

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM )	Case No. 312-2011
OF FRANK B. FOSTER, )	
)	
Claimant, )	
)	<b>FINAL AGENCY DECISION</b>
vs. )	
)	
JC BILLION, INC., a Montana Corporation, )	
)	
Respondent. )	

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**I. INTRODUCTION**

On August 25, 2010, Frank B. Foster filed a claim with the Department of Labor and Industry contending that JC Billion, Inc. (Billion) owed him \$1,175.02 in overtime wages for the time period from July 15, 2010 to August 16, 2010. On September 9, 2010, Billion filed a response to the claim, contending that Foster was not entitled to any overtime pay because it was not approved according to company policy. Billion later contended that Foster was not entitled to overtime because he was a partsman and therefore exempt from overtime provisions.

On October 15, 2010, the Department's Wage and Hour Unit issued a determination finding that Foster was a partsman and was therefore an exempt employee for whom the employer was not required to pay an overtime premium. On October 29, 2010, Foster requested a hearing on the matter.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Department's Hearings Bureau on November 10, 2010. On November 16, 2010, the Hearings Bureau issued a notice of hearing. Following a scheduling conference on December 2, 2010, the matter was set for hearing on March 17, 2011. The hearing date was later continued to May 3, 2011, at the request of counsel for Foster. Billion did not oppose the requested continuance. On April 26, 2011, the hearing officer conducted a pre-hearing conference with counsel for the parties.

Hearing Officer David A. Scrimm conducted the hearing on May 3, 2011. The claimant was present and represented by Geoffrey C. Angel, Attorney at Law. Lyman H. Bennett, Attorney at Law, represented the respondent. Foster, Joe Billion, and Judy Rockafellow testified. The administrative record compiled at the Wage and Hour Unit (Documents 1-86) and Exhibit E were admitted into evidence.

The claimant filed post-hearing proposed findings of fact and conclusions of law on June 3, 2011. The respondent filed its response on June 16, 2011 and the case was deemed submitted for decision on that date.

## **II. ISSUE**

The issue in this case is whether JC Billion, Inc. owes wages for work performed, as alleged in the claim filed by Frank B. Foster, and owes penalties or liquidated damages, as provided by law.

## **III. FINDINGS OF FACT**

1. Foster was hired as a shipping/receiving clerk for the parts department at Billion's main location on 19th Avenue in Bozeman, Montana. On March 18, 2008, Foster was transferred to Billion Auto Body, working as a partsman for that operation. Foster was paid a monthly salary of \$2,300.00.

2. Foster was not paid overtime for 59.95 hours he worked in excess of 40 hours per week during the time period between July 16, 2010 and August 15, 2010. Billion does not dispute that Foster worked these additional hours. During this time period, Foster averaged approximately 53.8 hours per workweek.

3. Foster's job duties included ordering and receiving parts for vehicles being repaired, answering the telephone, shuttling vehicles, checking in parts and delivering them to the technicians installing them on vehicles, chauffeuring customers, and photographing vehicles.

4. On June 30, 2010, a major hailstorm hit the Bozeman area resulting in hail damage to vehicles across the city. Billion Auto Body's workload increased to 3 to 4 times normal. On July 23, 2010, the body shop manager left his employment with Billion. Judy Rockafellow was made interim manager and Billion asked all employees of the body shop to "step up" to help the company and its customers through this difficult time. All employees stepped up including Foster.

5. During the time period in question, Foster performed all his normal duties identified in Finding of Fact No. 3, but also performed additional duties including calling insurance companies, handling claim paperwork and copying estimates into Billion's Pathways estimating system, cleaning cars, scheduling customers, and helping insurance adjusters.

6. Foster's principal duty was working as a partsman and he was engaged in this activity for greater than 74% of his workday (40 hours in his principal duties per week out of the average of 53.8 hours during the claim period).

7. Billion is an automotive dealership whose primary location is Bozeman, Montana. In 2010, it had total sales in excess of \$46,000,000.00, 79% of which were derived from the sale of new and used vehicles. Billion is not a manufacturer of automobiles. Billion is engaged in interstate commerce and primarily engaged in the business of selling vehicles to ultimate purchasers.

8. Billion's body shop is a part of Billion's overall operations and is not a separate business or legal entity.

9. Foster was not paid on a commission or contract basis.

10. Foster is owed \$1,193.00 in unpaid overtime wages. Foster's weekly rate is determined by multiplying his monthly salary by 12 months and then dividing the sum by 52 weeks. Admin R. Mont. 24.16.2512(2)(d)(ii). His weekly rate is \$530.77 ( $\$2,300.00 \times 12 \div 52 = \$530.77$ ). His regular hourly rate is then determined by dividing his weekly rate by 40 hours. Foster's hourly rate is \$13.27 ( $\$530.77 \div 40 = \$13.27$ ). Foster's overtime rate is \$19.90 per hour or 1½ times his hourly rate ( $\$13.27 \times 1.5 = \$19.90$ ). Foster is owed overtime wages in the amount of \$1,193.00 (59.95 overtime hours x \$19.90 per hour).

11. Penalty on the unpaid wages is \$1,312.30 ( $\$1,193.00 \times 110\% = \$1,312.30$ ).

#### IV. DISCUSSION AND ANALYSIS<sup>1</sup>

Both Montana law and the Fair Labor Standards Act (FLSA) prohibit employers from employing their employees in excess of 40 hours in a single workweek

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<sup>1</sup>Statements of fact in this discussion and analysis are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

unless the employee is compensated at a wage rate not less than one and one-half times the employee's regular wage rate. Mont. Code Ann. § 39-3-405 and 29 U.S.C. § 207(a)(1). Both laws exempt certain employees from the requirement for overtime premium pay. Montana law allows employees owed wages, including wages due under state law and the FLSA, to file a claim with the Department of Labor and Industry to recover wages they are due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232.

Foster contends that Billion owes him overtime pay for 59.95 hours worked in excess of 40 hours per week.<sup>2</sup> Billion contends that Foster is an exempt employee because he was employed as a partsman primarily engaged in the servicing of automobiles.

A. *Foster is not exempt under state law as a partsman for an automobile dealership.*

The FLSA and the Montana Wage Payment Act exempt certain employees of automobile dealerships from the overtime provisions of these statutes.

Section 7 shall not apply with respect to “any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers.”

29 CFR §779.372

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<sup>2</sup> Foster also argued in his post-hearing brief that based on a quote from the Department's Wage & Hour website, if Foster worked any non-exempt time during a workweek, all his time would be considered non-exempt. The hearing officer could find no authority for this proposition. He did find a federal regulation to this effect, but 29 CFR 780.11 is captioned “[e]xemptions applicable to agriculture, processing of agricultural commodities and related subjects under the Fair Labor Standards Act” which would not be applicable under the facts of this case. The hearing officer also found a federal court decision which held that “the fact that the plaintiff did on occasion perform non-exempt work does not automatically make him a non-exempt employee. The Court must look not only at specific tasks plaintiff sometimes performed but also at the overall nature of the job.” *Stein v. J.C. Penney Co.*, 557 F. Supp. 398, 401 (W.D. Tenn. 1983).

The [overtime] provisions of 39-3-405 do not apply to:

...

a salesperson, parts person, or mechanic paid on a commission or contract basis and primarily engaged in selling or servicing automobiles, trucks, mobile homes, recreational vehicles, or farm implements if the salesperson, parts person, or mechanic is employed by a nonmanufacturing establishment primarily engaged in the business of selling the vehicles or implements to ultimate purchasers;

Mont. Code Ann. § 39-3-406.

The only substantial difference between the federal and state provisions is that Montana specifically requires that the employee be “paid on a commission or contract basis.” *Id.* However, the federal courts have interpreted the FLSA provision as being inapplicable to employees paid on an hourly basis as opposed to by commission. *See McBeth v. Gabrielli Truck Sales, Ltd.*, 2010 U.S. Dist. LEXIS 116599 (E.D.N.Y. Nov. 1, 2010) (Intent of Congress to exempt from overtime compensation those dealership employees who worked irregular and/or seasonal hours and/or were paid on a commission basis); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1098 (5th Cir. Fla. 1973), (exemption for salesmen and mechanics in recognition of the traditional incentive pay plans and irregular hours of such employees).

While the federal case law may be interpreted to deny Billion the exemption because Foster’s exempt status at the time of his employment was not based on his irregular hours and because he was not paid on a commission basis, the partsman exemption in Montana law provides greater clarity by its specific requirement that the employees identified as potentially exempt must be paid on a commission or on a contract basis.

When the FLSA does not provide a remedy for unpaid overtime wages, an employee may look to the Montana Minimum Wage and Overtime Protection Act. *See* Mont. Code Ann. § 39-3-408, *Plouffe v. Farm & Ranch Equip. Co.*, 174 Mont. 313, 319-320 (Mont. 1977), *Stewart v. Region II Child & Family Servs.*, 788 P.2d 913, 919 (Mont. 1990).

Foster was not paid on commission, he was paid a monthly salary of \$2,300.00 and therefore cannot be exempt from overtime on that basis. The Wage and Hour Unit determined that there was an employment contract between Foster and Billion.

See § 39-2-101 (employment defined as a contract). However, such an interpretation would make the statute's "on a contract basis" language superfluous. It would also make every partsman exempt regardless of the basis for payment and would be contrary to the rules of statutory construction that require meaning be given to all of a statute's provisions. Mont. Code Ann. § 1-2-101.

When the intent of the Legislature cannot be readily determined from the plain language of the statute, it is reasonable to examine the legislative history. *Skinner Enterprises v. Board of Health* (1997), 286 Mont. 256, 274, 950 P.2d 733, 744. The salesman, partsman, and mechanic exclusion for the Montana Minimum Wage and Overtime Act was part of Senate Bill 155 which was introduced in the 1979 Legislature and did not originally include the "paid on a commission or contract basis" language. Testimony before the Senate Labor Committee illuminates the Legislature's intent to narrow the exclusion by amending the bill to add this provision. See Mont. Sen. Business & Labor Comm: Test. of Dep't of Labor at Hearing on SB 155, 46th Leg. (January 29, 1979)<sup>3</sup>. The overall intent of the Montana exclusion can also be inferred from the federal courts' interpretation of the similar FLSA provision "as a recognition of the incentive method of remuneration for salesmen, partsmen, and mechanics employed by an automobile dealership." *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095, 1098 (5th Cir. Fla. 1973). Foster was not paid on any basis that would demonstrate an incentive method - he was paid a straight salary.

While the exact meaning of "paid on a commission or on a contract basis" is not absolutely clear from the wording of the statute, it is clear that the amendment of SB 155 to add this language was meant to limit the exemption to only those employees paid on these bases, not to broaden it to every partsman who is an employee.

The only potential evidence that Foster was paid on a contract basis is Document 60, "Frank Foster Shipping and Receiving Pay Plan," which does not expressly show Foster's consent, which reserves management's right to modify it at any time and which by its own terms is not a contract. In interpreting contracts, one resolves disputes against the drafter. Mont. Code Ann. § 28-3-206. Accordingly, Foster was not paid on a contract basis.

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<sup>3</sup> The Department's testimony, presented by Dick Kane, administrator of the Labor Standards Division, argued that the proposed language of SB 155 was more restrictive than its federal counterpart and specifically that the salesman, mechanic, and partsman exemption should not be available for employers of employees paid on an hourly basis or to those not paid on a commission basis.

The employer must prove each of the elements of an overtime exclusion. *Wage Claim of Holbeck v. Stevi-West*, 240 Mont. 121, 125 (Mont. 1989). The Montana courts have not held that the exclusions are inapplicable except to persons ‘plainly and unmistakably within their terms and spirit,’ but a fair reading of Mont. Code Ann. § 39-3-408 requires a similar standard of proof for the exemptions under both the FLSA and Montana law. See *Auer v. Robbins*, 519 U.S. 452, 462, 137 L.Ed. 2d 79, 91, 117 S. Ct. 905, 912 (1997) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 4 L. Ed. 2d 393, 80 S. Ct. 453 (1960)); see also *Donovan v. Nekton, Inc.*, 703 F.2d 1148, 1151 (9th Cir. 1983); *Klem v. County of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000). Billion has not proven the elements of the partsman exclusion under Montana law. Because Foster was not paid on a commission, on a contract basis, or by some incentive basis, he was not clearly and unmistakably within the terms and spirit of the partsman exclusion.

Billion must, therefore, pay overtime to Foster for the work he performed in excess of 40 hours during the period of his claim.

B. *Penalty is due on the wages due Frank Foster.*

Montana Administrative Rules applicable to wage and hour cases require imposition of penalty when wages are found to be due and unpaid. Where overtime wages are found to be due, the applicable administrative rules require the imposition of a 110% penalty. Admin. R. Mont. 24.16.7561.

## V. CONCLUSIONS OF LAW

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

2. Frank B. Foster’s principal duty was as a partsman for JC Billion, Inc.

3. Foster was not paid on a commission or contract basis under Mont. Code Ann. § 39-3-406(2)(d).

4. Foster was entitled to overtime premium pay when he worked more than 40 hours per week.

5. Billion owes Foster overtime premium pay and penalties in the total amount of \$2,505.30, for the 59.95 hours he worked in excess of 40 hours per week during the period July 16, 2010 to August 15, 2010.

**VI. ORDER**

JC Billion, Inc. is hereby ORDERED to tender a cashier's check or money order in a total amount of \$2,505.30, representing \$1,193.00 in unpaid wages and \$1312.30 in penalties, made payable to Frank B. Foster. JC Billion, Inc. may deduct applicable withholding taxes from the portion representing wages, but not from the portion representing penalties.

All payments required above shall be mailed to the Employment Relations Division, P.O. Box 201503, Helena, MT 59620-1503, no later than 30 days after service of this decision.

DATED this 26th day of July, 2011.

DEPARTMENT OF LABOR & INDUSTRY  
HEARINGS BUREAU

By: /s/ DAVID A. SCRIMM  
DAVID A. SCRIMM  
Hearing Officer

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.