

**STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU**

<b>IN THE MATTER OF THE WAGE CLAIM</b>	)	<b>Case No. 2113-2003</b>
<b>OF THOMAS BITSUE,</b>	)	
<b>Claimant,</b>	)	
	)	
<b>vs.</b>	)	<b>FINAL AGENCY DECISION</b>
	)	
<b>BIG SKY TANK COMPANY, LLC,</b>	)	
a Montana limited liability corporation,	)	
<b>Respondent.</b>	)	

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**I. Introduction**

The Hearing Officer convened a telephone hearing on the claimant's wage claim on January 28, 2004. The claimant Thomas Bitsue participated, together with his attorney, D. Michael Eaton, Montana Legal Services Association. Big Sky Tank Company, LLC ("Big Sky") participated through Kristin Richard, its Operations Manager. The parties agreed to a telephonic hearing, with all testimony submitted by telephone. Thomas Bitsue and Wilbur Lovato testified. The hearing officer admitted as exhibits the documents bearing the Bates stamp numbers 19 through 22. On March 24, 2004, Bitsue filed a notice that he would not be filing a further post hearing brief and this matter was submitted for decision.

**II. Issue**

The issue in this case is whether Big Sky owes wages for work performed to Bitsue, as provided by law, as alleged by his complaint, and if so whether Big Sky is additionally liable for either a penalty or liquidated damages.

**III. Findings of Fact**

1. Thomas Bitsue, the claimant, met Wilbur Lovato when Bitsue worked for Lovato's New Mexico tank-building company, Double Tank. Bitsue started as the shop welder and eventually worked as the shop foreman. Double Tank shut down when it went into bankruptcy and Bitsue found work with another tank-building company in New Mexico. Lovato approached him about helping to move equipment to Montana for a new tank-building company Lovato was starting. Lovato proposed that after he got the company up and running, Bitsue would become shop foreman.

2. Lovato offered Bitsue \$600.00 per week to work as shop foreman after the start-up, with a place on-premises to sleep (Bitsue would be "on-call" while on the premises). Bitsue agreed. He also agreed to participate, before commencing his employment, in moving equipment needed for the business and personal property of Lovato from New Mexico to Montana, with his expenses paid.

3. The loading for the move of equipment to Montana commenced in late September 2002. The equipment included both tank-building and office equipment and personal items belonging to Lovato. Bitsue helped with the move, and traveled with Lovato and others who were coming to work for Lovato's new company. The entourage arrived in Billings, Montana, on or about September 27, 2002 ( Friday), stayed at a hotel over the weekend and unloaded on Monday, September 30, 2002. Bitsue commenced his duties as shop foreman during the unloading in Billings.

4. Big Sky Tank Company, Lovato's new tank-building company, was Bitsue's employer. Big Sky directed Bitsue's performance of his work. The method of pay was to be biweekly. Big Sky provided the premises and the equipment and hired the men Bitsue was to supervise. Big Sky had the right to fire Bitsue at any time.

5. Lovato told Bitsue that he need not report his time, since he was on salary. Bitsue never did report his time.

6. Bitsue asked for payment of his wages several times. Lovato told him the company would pay him (including back pay), when it began to make money.

7. Bitsue took a week off at Thanksgiving 2002 to visit his family in New Mexico. He made two trips back to New Mexico (including the trip during which he took the week off to visit his family) on behalf of Big Sky. His expenses for those trips were paid, and he received an additional \$1,017.43 for which no receipts were submitted. That \$1,017.43 was payment for wages.

8. From September 30, 2002, through January 17, 2003, Bitsue worked a total of 15 weeks for Big Sky (excluding the week of Thanksgiving). He received, in addition to travel expense payments in excess of receipts submitted for company reimbursement, an additional \$600.00 in payments, which can only be for wages.

9. Bitsue, in his post-hearing brief, adopted the department's redetermination as correct and accurate. He asked for relief on this basis. The department accepted the figure of \$360.00 per week, based upon the employer's evidence of wages, rather than the \$600.00 per week salary. Since Bitsue made a binding admission that \$360.00 per week was accurate, he earned \$5,400.00 in wages from Big Sky over the 15 weeks he was an employee. Big Sky paid him (through Lovato or directly) \$1,617.43.

10. Big Sky owes Bitsue \$3,782.57 in wages due and unpaid.

11. According to the department redetermination, Big Sky has a history of violation of wage and hour statutes within the three years preceding this claim. Big Sky did not rebut this determination. 110% of \$3,782.57 is \$4,160.83, which is the penalty Big Sky owes Bitsue.

12. Big Sky owes Bitsue \$7,943.40 in past due and unpaid wages and statutory penalty.

#### **IV. Opinion**

##### Employment Status

Montana law requires employers to compensate employees for all hours worked. Mont. Code Ann. § 39-2-204(1). The law applies when there is an employer-employee relationship. In this case, the claimant, Thomas Bitsue, came from New Mexico for the express purpose of working for Big Sky Tank Company, L.L.C., in Billings, Montana. Bitsue credibly testified that Big Sky's owner and founder, Wilbur Lovato, hired him to work as the shop foreman, beginning after the move of business equipment and personal property to Montana.

The most significant indication that a employer-employee relationship exists is the degree of control that the alleged employer exercises over the work of the alleged employee. *E.g.*, *Watts v. Montana Rail Link, Inc.*, ¶ 9, 1999 MT 18, 293 Mont. 167, 975 P.2d 283. The "control test" appears in a statute, and in the case law, most typically with regard to whether there is an employment or independent contract relationship. Mont. Code Ann. § 39-51-201(15); *see Sharp v. Hoerner Waldorf Corp.* (1978), 178 Mont. 419, 584 P.2d 1298. *Sharp* recognizes four factors in determining if the right to control exists, evidencing an employment relationship. These factors are: (1) direct evidence of right or exercise of control; (2) method of payment; (3) furnishing of equipment; and (4) right to fire. All four of these factors indicate that Big Sky did employ Bitsue.

The parties never subsequently reached an enforceable agreement modifying Bitsue's status as an employee. Bitsue could not waive his rights as an employee, which are established as a matter of public policy. *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232, 234-35. An employer's good faith belief that a person is not an employee or that the person has been paid in full does not defeat application of the employment laws. *Rosebud County v. Roan* (1981), 192 Mont. 252, 627 P.2d 1222, 1228. Bitsue testified that he was told he need not record and submit his hours worked, because he was on salary. Big Sky could not have a good faith belief that he was not an employee, but even if it did, he still prevails.

Big Sky clearly had the right (which it exercised intermittently) to control Bitsue's work performance. The method of payment was that of payment for wages (payment for hours worked), even though Bitsue received virtually no pay because he did not submit his hours. The equipment involved in the tank operation was essentially all that of Big Sky. Big Sky could have fired Bitsue at any time, and he could (as he ultimately did) quit at any time. He was an employee of Big Sky.

Big Sky has not provided credible evidence that Bitsue was a prospective owner, working on speculation for an interest in the company. Big Sky has not provided credible evidence that

Bitsue was a guest of Lovato who merely happened to be residing on the business premises of Big Sky. Big Sky has not provided credible evidence that Bitsue moved from his family and current work to Montana in order to live at the shop of Lovato's fledgling business. This assertion is incredible.

### Wages Due

There is no record, nor specific evidence, of the hours Bitsue worked. Thus, there is no way to calculate hourly wages and evaluate whether he worked any overtime. However, there is credible evidence that he agreed to move to Montana for a salary as shop foreman. He testified that the salary was \$600.00 a week, however, in his post-hearing submission he cited the Department's redetermination as accurate and adopted it. That redetermination set his wages at \$360.00 per week. In the absence of accurate employer record-keeping, the employee's presentation can establish the wages due. *Lewis v. B & B Pawnbrokers, Inc.* (1998), 292 Mont. 82, 968 P.2d 1145; **quoting** *Garsjo v. Dept. of Lab. and Indus.* (1977), 172 Mont. 182, 562 P.2d 473, 476; **as quoted in** *Holbeck v. Stevi-West, Inc.* (1989), 240 Mont. 121, 783 P.2d 391, 394-5. Bitsue's filing supports the figure in the redetermination.

### Remedies

Mont. Code Ann. § 39-3-206(1) provides for an employee to recover the wages due plus a penalty against an employer in an amount not to exceed 110% of the wages due and unpaid. The rules of the department provide for the full 110% penalty for any amounts not paid by an employer who has previously violated wage hour statutes within the past three years. Admin. R. Mont. 24.16.7556(3).

## **V. Conclusions of Law**

1. The State and the Commissioner of the Montana Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 *et seq.*; *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Big Sky Tank Co., L.L.C., employed Thomas Bitsue beginning upon September 30, 2002, through January 17, 2003, at a wage of \$360.00 per week, excluding the week of Thanksgiving, for a total of \$5,400.00, of which he received pay of \$1,617.43. Bitsue is entitled under Montana law to the sum of \$3,782.57 in wages due and unpaid. Mont. Code Ann. § 39-3-204(1).

3. Big Sky owes Bitsue a penalty of 110% of the unpaid wages, in the amount of \$4,160.83. Mont. Code Ann. § 39-3-206(1); Admin. R. Mont. 24.16.7556(3).

## **VI. Order**

Big Sky Tank Co., L.L.C., is ORDERED to tender a cashier's check or money order for \$7,943.40 (\$3,782.57 in wages and \$4,160.83 in penalty), payable to THOMAS BITSUE, mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision.

DATED this 14th day of May, 2004.

DEPARTMENT OF LABOR & INDUSTRY

HEARINGS BUREAU

By: /s/ TERRY SPEAR

Terry Spear

Hearing Officer

**THE NEXT PAGE CONTAINS A NOTICE OF APPEAL RIGHTS AND TIME WITHIN WHICH TO SEEK REVIEW OF THIS FINAL DECISION.**

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.

If no appeal is filed and the payment ordered is not made, the Montana Commissioner of Labor and Industry will apply to the District Court for a judgment enforcing this Order. Mont. Code Ann. § 39-3-212. Such an application is not a request for review of the validity of this Order.