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**The Employer
Advisory**

Employment Case Analysis You Can Use

CHANGE IN THE LAW: OVERTIME PAY NOT INCLUDED IN AVERAGE WEEKLY WAGE UNLESS MANDATORY OR REGULAR

Bart Amato worked as a delivery truck driver for Edward Don Company ("EdwardDon"). Amato was injured making a delivery. The Arbitrator made an award of compensation, calculated to include his overtime earnings. Edward Don filed a review.

The Illinois Industrial Commission affirmed and adopted the Arbitrator's decision. Edward Don filed an appeal. The circuit court confirmed the Commission's decision, and Edward Don appealed to the Illinois Appellate Court.

Edward Don argued the Commission improperly included Amato's overtime wages when computing his average weekly wage ("AWW"). The appellate court agreed and remanded for recalculation of Amato's AWW.

The claimant has the burden of establishing his AWW. Amato introduced into evidence a wage summary sheet, which demonstrated he had only worked for Edward Don during the 16 weeks preceding his accident. During those 16 weeks, Amato worked a total of 624 "regular hours," varying from 28 to 48 hours of regular time per week. He worked 77 hours of overtime, varying from 0 to 7.8 hours per week. The arbitrator included the 77 hours of overtime Amato worked, and multiplied that number by the claimant's regular rate of pay.

Amato presented no evidence establishing the number of hours that he was required to work. In 15 of the 16 weeks that Amato worked for Edward Don, he worked some overtime. There was no evidence the overtime was mandatory or that he regularly worked a set number of overtime hours each week. Thus, the commission erred in including Amato's overtime hours.

Overtime hours are not included in the calculation of AWW unless, a claimant proves (1) the overtime hours were required as a condition of employment or (2) the overtime hours were part of the regular hours of employment.

Edward Don Co. v. The Indus. Commn., 801 N.E.2d 18 (Ill. App. 1st. 2003).

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