

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

<b>IN THE MATTER OF THE WAGE CLAIM</b>	)	<b>Case No. 1137-2004</b>
<b>OF OLIVER F. STONE,</b>	)	
<b>Claimant,</b>	)	
	)	
<b>vs.</b>	)	<b>FINAL AGENCY DECISION</b>
	)	
<b>LIBBY WOODWORKS, LLC, a Montana LLC,</b>	)	
	)	
<b>Respondent.</b>	)	

\* \* \* \* \*

**I. INTRODUCTION**

On November 26, 2003, Oliver Stone filed a claim with the Department of Labor and Industry in which he contended that Libby Woodworks, LLC, had failed to pay him overtime pay in the amount of \$1,992.13 for the period April 1, 2003 through September 30, 2003. On January 28, 2004, the Department's Wage and Hour Unit issued a determination finding that the employer owed Stone \$1,832.32 in overtime pay, plus \$1,007.80 in statutory penalties. On February 18, 2004, Stephen H. Dalby, Attorney at Law, filed a request for redetermination on behalf of Libby Woodworks, citing certain factual errors in the determination. On March 22, 2004, the Wage and Hour Unit issued a redetermination, finding that the employer owed Stone \$1,041.79 in overtime pay, plus a penalty in the amount of \$572.98. On April 5, 2004, both Stone and Libby Woodworks filed appeals of the redetermination. On April 28, 2004, the case was transferred to the Department's Hearings Bureau for a hearing.

On May 14, 2004, the Hearing Officer conducted a prehearing conference in this matter pursuant to a notice of hearing and telephone conference issued on May 4, 2004. The claimant, Oliver F. Stone, was present. When the Hearing Officer attempted to contact the respondent, Libby Woodworks LLC, at the telephone number listed in the file, the number had been disconnected. The Hearing Officer proceeded with the prehearing conference in the respondent's absence. At the conference, the claimant agreed to a schedule for the hearing of this case.

Following the conference, the Hearings Bureau contacted Dalby, who had not been identified by the Wage and Hour Unit as counsel in the file. Dalby indicated he would make an appearance if Libby Woodworks wanted him to represent the employer at hearing. The Hearings Bureau then determined that the telephone number included in the file was incorrect, and contacted representatives of Libby Woodworks. They agreed to proceed with the hearing as scheduled. They also indicated that they would not be represented by counsel in the case. Dalby filed no appearance in the contested case proceeding.

The Hearing Officer conducted a hearing in the case on June 2, 2004. The parties stipulated to proceeding by telephone. Stone represented himself and testified. Ora Miller, owner, represented Libby Woodworks and testified. Ginger Dailey, a former bookkeeper for Libby Woodworks, also testified. Documents numbered 1, 5, 7, 9 - 13, 15, 19 - 27, 39 - 44, 50, 52, 55 - 58, and 60 - 105 were admitted into evidence by stipulation of the parties.

The Hearing Officer found, after completing the hearing in this case, that a portion of the tape recording containing the direct examination of Stone is not audible due to technical problems. However, the missing testimony is not essential to a decision in the case because the documentary evidence is key to the decision in this case.

## **II. ISSUES**

The issues in this case are whether Libby Woodworks, LLC, owes wages in the form of overtime premium pay for work performed, as alleged in the complaint filed by Oliver F. Stone, and owes penalties or liquidated damages, as provided by law.

## **III. FINDINGS OF FACT**

1. Oliver Stone commenced employment for Libby Woodworks, LLC, in November, 2002, initially working in the spray room at a wage of \$6.00 per hour. Stone also worked in several other positions in the company. Ora Miller is the owner of Libby Woodworks.

2. In about March of 2003, Miller and Stone agreed that Stone would become the shop foreman effective April 1, 2003. They planned that he would work into the business. Instead of being paid for any overtime that he worked, Libby Woodworks would "bank" his overtime, which he would then use to invest in the business. The parties agreed that they would sign some kind of "papers" in September 2003, presumably to reflect the interest Stone would by then earn in Libby Woodworks.

3. Stone's rate of pay after April 1, 2003, continued to be \$6.00 per hour until June 16, 2003, when Libby Woodworks increased the rate of pay to \$7.00 per hour.

4. Beginning April 1, 2003, through the end of his employment on October 10, 2003, there were 28 work weeks. Stone worked more than 40 hours per week in every work week in the period except the weeks ending April 6, May 4, July 6, August 24, and September 14, 2003. The total number of hours worked in excess of 40 per week during this time was 225.53 hours. See attachment A.

5. Libby Woodworks paid Stone on a bi-monthly basis. The first pay period of the month was for the 1<sup>st</sup> of the month through the 15<sup>th</sup>. The second pay period of the month was for the 16<sup>th</sup> of the month through the end of the month. Libby Woodworks paid employees between 4 - 6 days following the end of each pay period. For most of the pay periods after April 1, 2003, with the exceptions described in findings 6 through 12, Libby Woodworks paid Stone his hourly rate times 80 hours.

6. For the pay period ending July 15, 2003, Stone's paycheck included \$147.00 for 14 hours of overtime.

7. The check for the pay period ending July 31, 2003, issued August 5, 2003, was for \$480.00 even though Stone's rate of pay had increased to \$7.00 before then. On August 6, 2003, Libby Woodworks issued a second check to Stone in the amount of \$71.80. Although there is no pay stub detail to explain why the check was for \$71.80 instead of \$80.00, it is probable that this check represented the difference between the \$560.00 Libby Woodworks normally paid Stone for a pay period after his raise, and the \$480.00 it paid him on August 5, 2003.

8. For the pay period ending August 31, 2003, Libby Woodworks paid Stone a gross amount of \$704.50. The paycheck, number 2384, states it is for the pay period 10/01/2003 to 10/15/2003, but it is dated September 5, 2003, and the dollar amount matches the pay stub detail for the pay period ending August 31. The pay stub detail shows Libby Woodworks paid Stone for 58.5 hours at \$7.00 per hour and for 29.5 hours at \$10.00. The 29.5 hours are described on the pay stub detail as "venture." The amount of the payment over \$560.00 represented \$144.50 in overtime premium compensation (\$704.50 minus \$560.00 regular compensation = \$144.50).

9. For the pay period ending September 15, 2003, Libby Woodworks paid Stone a gross amount of \$528.50. This pay period was paid by check number 2509, which states it was for pay period 12/01/2003 to 12/15/2003. However, Stone was no longer employed in December 2003, and check no. 2509 is dated September 19, 2003, immediately after the end of the pay period. Further, the pay stub detail for a paycheck issued on September 19, 2003, shows the pay period as 12/01/2003 to 12/15/2003, but it has been modified in handwriting to show 9/01/2003 to 9/15/2003. Although the pay stub detail states this pay period was paid by check number 2401, Libby Woodworks did not issue a check numbered 2401 to Stone. Even though there is a discrepancy of \$1.33 in the net amount between the pay stub detail and check number 2509, 2509 was the pay check for the period in question. The description on this pay stub detail states that it is for 74 hours of regular time but also includes \$10.50 for 9 hours of "holiday."

10. On September 22, 2003, Libby Woodworks paid Stone \$72.00 by check number 1698. There is no pay stub detail to support this check, but the memo line of the check includes the notation "payroll." In view of timing and the "holiday" notation on the pay check detail for the pay period ending September 15, 2003, Libby Woodworks intended to compensate Stone an overtime premium for his work on Labor Day, September 1, 2003. However, taken together with the paycheck for the period ending September 15, 2003, the amount of this payment over \$560.00 represented overtime premium pay of \$40.50 ( $\$528.50 + \$72.00 = \$600.50$  minus  $\$560.00$  regular compensation = \$40.50).

11. Stone worked 8 days of the pay period ending October 15, 2003. Libby Woodworks paid him a gross amount of \$465.50. His regular compensation for 8 days of work would have been \$448.00. Thus, Stone received \$17.50 in his final paycheck which is attributable to overtime premium ( $\$465.50$  minus  $\$448.00 = \$17.50$ ).

12. Libby Woodworks never accorded Stone the ownership interest in exchange for his banked overtime, and Stone quit the job. After leaving employment with Libby Woodworks,

Stone believed the employer owed him \$2,242.13 for his banked overtime, based on a calculation completed by the employer's bookkeeper. In November 2003, Stone asked Miller for payment of the overtime. On November 10, 2003, Miller paid Stone \$250.00.

13. From April 1, 2003 through the end of Stone's employment in October 2003, Libby Woodworks paid Stone gross wages of \$7,359.30, including the \$250.00 paid on November 10, 2003. This represented regular wages of \$6,759.80 and overtime pay of \$599.50. Even though in some work weeks, Stone worked fewer than 40 hours, Stone never worked fewer than 80 hours in a pay period, except for his last week of work. Thus, Libby Woodworks did not overcompensate Stone for any of the weeks in which he worked fewer than 40 hours. See attachment B.

14. Libby Woodworks owed Stone a total of \$1,877.26 in overtime premium pay for the period April 1, 2003 through the end of his employment. Of this amount, it paid him a total of \$599.50 during his employment or on November 10, 2003. As a result, Libby Woodworks still owes Stone \$1,277.76 in overtime pay.

#### **IV. DISCUSSION AND ANALYSIS<sup>(1)</sup>**

Montana law requires employers to pay employees an overtime premium of 1½ times their hourly rate for hours worked in excess of 40 in any work week. Mont. Code Ann. § 39-3-405. An employee owed overtime premium pay may seek to recover payment by filing a claim with the Department of Labor and Industry. Mont. Code Ann. §§ 39-3-407 and 39-3-211.

##### **A. Determination of Hours Worked**

Stone contended that at the conclusion of his employment, Libby Woodworks owed him for at least 226 hours of overtime pay based on a calculation that he received from the employer's bookkeeper (document 62). He believed that he had actually worked more overtime hours than reflected on document 62 due to failures to clock in or due to travel time that was not recorded, but said he could not prove any additional hours. The employer conceded that Stone worked overtime hours but contended that it had compensated Stone for all of the overtime he worked. Thus, the initial question is the amount of overtime Stone worked.

The evidence of Stone's hours worked consisted of copies of time cards for most of the pay periods in question, and a spreadsheet showing hours worked prepared by Libby Woodworks (documents 43 and 44). At the hearing, Stone indicated that he was willing to accept the hours worked presented by Libby Woodworks on documents 43 and 44 to arrive at the hours worked. However, a review of the employer's compilation and comparison of the hours on the spreadsheet to the time cards shows fundamental errors in the way the employer prepared the spreadsheet. The most general error is that the spreadsheet includes minutes instead of converting the minutes to fractions of hours. Thus, 30 minutes is shown on the employer's spreadsheet as .3 hours rather than .5 hours. In addition, the time cards show hours worked that are not included on the employer's spreadsheet at all, and the spreadsheet shows hours not on the time cards and adds the hours together incorrectly. Therefore, with the exception of the one pay period (September 1 to September 15, 2003) for which the time cards are missing, the finding of

the number of hours worked is based on the time cards. For the pay period of September 1 to September 15, 2003, the hearing officer has relied on the employer's spreadsheet, but converted the minutes shown to fractions of hours. The hearing officer's spreadsheet showing the hours worked by Stone is included as attachment A. Stone worked a total of 225.53 overtime hours from April 1, 2003 through the end of his employment.

## **B. Determination of Wages Paid**

Libby Woodworks defended this claim by contending that it had already paid Stone for any overtime pay due to him. Its spreadsheet shows that it owed Stone \$6,787.63 in regular pay and \$1,786.79 in overtime premium, for a total wages due of \$8,574.42. It contends that during the period, it paid him wages of \$9,585.80, thus compensating him more than he was due for the period.

Libby Woodworks did not pay Stone \$9,585.80 during the period. As noted in paragraph 13 of the findings of fact, above, Libby Woodworks paid Stone gross wages of \$7,359.30, including the \$250.00 paid on November 10, 2003. The employer's spreadsheet calculation of what it paid Stone is incorrect for the following reasons:

1. It includes a paycheck, number 2259, which was payment for the pay period March 16 to March 31, 2003. This check and this pay period precede the period of the claim.
2. It includes as compensation the value of several items of furniture. The claimant never agreed to accept furniture as part of his wages, and Miller conceded as much at hearing.
3. It includes several checks that Libby Woodworks wrote to Stone to reimburse him for miscellaneous business expenses. Although Miller maintained that these checks were advances of salary to Stone so that he had money to buy gas or lunch, Stone credibly testified that this was not the case.
4. It includes three checks, numbered 2380 in the amount of \$704.50, 2401 in the amount of \$528.50, and 2525 in the amount of \$560.00, that were never issued to Stone. Although Miller contended that the employer overpaid Stone on several occasions by issuing duplicate paychecks to him, Stone denied receiving duplicate paychecks. Miller submitted as evidence copies of all checks Libby Woodworks wrote to Stone from April 1, 2003 through November 10, 2003. There are no copies of checks numbered 2380, 2401, and 2525. Thus, Libby Woodworks did not make these payments to Stone.

Further, with respect to check number 2380, check number 2384 was substituted for 2380. The pay stub detail form associated with check number 2380 states that it was for the pay period August 16 to August 31, 2003. Check number 2384 is for net pay of \$577.80, a unique amount in the paychecks issued to Stone and the exact same amount shown on the pay stub detail form. Although check number

2384 states on the memo line that it is for the pay period October 1 to October 15, 2003, it is dated September 5, 2003, well before the October pay period. The payroll checks in this case show a consistent pattern of being dated 4 to 6 days after the end of the pay period, so the fact that the check is dated September 5 and the fact that there is no copy of a check numbered 2380 establish that check number 2384 was for the period that ended August 31, 2003, and replaced check number 2380.

As to check number 2401, check number 2509 was substituted for this check. The original dates on the pay stub detail form associated with check number 2401 state it was for the pay period December 1 to December 15, 2003, and the memo line of check number 2509 states it was for the same December pay period. However, Stone was no longer employed in December. Check number 2509 is dated September 19, 2003, making it likely that it was for the period September 1 to September 15, 2003. On the pay stub detail, a handwritten notation has crossed out the number "12" in the dates of the pay period and written in the number "9", further supporting the probability that the check was for the September pay period. Even though the amount of check number 2509 differs from the net pay shown on the pay stub detail by \$1.33, the timing of the check and the absence of a copy of check number 2401 establish that check number 2509 was for the pay period that ended September 15, 2003, and replaced check number 2401.

As to check number 2525, checks numbered 1722 and 1733 were substituted for this check. The pay stub detail associated with check number 2525 states that it was for the period September 16 to September 30, 2003. The date on the pay stub detail is October 6, 2003, and the net amount of the pay shown is \$469.69. Libby Woodworks issued two checks to Stone on October 6, 2003: check number 1722 in the amount of \$250.00 and check number 1723 in the amount of \$219.69. These two checks together total the net amount of pay due to Stone for the pay period that ended September 30, 2003. The timing and the amounts together with the absence of a copy of check number 2525 establish that the checks numbered 1722 and 1723 replaced check number 2525.

5. Finally, because the employer did not associate the replacement checks with the appropriate pay stub detail when it prepared its spreadsheet, it listed the net amounts of the three replacement checks rather than the gross amounts reflected on the pay stub detail. Therefore, the payment to Stone associated with check number 2384 was \$704.50, with check number 2509, \$528.50, and with the combined checks numbered 1722 and 1723, \$560.00.

In summary, Libby Woodworks paid Stone gross wages of \$7,359.30, as shown in the hearing officer's reconstruction of the payments actually made to Stone, included as attachment B. The payroll and accounting records of Libby Woodworks on which it based its contention that it overpaid Stone are inaccurate and its spreadsheet is unreliable. As to the alleged duplicate payroll checks, absent evidence in the form of check copies to substantiate the contention that it paid Stone the amounts it claimed, these records are inadequate to establish that it paid him what



it contended. The other items of claimed payment, the furniture and miscellaneous checks, do not represent wages paid to Stone; check number 2259 is not properly included in the calculation.

### C. Determination of Compensation Owed

Even though Stone was essentially correct in his contention that he worked 226 hours of overtime, his contention that the employer still owes him \$1,992.13 is not correct. Libby Woodworks in fact still owes him \$1,277.76 in overtime pay, as shown in attachment A. There are several reasons for the difference between what Stone believed he was owed, and what Libby Woodworks still owes.

First, Stone based his contention regarding the amount of overtime due on a calculation given him by the bookkeeper of Libby Woodworks (document 62). This document calculates the number of hours over 80 hours that Stone worked in each pay period, then multiplies those hours by the appropriate rate of pay for each pay period to arrive at a total of \$2,242.13. Stone then deducted the \$250.00 that the employer paid him on November 10, 2003, to arrive at the amount of his claim, \$1,992.13.

Mont. Code Ann. § 39-3-405 requires employers to pay employees 1½ times their hourly rate for hours worked in excess of 40 per week, not for hours worked in excess of 80 in a 15 or 16 day period. Because Libby Woodworks paid Stone for 80 hours twice per month, and because Stone worked more than 40 hours in some weeks and fewer than 40 in others, the computation of the overtime pay owed in document 62 is not correct. Attachment A shows the correct computation of the overtime due to Stone. In order to simplify the calculation, it shows the hours in excess of 40 per week times 1½ Stone's hourly rate in those weeks in which he worked more than 40 hours and adjusts by a negative amount in the weeks for which Stone worked fewer than 40 hours. The reason for this is to offset the straight time pay for that number of hours for which Stone was paid in another week.

As an example of the calculation in this instance, assume a two-week pay period in which an employee works 20 hours the first week and 60 hours the second week. The employer pays the employee \$480.00, or \$6.00 per hour for the total 80 hours. Even though the employee worked 20 hours of overtime in the second week, he is entitled to only \$60.00 in overtime premium pay (20 hours x \$6.00 x .5), not \$180.00 (20 hours x \$6.00 x 1.5). This is because the employer paid the straight time portion of the second week. It is necessary to adjust the overtime earned by Stone in this manner in the weeks in which he worked fewer than 40 hours, or he would be overcompensated in the other week in the same pay period in which he worked more than 40 hours. On attachment A, this circumstance is treated as follows:

<b>Period</b>	<b>Total hours</b>	<b>Overtime hours</b>	<b>Overtime Rate</b>	<b>Overtime wages</b>
Week 1	20	0	n/a	(\$120.00)
Week 2	60	20	\$9.00	\$180.00
Total				\$60.00

Thus, the total amount of overtime premium due to Stone for his overtime hours was \$1,877.26, as shown in attachment A.

The second reason for the difference between the amount Stone is claiming and the amount actually due is that Libby Woodworks paid Stone for some overtime during his employment, and this was not deducted from the total. The employer paid \$147.00 in overtime premium in the paycheck of July 21, 2003, \$144.50 in the paycheck of September 5, 2003, \$40.50 in the two combined checks for the pay period that ended September 15, 2003 (checks numbered 2509 and 1698), and \$17.50 in the final paycheck. Combining these amounts with the \$250.00 that Libby Woodworks paid to Stone on November 10, 2003, the employer had paid Stone \$599.50 of his overtime premium pay before he filed his claim. See attachment B for the computation of wages paid to Stone. Therefore, Libby Woodworks still owes Stone \$1,277.76 of the overtime he was entitled to after April 1, 2003 (\$1,877.26 minus \$599.50 = \$1,277.76).

#### **D. Determination of Penalty Owed**

Montana law provides for a penalty to be assessed against an employer and paid to the employee in an amount not to exceed 110% of the wages due and unpaid. Mont. Code Ann. § 39-3-206(1). The rules of the department provide that for overtime violations, the full 110% penalty applies for any amounts not paid within the time specified in the department determination. Admin. R. Mont. 24.16.7561. Even though Stone stated in the hearing that he did not care about the penalty, the imposition of the penalty is mandatory under the rule.

This case is an overtime case, and the full 110% penalty is therefore applicable. Therefore, Libby Woodworks owes Stone a penalty in the amount of \$1,405.54 ( $\$1,277.76 \times 1.1 = \$1,405.54$ ).

#### **V. CONCLUSIONS OF LAW**

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

2. Libby Woodworks, LLC, violated Mont. Code Ann. § 39-3-405 by failing to pay Oliver F. Stone overtime premium for hours worked in excess of 40 per week during the period April 1, 2003 through October 12, 2003. Libby Woodworks owes Stone \$1,277.76 in overtime premium which it has not paid him.

3. Because it violated Mont. Code Ann. § 39-3-305, Libby Woodworks, LLC, is liable to Stone for a penalty in the amount of \$1,405.54, in addition to the unpaid wages.

#### **VI. ORDER**

Libby Woodworks, LLC, is hereby ordered to tender a cashier's check or money order in the amount of \$2,683.30, representing \$1,277.76 in unpaid wages for overtime premium, and



\$1,405.54 in penalty, payable to the claimant, Oliver F. Stone, and delivered to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than August 30, 2004.

DATED this 30th day of July, 2004.

DEPARTMENT OF LABOR AND INDUSTRY

By:

Anne L. MacIntyre, Chief  
Hearings Bureau

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

If there is no appeal filed and no payment is made pursuant to this Order, the Commissioner of the Department of Labor and Industry will apply to the District Court for a judgment to enforce this Order pursuant to § 39-3-212, MCA. Such an application is not a review of the validity of this Order.

\* \* \* \* \*

CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

OLIVER STONE  
300 TAMARACK LN  
LIBBY MT 59923

ORA MILLER  
LIBBY WOODWORKS LLC  
551 HWY 2 WEST  
LIBBY MT 59923

DATED this 30th day of July, 2004.

/NATACHA BIRD/

1. Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.