arbitrator's review of the corresponding medical records, these bills are reasonable, necessary and causally related to the petitioner's work accident of October 8, 2001. The Arbitrator awards medical bills in the amount of $ 1,487.74.

AVERAGE WEEKLY WAGE

The petitioner **[*29]** testified that he was employed by the respondent as a driver/dockworker since 1994. As a member of Local 705 Teamsters, his pay and hours were governed by the union contract which he identified and was accepted into evidence. (Pet. Ex. 3) The petitioner testified that his normal workday was eight hours but he frequently worked overtime in the year prior to his injury of October 8, 2001.

The respondent had a policy in effect at all relevant times that drivers could not return to the station with undeliverable freight. He identified a memo authored by Joe Edell, one of the respondent's supervisors, dated July 29, 2002 (Pet. Ex. 2) which set forth the policy regarding drivers returning to the garage with undeliverable freight. In 1994, he was given a written warning for doing so. He was never written up thereafter.

On cross-examination, after reviewing the memo of Joe Edell dated July 29, 2002 (Pet. Ex. 2), he agreed that the policy was that drivers could not return with undeliverable freight without first obtaining the approval of a supervisor. He further conceded that he could normally finish his route within the eight hours allocated for that work. He further testified that the custom **[*30]** and practice for overtime work at the respondent's station was that sign-up sheets were posted for additional routes and Saturday work. Any driver who wished to work overtime would sign his name and seniority number on the posted list. The overtime would then be awarded to those individuals with the highest seniority. He stated that most of his overtime hours were for additional routes during the week which he was awarded as a result of voluntarily signing his name on the sign-up sheets. He did not usually work on Saturdays.

Scott Meir testified that he is a driver/dockworker for the respondent and also has served as a union steward for the past two years. According to Meir, overtime is assigned on a seniority basis: those with the highest seniority are awarded overtime based on voluntary bidding by entering their names on a signup sheet. If there are not enough individuals who volunteer for overtime, drivers with the lowest seniority can be required to work it. He conceded that the union contract does not make overtime mandatory except on two days out of the year.

With respect to undeliverable freight, he confirmed that the respondent's rule was that a driver could not return with **[*31]** undeliverable freight. He identified Joe Edell's memo of July 29, 2002 (Pet. Ex. 2) as embodying that rule. He later conceded that the rule was actually that a driver could not return with undeliverable freight unless receiving the prior approval of management.

Neil Messino testified that he was employed by Teamster's Local 705 as a union representative. Prior to that, he worked as driver/dockworker for **Airborne Express** and served as a union steward. He testified that the union contract (Pet. Ex. 3) does not state that overtime is mandatory. The policy with respect to overtime is that it is awarded based on the highest seniority to those who volunteer and can be required of those with the lowest seniority if not enough drivers volunteer.

Joe Yates testified that he has been employed by the respondent since 1994. He has worked as the Station Manager since 2000 at the Schaumburg station which is where the petitioner has been employed as a driver/dockworker. Mr. Yates's job duties include making sure that the freight gets delivered, productivity, and managing his supervisors, drivers and clerks. His job duties require that he review the work schedules and earnings records of the driver/dockworkers **[*32]** to enable him to schedule and assign routes. He endeavors to plan the routes so that they can be performed in the normal eight hour workday. In the event that a driver cannot deliver all of his freight in the normal eight hour workday, he must obtain approval from his supervisor before returning to the station with undeliverable freight. (Pet. Ex. 2)

Drivers frequently work overtime for three reasons: the driver cannot deliver all of his freight within the normal eight hours; there are additional routes to be run as a result of excess freight or unplanned absences of other drivers; and the need to staff Saturday routes. Additional routes and Saturday work are awarded to drivers based on the highest seniority. Throughout all relevant periods, sign-up sheets for additional routes and Saturday work were posted and drivers would volunteer by entering their names and seniority numbers on the sign-up sheets. Other than approximately twenty days out of the year, enough individuals volunteer for the additional routes and Saturday work to fully staff the work. In those instances where enough individuals do not volunteer for the overtime work, the drivers with the lowest seniority are assigned **[*33]** to work the additional or Saturday routes. The drivers who are required to work additional routes and Saturday work are never higher than the bottom 20% - 25% of the seniority list. The top 30% of the seniority list will usually be awarded overtime whenever they volunteer for it.

Yates further testified that the petitioner's seniority number in the year 2001 was in the 230's. This would place him in the top 30% - 40% of the seniority list. The petitioner was never forced to work overtime during that period of time. He regularly volunteered for overtime during that period and he was awarded it due to his relatively high seniority level.

Yates is familiar with the union contract in effect at the time. (Pet. Ex. 3) The contract did not make overtime mandatory. In reviewing the wage records for his other employees, (Resp. Ex. 3) there are employees with relatively high seniority numbers who never chose to work overtime. There are also employees with low seniority who do not work overtime.

The issue in dispute with respect to the petitioner's earnings is whether the petitioner's overtime earnings should be included in average weekly wage calculations. Section 10 of the Act provides that **[*34]** compensation under section 8 of the Act, which governs TTD and PPD benefits, shall be computed on the basis of average weekly wage, which is defined in relevant part as:

"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 injury, illness, or disablement excluding overtime, ..."

The claimant in a workers' compensation proceeding has the burden of establishing his average weekly wage. Cook v. Industrial Commission, 231 Ill. App. 3d 729, 731, 596 N.E. 2d 746 (1992).

In Edward Don v. Industrial Commission (2003) 344 Ill. App. 3rd 643, 801 N.E. 2nd 18, 279 Ill. Dec. 3rd 726, the petitioner established that he worked overtime in 15 of the 16 weeks that he worked for the respondent immediately prior to the accident. In holding that the petitioner's overtime earnings should not be included in the average weekly wage computations, the Illinois Appellate Court found that the petitioner had failed to prove that he was required **[*35]** to work overtime as a condition of his employment; that he consistently worked a set number of overtime hours each week; or that his overtime hours were part of his regular hours of employment.

In Freesen v. Industrial Commission (2004) 348 Ill. App. 1035, 811 N.E. 2nd 322, 285 Ill. Dec. 81 the employee worked overtime in 23 of the 34.6 weeks during the 52 week period prior to his injury. In re-affirming the ruling in Edward Don, supra, the Appellate Court reversed the Industrial Commission's inclusion of overtime earnings because the petitioner could "point to no evidence that (1) he was required to work overtime as a condition of his employment (2) he consistently worked a set number of overtime hours each week or (3) the overtime hours he worked were part of his regular hours of employment."

In the present case, with respect to whether the petitioner was required to work overtime as a condition of his employment, the Arbitrator finds that the petitioner's overtime was not so required. The Arbitrator notes that the union contract in effect at the period in question does not make overtime mandatory. All individuals **[*36]** who testified that they were familiar with the union contract agreed that the union contract does not indicate that overtime is mandatory, with the exception of Scott Meir who claimed it was mandatory on only two days out of the year.

Notwithstanding the provisions in the union contract, the petitioner argues that overtime is mandatory due to the policy in effect which mandated that the drivers must work as long as necessary to deliver the freight because drivers could not return to the station with undelivered freight. However, the memo of Joe Edell, dated July 29, 2002 (Pet. Ex. 2) does not reflect that the driver cannot return with undeliverable freight. It reflects only that prior approval from a supervisor must be obtained before returning with undeliverable freight. More importantly, the petitioner testified that he could complete his assigned route in the normal eight hour workday, thus making the issue of overtime arising from undeliverable freight irrelevant to petitioner's average weekly wage issue.

With respect to the additional routes and Saturday routes, all witnesses agreed that such work was awarded on a seniority basis to those who voluntarily signed their name to the **[*37]** posted sign-up sheets. If an insufficient number of drivers volunteered for such work, only those with the lowest seniority could be required to work the additional routes. The petitioner conceded that his overtime hours arose from voluntarily entering his name on the sign-up sheets. Although he claimed to do so early in the week so that he would not be forced to work overtime later in the week or on Saturday, there was no evidence that he ever was forced to work such overtime shifts or that he ever would be required to do so. On the contrary, the unrebutted evidence from Joe Yates was that only those individuals in the lowest 20% - 25% of the seniority list were ever required to work overtime. Although Joe Yates placed the petitioner in the top third of the seniority list and the petitioner claimed he was only in the top half of the seniority list, there was no evidence that during the 52 weeks prior to his accident, he was in the lower 20% - 25% of the seniority list. Therefore, the Arbitrator finds that the overtime hours worked by the petitioner were not required as a condition of his employment.

As to the second way in which overtime hours can be found to be includable, i.e. **[*38]** a worker who works a set number of overtime hours each week, the wage records clearly indicate that the petitioner worked a varying number of hours of overtime each week ranging between 1-28, not a set number of overtime hours. (Resp. Ex. 4)

With respect to the third method of establishing overtime, i.e. that the overtime hours were part of the regular hours of employment, the union contract stipulates and all witnesses agreed that the regular hours of employment are 40 hours per week. (Pet. Ex. 3, Article 7, Section 3)

Having found that the overtime earnings are not includable in the average weekly wage calculations, the Arbitrator calculates the average weekly earnings as follows. The petitioner's wage records for the 52 weeks prior to his injury (Resp. Ex. 4) reflect that he worked 32 weeks (2/11/01 - 10/7/01) earning regular earnings of $ 25,142.40 and other earnings (vacation, holiday pay, etc.) of $ 3,702.69 for a total of $ 28,845.09. This renders an average weekly wage of $ 901.41. The Arbitrator bases this finding on the testimony of the petitioner, Scott Meir, Neil Messino and Joe Yates; the union contract (Pet. Ex. 3); the Joe Edell memo of 7/29/02; and the wage records **[*39]** of the petitioner (Pet. Ex. 1, Resp. Ex. 4).

TEMPORARY TOTAL DISABILITY BENEFITS

After injuring his left knee on October 8, 2001, the petitioner began missing time from work on November 29, 2001. He returned to work in a modified capacity on August 5, 2002. Thereafter, he was again taken off of work by Dr. Sigmond on September 4, 2002 and has not returned back to work for the respondent up to the date of the hearing, November 15, 2004. As of June 3, 2003, the petitioner began working with a vocational rehabilitation counselor assigned by the respondent in an effort to locate full time employment. As of that date and thereafter, Respondent is liable to pay maintenance benefits as provided is section 8(a) of the Act.

The Arbitrator finds that the petitioner was temporarily totally disabled from November 29, 2001 through and including August 5, 2002 and then again from September 4, 2002 through and including June 2, 2003. The respondent shall pay the petitioner temporary total disability benefits of $ 600.94 per week for a period of 74 4/7 weeks as provided in Section 8(b) of the Act. The Arbitrator further finds that Respondent shall pay maintenance benefits of $ 600.94 per week for **[*40]** a period of 76 weeks, from June 3, 2003 through November 15, 2004, the date of the hearing.

Because the injuries sustained caused a disabling condition of the petitioner, the disabling condition is temporary and has not yet reached permanent condition pursuant to Section 19(b) of the Act.

PENALTIES AND ATTORNEY'S FEES

The petitioner has filed a Petition for Penalties under Section 19(k) and 19(1) as well as attorney's fees pursuant to Section 16 of the Act. The basis for the Petition for Penalties is the alleged underpayment due to the issue of inclusion of overtime earnings in the petitioner's average weekly wage calculations. (Pet. Ex. 23)

The key factor in determining whether penalties under Section 19(k) and Section 19(1) and attorney's fees under Section 16 can be awarded is whether the respondent's actions were reasonable. Board of Education of Chicago v. Industrial Commission (1982) 93 Ill. 2nd 1, 442 N.E. 2nd 861. Illinois Courts have refused to assess penalties under the sections where the evidence indicates that the employer reasonably could have believed that the employee was not entitled to withheld compensation. Avon Products v. Industrial Commission (1980) 82 Ill. 2nd 297, 412 N.E. 2nd 468. **[*41]**

The respondent presented live testimony and documentation in support of its position that the petitioner's overtime earnings should not be included in the average weekly wage calculations. The respondent's evidence indicated that the overtime earnings were not mandatory; that they do not constitute a set number of hours per week; and that the overtime was not part of the petitioner's regular hours of employment. Moreover, the recent rulings of Edward Don v. The Industrial Commission and Freesen v. The Industrial Commission have enunciated new standards with respect to overtime earnings.

The Arbitrator finds that the respondent did not act unreasonably in not including the overtime earnings in the average weekly wage calculations. Therefore, the petitioner's request for additional compensation under Section 19(k), 19(1) and attorney's fees under Section 16 of the Act is denied.

DISSENTBY: MARIO BASURTO

DISSENT: I respectfully dissent with the inclusion of overtime in the average weekly wage. The majority correctly points out that drivers were required to deliver all of their fright before returning. However, it ignores the Petitioners own testimony that he was able to complete his route in the **[*42]** normal eight hour work day. The testimony is also undisputed that it was only the drivers with minimal seniority that were required to work over time. The Petitioner was at a level of seniority that he worked over time for his own benefit and not because he couldn't finish his route. Therefore, under the law, the Petitioner does not meet the requirements to have over time included in his wage calculation.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > General Overview
Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods
Workers' Compensation & SSDI > Compensability > Injuries > Successive Injuries

Source: Legal > States Legal - U.S. > Illinois > Find Statutes, Regulations, Administrative Materials & Court Rules > IL Workers' Compensation Decisions
Terms: airborne and express and ron and bronke (Edit Search | Suggest Terms for My Search)
View: Full
Date/Time: Tuesday, May 5, 2009 - 2:46 PM EDT

Rec'd 6/7/09
2-27-09

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [ ] PTD/Fatal denied
- [x] None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Robert F. Clark,
Petitioner,

09IWCC0197

vs.

NO: 05 WC 06379

SOI/Illinois Dept. of Transportation,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue(s) of wage rate, inclusion of overtime earnings and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 3, 2008 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

DATED: FEB 2 4 2009

David L. Gore

James F. DeMunno

Mario Basurto

DLG/md
o/2/19/09
45

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

09IWCC0197

CLARK, ROBERT F
Employee/Petitioner

Case# 05WC006379

ISOI/LLINOIS DEPT OF TRANSPORTATION
Employer/Respondent

On 06/03/2008, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.95% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

FIGLIOLI, DAVID
150 N MICHIGAN AVE
SUITE 1100
CHICAGO, IL 60601

1770 ASSISTANT ATTORNEY GENERAL
ROBERT DELANEY
100 W RANDOLPH ST -13TH FL
CHICAGO, IL 60601

1430 DEPT OF TRANSPORTATION
WORKERS COMPENSATION MANAGER
2300 W DIRKSEN PARKWAY
SPRINGFIELD, IL 62764

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794

CERTIFIED as a true and correct copy
pursuant to 820 ILCS 305/14

JUN 3 2008

AMY MASTERS, Secretary
Illinois Workers' Compensation Commission

STATE OF ILLINOIS)
)
COUNTY OF Kane)

09IWCC0197

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
REGARDING THE NATURE AND EXTENT OF THE INJURY

Robert F. Clark
Employee/Petitioner

Case # **05** WC **06379**

v.

SOI/Ill. Dept. of Transportation
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **J. Kinnaman**, arbitrator of the Commission, in the city of **Geneva, IL**, on **May 13, 2008**.

The only disputed issue is the nature and extent of the injury. By stipulation, the parties agree on the following items:

- On **Aug. 13, 2004**, the respondent **SOI/Ill. Dept. of Transportation** was operating under and subject to the provisions of the Act.
- On this date, the relationship of employee and employer did exist between the petitioner and respondent.
- On this date, the petitioner sustained accidental injuries that arose out of and in the course of employment.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $ **53,342.64**, and the average weekly wage was $ **1,025.82**.
- At the time of injury, the petitioner was **57** years of age, ***married*** with **0** children under 18.
- Necessary medical services have been provided by the respondent.
- The respondent shall pay the petitioner temporary total disability benefits of $ **683.88**/week for **195-4/7** weeks, from **8/14/04** through **5/13/08**, which is the period of temporary total disability for which compensation is payable.
- To date, $ **119,059.97** has been paid for TTD and/or maintenance benefits.

After reviewing all of the evidence presented, the arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

09IWCC0197

- The respondent shall pay the petitioner the sum of $ **683.88**/week for a further period of **life**, as provided in Section **8(f)** of the Act, because the injuries sustained caused **his permanent and total disability commencing May 14, 2008** .
- The respondent shall pay the petitioner compensation that has accrued from **8/13/04** through **5/13/08** and shall pay the remainder of the award, if any, in weekly payments.
- The respondent shall pay $ **0** for medical services, as provided in Section 8(a) of the Act.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

1.95

STATEMENT OF INTEREST RATE If this award is reviewed by the Commission, interest of _____ % shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of arbitrator

June 2, 2008
Date

ICArbDecN&E p.2

JUN 3 2008

On Aug. 13, 2004, Petitioner had been a highway maintainer for Respondent for seven years. His job was to repair highways for the State of Illinois, trim trees, cut grass, provide ice and snow removal and repair tractors and trucks. His work week was eight hours a day, five days a week. From Nov. 1 through March 31 of each year Petitioner was required to work overtime if necessary due to a snow or ice storm.

PX1 is the collective bargaining agreement governing Petitioner's employment. Article 8.3 provides that employees "shall" work reasonable amounts of overtime when necessary. The first Addendum to the contract provides for the disciplinary steps, culminating in termination, to be taken when an employee fails to answer a snow and ice call out.

On Aug. 13, 2004, Petitioner was fixing a water pump on a tractor with a mower on the back. While he was standing on the mower, it became engaged and he was dragged under it. He remembers being hit and knocked down. He does not recall his hospitalization, but has seen the bills. The parties agreed Petitioner has been temporarily totally disabled since his accident to the date of hearing. They also agreed all Petitioner's medical bills would be paid or Petitioner would be held harmless for any charges. ARBX1. Furthermore, in its proposed decision, Respondent agreed Petitioner is permanently, totally disabled.

The medical records show Petitioner was admitted to Delnor-Community Hospital on Aug. 13, 2004. The admission history shows he had a crush injury to his head, lower abdomen and legs after a 600 lb. mower fell on him. He was found with the mower lying on his back and legs and he was bleeding from his face and ears. The extrication was prolonged. The discharge summary of Aug. 19, 2004 shows Petitioner underwent treatment for his severe closed head injury, pelvic fractures and facial pathology. PX3. He was transferred to Loyola University Medical Center (PX2) where sacral fracture with superior and inferior rami fractures was diagnosed. Left temporal bone fracture with facial paralysis was also diagnosed. He underwent surgeries to repair the fractures. He also underwent a procedure for the facial palsy, a reconstruction of the left hearing canal so a hearing aid could be implanted, and an eye surgery. He is now blind in his right eye and the tear gland on the left doesn't work. Petitioner treated at the VA hospitals in Madison, WI and Rockford, IL. PX9. He has had pain management consisting of radial branch nerve blocks and radiofrequency denervation. PX10. He has remained under the primary care of Dr. Michalsen, who, on Sept. 20, 2005, wrote that he did not believe Petitioner was able to return to any gainful work. PX8.

Petitioner testified he still has palsy and nerve damage on the left side of his face. He has problems chewing. Sometimes food gets stuck and he has to hack it back up. He has a sines problem on the left and blinking in his left eye. His right eye isn't permanently closed, but it doesn't see anything so it doesn't open. He wears a hearing aide in his left ear. Sometimes he's dizzy when he stands up due to disequilibrium in the left ear. He has pain in his low back and left pelvis every time he takes a step. It's like being stabbed with

a hypodermic in the butt. He also has pain into his left leg to the knee. There is paralysis in the right leg below the knee. He has a drop foot, wears a brace and uses a cane. He can sit for about 30 minutes before his symptoms increase. He can stand about 15 minutes. He walks a block and then lets the pain die down. He takes stairs one at a time. He is taking a pain killer, Tramadol, every 3 to 4 hours. He has never been released for work.

The Arbitrator concludes:

1. Petitioner's earnings were $53,342.64 and his average weekly wage was $1,025.82, which includes his overtime earnings. In Airborne Express v. Ill. Workers' Comp. Comm. (App.Ct., 1st Dist., 2007), 372 Ill.App.3d 549, 865 N.E.2d 979, 2007 Ill.App.LEXIS 244, 310 Ill.Dec. 259, the court held: "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." Airborne Express, 372 Ill.App.3d at 554. Stated conversely, hours that an employee is required to work as a condition of employment or hours that are set and worked each week are not excluded from the calculation of the AWW as overtime. The two criteria are stated disjunctively. Here, Petitioner established that overtime was mandatory under his union contract so he could be disciplined for failing to work overtime. He has met the first criteria identified by the court and his overtime hours are included in his average weekly wage calculation; he is not required to prove more.
2. Petitioner is permanently totally disabled within the meaning of sec. 8(f) of the Act based on all the medical records, the opinion of Dr. Michalsen, Petitioner's credible testimony and the parties' agreement.