

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

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|--|------------------------------|
| IN THE MATTER OF THE WAGE CLAIM )      | Case No. 1124-2003           |
| OF LOREN T. SHRINER, )                 |                              |
| )                                      |                              |
| Claimant, )                            |                              |
| )                                      | <b>FINAL AGENCY DECISION</b> |
| vs. )                                  |                              |
| )                                      |                              |
| SMURFIT-STONE CONTAINER )              |                              |
| CORPORATION, a Delaware Corporation, ) |                              |
| )                                      |                              |
| Respondent. )                          |                              |

\* \* \* \* \*

**I. INTRODUCTION**

On December 27, 2002, Loren T. Shriner filed a claim with the Department of Labor and Industry, contending that the respondent owed him \$13,090.75 in overtime premium pay. On March 12, 2003, the Department issued a determination holding that Shriner was exempt from the requirement to pay overtime wages and dismissed the claim. On March 28, 2003, Shriner appealed the determination and requested a hearing.

On April 28, 2003, the Department transferred the case to the Hearings Bureau for hearing. Following joint motions for summary judgment, hearing officer Anne L. MacIntyre granted summary judgment in favor of Smurfit-Stone on October 15, 2003.

On February 14, 2005, the First Judicial District Court reversed the Hearing Officer's grant of summary judgment and remanded the case to the Department for further proceedings.

The hearing officer conducted a hearing in the case on July 5 and 6, 2005. Elizabeth A. O'Halloran, Attorney at Law, represented the claimant, Loren T. Shriner. Donald C. Robinson, Attorney at Law, represented the respondent, Smurfit-Stone Container Corp. Its human resource officer, Lori Jacobsen, was present as

Smurfit-Stone's representative. Loren T. Shriner, Drexel Mills, David Serba, Ken Erickson, Dennis Cranston, and James Heath testified. Claimant's exhibits 1 through 45, and respondent's exhibits 501 through 524 were admitted into evidence by stipulation. The parties also stipulated to the inclusion of the deposition exhibits and the administrative record that was made part of the summary judgment proceedings into evidence in this case. In addition exhibits 525A, 525B, 525C, 525D, and 525E, photographs of the respondent's facility, were admitted for demonstrative purposes.

The parties filed final post-hearing arguments on October 14, 2005, and the case was deemed submitted for decision.

## II. ISSUE

The issue in this case is whether Smurfit-Stone Container Corp., owes overtime premium pay for work performed, as alleged in the complaint filed by Loren T. Shriner, and owes penalties or liquidated damages, as provided by law.

## III. FINDINGS OF FACT

1. Smurfit-Stone Container Corp. (Smurfit-Stone) is an enterprise engaged in commerce, as that term is used in federal Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*
2. The claimant, Loren Shriner, is employed by respondent as a Pulp and Utilities Supervisor in the Pulp and Utilities Department of Smurfit-Stone's paper mill at Frenchtown, Montana.
3. Smurfit-Stone hired Shriner into an hourly union position on October 1, 1969. He was promoted and became a salaried supervisor on December 30, 1985. Claimant's position presently, and during the disputed period January 1, 2002, to August 8, 2003, was Pulp and Utilities Supervisor, at a salary of \$82,702.80. In addition, he received a bonus in the amount of \$9,448.00, resulting in total compensation in 2002 of \$92,150.00.
4. When Shriner's assignment is shift supervisor, there are approximately 27 hourly employees in the Pulp and Utilities Department working on that shift.

5. For more than 50% of the weeks during 2001 and for approximately 20% of the weeks in 2002, claimant acted as shift supervisor.

6. The Pulp and Utilities Department employs approximately 100 hourly workers and makes up over 70% of all processes that are necessary for the production of paper.

7. Shriner's discretion is limited by pre-established rules and regulations, such as the union contract that Smurfit-Stone entered in to with the union that represents the hourly workers at the mill.

8. In addition to his duties as shift supervisor, Shriner was responsible to write "zero energy lockout" procedures. These procedures were designed to insure safety of workers in the paper mill when it became necessary to shut down a system or piece of equipment for maintenance.

9. Shriner's work on "zero energy lockout" procedures was managerial work.

10. Both when Shriner was assigned to work as a shift supervisor, and at other times, he performed the following duties:

- < Communicating between the Pulp and Utilities Department and the paper machines for efficient coordination to ensure mill production goals;

- < Observing environmental discharges, maintaining pollution control devices, and operating within federal and state discharge standards for air and water;

- < Employee recognition for safety and years of service;

- < Scheduling and calling in workers, approving time sheets and adjusting grievances;

- < Identifying training needs for workers;

- < Touring operating areas checking equipment for abnormal conditions and talking to workers about problems they might be having, safety, or operations;

- < Reinforcing the importance of safety, observing workers to see if they are wearing proper personal protective equipment and performing their work in a safe

manner, including conducting safety training meetings and working one-on-one with crew members to develop job skill knowledge and confidence;

< Assisting in the implementation of department policies, objectives and procedures, reviewing operating data and production; and

< Assisting in coordination, scheduling, and expediting maintenance work in the department to maintain equipment availability and writing work orders.

11. Smurfit-Stone paid Shriner on a salary basis. He could take personal leave away from work without being docked pay.

12. During the period January 1, 2002 through August 8, 2003, Shriner worked 305.75 hours in excess of his 40 regular hours of work per week.

13. Shriner's regular rate of pay during the period January 1, 2002 through March 24, 2002 was \$38.79; thereafter it was \$43.07. His weekly salary for the former period was \$1,551.60; for the latter it was \$1,722.97.

#### 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 work week unless the employee is compensated at a rate not less than one and one-half times the regular rate at which the employee is employed. Mont. Code Ann. § 39-3-405 and 29 U.S.C. § 207(a)(1). Both laws exempt from the requirement for overtime premium pay "any employee employed in a bona fide executive, administrative, or professional capacity . . . ." Mont. Code Ann. § 39-3-406(1)(j) and 29 U.S.C. § 213(a)(1). Montana law allows employees owed wages, including wages due under the FLSA, to file a claim with the Department of Labor and Industry to recover wages due. Mont. Code Ann. § 39-3-207; *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 668 P.2d 232.

Shriner contends that Smurfit-Stone owes him overtime premium pay for hours worked in excess of 40 per week during the period January 1, 2002 through

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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.

August 8, 2003. Smurfit-Stone contends that Shriner is an exempt executive employee and therefore not entitled to overtime premium pay.

The FLSA gives the U.S. Department of Labor (DOL) the power to adopt regulations to define and delimit the terms “bona fide executive, administrative, or professional capacity.” 29 U.S.C. § 213(a)(1). Regarding the term “bona fide executive,” the regulations provide:

The term employee employed in a bona fide executive \* \* \* capacity in section 13(a)(1) of the act shall mean any employee:

- (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and
- (b) Who customarily and regularly directs the work of two or more other employees therein; and
- (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
- (d) Who customarily and regularly exercises discretionary powers; and
- (e) Who does not devote more than 20 percent . . . of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section . . . and
- (f) Who is compensated for his services on a salary basis at a rate of not less than \$155 per week . . ., exclusive of board, lodging, or other facilities: Provided, That an employee who is compensated on a salary basis at a rate of not less than \$250 per week . . ., exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

29 C.F.R. § 541.1.

The proviso contained in 29 C.F.R. § 541.1(f) is generally referred to as the “short test” applicable to highly paid executives. Smurfit-Stone pays Shriner a weekly salary that is substantially more than \$250.00. There is no dispute that Smurfit-

Stone pays Shriner on a salary basis. Thus, the short test is applicable to determine whether Shriner is an exempt employee. Under the short test, Shriner is an exempt employee if his “primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees.”

### 1. Primary Duty Test

The hearing officer held in the order granting summary judgment in this case that Shriner’s primary duty was management. In its order reversing the grant of summary judgment and remanding the case for further proceedings, the district court agreed with the ruling of the hearing officer that Shriner’s work on lockout procedures and safety was managerial. However, the district court remanded for hearing on whether the duties actually performed by Shriner as relief shift supervisor were managerial, and how this finding affects the conclusion that Shriner’s duties were primarily managerial.

Shriner’s primary duty is management. The DOL regulations identify the following types of work as management work when performed by the employee in the management of his department:

[I]t is generally clear that work such as the following is exempt work when it is performed by an employee **in the management of his department** or the supervision of the employees under him: interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; **planning the work; determining the techniques to be used;** apportioning the work among the workers; **determining the type of materials, supplies, machinery or tools to be used** or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; **providing for the safety of the men and the property.**

29 C.F.R. § 541.102(b) (emphasis added).

Shriner has two principal responsibilities: managing safety in the Pulp/Utilities Department, and working as a shift supervisor. His primary duties in the area of safety management involve the creation of lockout policies and procedures as an integral part of the plant's safety program. Lockout policies, also known as "zero energy policies" in the Smurfit-Stone operation, entail procedures for the de-energization of equipment in such a way that it will not start up unexpectedly while employees are performing maintenance and repairs. In addition to his ongoing zero energy policy activities, Shriner is responsible for other safety matters at the plant. He does safety audits. He performs tests and monitoring for purposes of safety certifications. He also completes incident reports and determines what corrective action should be taken with regard to safety. These activities are the essence of management work in the area of safety.

Shriner has asked the hearing officer to revisit the question of whether the time he spends on writing lockouts is management work. However, that question has been addressed by the district court on appeal and is the law of the case in this matter. *State of Montana v. Gilder*, 2001 MT 121, ¶14, 305 Mont. 362, 28 P.3d 488. The development of the record provides no basis for reconsidering the question.

Shriner points to the fact that some other non-management employees wrote lockouts, suggesting that these cannot therefore be management duties. Even if non-management employees are performing some of the same duties, however, that does not alter the character of the duties themselves. *See Baldwin v. Trailer Inns, Inc.* (9<sup>th</sup> Cir. 2001), 266 F.3d 1104, 1115. In addition, Shriner maintains that writing lockouts cannot be a managerial duty because it does not involve supervision or direction of employees. The argument blurs the distinction between "management" and "supervision" which is contemplated by the rules. Neither the hearing officer nor the district court held that writing lockouts constituted supervision, and the hearing officer in fact rejected that contention. "Providing for the safety of the men and the property" is clearly set forth as management work. 29 C.F.R. § 541.102. Shriner's duties on the lockouts are management duties.

In addition to his safety management duties, Shriner is responsible to work as a shift supervisor. Both when he is working as a shift supervisor and at other times, he is responsible for matters such as communication, trouble shooting, problem solving, scheduling, implementation of department policies, objectives, and procedures, coordinating, scheduling and expediting maintenance work. All of these activities are management activities. When he is not actually engaged in supervision, he may be in his office writing lockouts, but available to the workers on shift.

Although Shriner contends his primary duty is not management, he has failed to identify any tasks he performs which are not management tasks. He cites to 29 C.F.R. § 541.103, a DOL regulation which sets out five factors to weigh in determining whether an employee's primary duty is management. However, the purpose of this regulation is to determine whether an employee who spends less than 50% of his time in management activity can still be said to have management as his primary duty. Shriner spends virtually all of his time in management activity, and it is therefore unnecessary to address the five factors.

## 2. Customary and Regular Direction of Two or More Employees

The second element of the short test for a bona fide executive employee is that the employee regularly and customarily direct the work of two or more other employees. Smurfit-Stone points to the fact that Shriner regularly acts as relief shift supervisor in support of its contention that Shriner is a bona fide executive.

Under the DOL regulations, "the phrase 'customarily and regularly' signifies a frequency which must be greater than occasional but which, of course, may be less than constant." 29 C.F.R. § 541.107. The determination as to whether an employee customarily and regularly supervises other employees within the meaning of 29 C.F.R. 541.1(b) depends on all the facts and circumstances. *Murray v. Stuckey's, Inc.* (8<sup>th</sup> Cir. 1995), 50 F.3d 564, 569.

Shriner was the relief shift supervisor for 50% of the time in 2002 and 20% of the time in 2003. He cites *Secretary of Labor v. Daylight Dairy Products, Inc.* (1<sup>st</sup> Cir. 1985), 779 F.2d 784, for the proposition that this amount of supervision is insufficient to constitute customary and regular direction or supervision. In *Daylight Dairy*, the court held that supervision of part-time employees whose total hours did not exceed 80 per week (and were thus fewer than 2 full-time equivalents) more than 76% of the time did not meet the element of customary and regular direction of two or more employees.<sup>2</sup> Smurfit-Stone has correctly distinguished *Daylight Dairy* because the 80 hour rule has no application to the facts of this case.

Considering all of the facts and circumstances of this case, the work Shriner performed as a shift supervisor was sufficient to constitute customary and regular direction of at least two other employees. When he worked as relief shift supervisor, he supervised approximately 27 other employees. When not working as relief shift

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<sup>2</sup>See also *Perez v. Radioshack Corp.*, 2005 U.S. Dist. LEXIS 27122.

supervisor, in contrast to the store managers in *Daylight Dairy*, he performed other management responsibilities that would also be considered exempt under other provisions of the DOL's regulations concerning exempt employees. On this point, the regulations state: "In short, under the regulations in subpart A, work which is 'exempt' under one section of the regulations in subpart A will not defeat the exemption under any other section. 29 C.F.R. § 541.600(b).

Because Smurfit-Stone established that Shriner was exempt from the FLSA requirements for overtime premium pay as a bona fide executive employee, it is unnecessary to address the issues of damages and attorney fees in the case.

## 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. Loren T. Shriner, in his work for Smurfit-Stone Container Corp., between January 2002 and August 8, 2003, was a bona fide executive employee as provided in the federal Fair Labor Standards Act, 29 U.S.C. § 213(a)(1). As such he is an exempt employee not entitled to overtime premium pay when he works more than 40 hours per week.

3. Because Loren T. Shriner was exempt, Smurfit-Stone Container Corp., does not owe him overtime premium pay, liquidated damages, or penalties for the hours he worked over 40 per week during the period January 2002 through August 8, 2003.

## VI. ORDER

The wage claim of Loren T. Shriner for overtime premium pay is hereby **DISMISSED**.

DATED this 18th day of January, 2006.

DEPARTMENT OF LABOR AND  
INDUSTRY

By: /s/ ANNE L. MACINTYRE  
Anne L. MacIntyre, 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 mailing of the decision. See also Mont. Code Ann. § 2-4-702.