

## In This Issue:

June 2010

On June 8, 2010, the Ohio Supreme Court held in *State ex rel. FedEx Ground Package Sys., Inc. v. Industrial Commission* that it was not an abuse of discretion for the Industrial Commission to include wages from a second job in the calculation of an injured worker's temporary total disability benefits.

## Ohio Supreme Court Determines that Workers' Compensation Rate Includes Wages from Second Job

By Bonnie Kristan

On June 8, 2010, the Ohio Supreme Court held in *State ex rel. FedEx Ground Package Sys., Inc. v. Industrial Commission*, No. 2010-Ohio-2451, that it was not an abuse of discretion for the Industrial Commission to include wages from a second job in the calculation of an injured worker's temporary total disability benefits.

### Facts

At the time he was injured while working for FedEx Ground Package Systems, Inc. ("FedEx Ground") on October 24, 2006, Christopher Roper held two jobs. He worked part-time at FedEx Ground and also worked at Integrated Pest Control, where he earned significantly more than he did from his FedEx Ground employment.

In computing his compensation rate, FedEx Ground, a self-insured employer, set Roper's average weekly wage<sup>1</sup> (AWW) and his full weekly wage<sup>2</sup> (FWW) based solely on his earnings from FedEx Ground.

Roper filed a motion to have his AWW and FWW increased to reflect his combined earnings from both jobs. The Industrial Commission granted the motion and increased his AWW and FWW accordingly, resulting in rates that were over twice the employer's initial calculation. FedEx Ground filed a mandamus action in the Tenth District Court of Appeals alleging that the Industrial Commission abused its discretion in basing the AWW/FWW on earnings from both employers. Upon denial of the writ of mandamus by the Court of Appeals, FedEx Ground appealed to the Ohio Supreme Court.

### Ohio Supreme Court Ruling

FedEx Ground made two arguments in seeking to exclude or limit Mr. Roper's secondary wages from consideration in the AWW and FWW calculations. First, it argued that the higher AWW resulting from the combined wages would create a disincentive for the injured employee to work at his other job even if he was

medically able. It also argued that it was unfair to make an employer pay temporary total disability compensation in an amount exceeding the weekly amount that the employee made while in its employ.

The court, in a 5-0 *per curiam opinion*, rejected FedEx Ground's arguments and affirmed the judgment of the Court of Appeals that the Industrial Commission did not abuse its discretion in considering Roper's combined wages when setting his AWW and FWW.

The court relied on Ohio Revised Code section 4123.61, which refers to wages earned in the year prior to the injury without qualification or exclusion, in determining that there was no statutory basis for excluding concurrent wages from the AWW calculation. Furthermore, the court found that the case law cited by FedEx did not support limiting the inclusion of concurrent wages to jobs involving similar employment as it was based on a significantly different predecessor version of section 4123.61.

The court went on to reject FedEx Ground's argument that an injured employee would have no incentive to keep working at his secondary job if medically able. It explained that section 4123.56(A) prohibits temporary total compensation when work within the physical capabilities is made available, and went on to state that "a claimant who is still physically capable of working the second job but chooses not to cannot receive temporary total disability compensation."

Finally, the court did not find the Industrial Commission's calculations unfair, stating that it is not unfair to compensate an injured worker for the cumulative loss of wages if he is unable to work both jobs.

## Implications for Employers

Self-insured employers, especially those with a higher proportion of part-time employees, should be aware that all of an injured worker's earnings from the year prior to the date of injury, and not just those from its employ, should be considered in the calculation of AWW/FWW.

Additionally, although it makes financial sense to offer light duty work in almost every case when an injured worker is assigned work restrictions so as to minimize compensation paid in the claim, this would be especially true in the case of an injured employee with concurrent employment, since any temporary total compensation would be paid at a higher rate.

Finally, it would be worthwhile for the employer against whom the claim was filed to communicate with the injured worker's concurrent employer to determine if his job there is within the work restrictions assessed by the physician or if light duty is available. If the injured worker is able to perform his second job but refuses, it could be a basis on which to dispute payment of temporary total compensation. If the employee cannot perform the second job due to medical restrictions, the other employer may be willing to offer light duty, which would help minimize benefits paid in the claim.

.....  
Bonnie Kristan is a Shareholder in Littler Mendelson's Cleveland office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Kristan at bkristan@littler.com.

---

<sup>1</sup> The average weekly wage is "the basis on which to compute benefits" and "should approximate the amount the claimant would have received had he continued working after the injury as he had before the injury." Ohio Revised Code §4123.61; *State ex rel. Erkard v. Indus. Comm.* (1988), 55 Ohio App. 3d 186, 188, 563 N.E.2d 310. The average weekly wage is typically based on the employee's earnings for the year prior to injury divided by 52 weeks. *State ex rel. Clark v. Indus. Comm.* (1994), 69 Ohio St. 3d 563, 565, 634 N.E.2d 1014.

<sup>2</sup> The first 12 weeks of compensation are based on the full weekly wage, as opposed to the average weekly wage which is the basis for payment after the first 12-week period. See Ohio Revised Code §4123.61. "For employees who have been either continuously employed for six weeks prior to the date of injury or who have worked for at least seven days prior to the date of injury, the full weekly wage shall be the higher amount of either: a) the gross wages (including overtime pay) earned over the aforementioned six week period divided by six; or b) the employee's gross wages earned for the seven days prior to the date of injury (excluding overtime pay)." Industrial Commission Joint Resolution No. R80-7-48.