



because the evidentiary portion of the hearing was closed and because the Hearing Officer had disposed of the documents which had not been proposed for admission. Following the posthearing arguments, the case was deemed submitted for decision.

## II. ISSUE

The issue in this case is whether BioGrafts, Inc., owes wages for work performed and specifically whether it owes overtime premium pay, as alleged in the complaint filed by Cynthia Kawasaki, and owes penalties or liquidated damages, as provided by law.

## III. FINDINGS OF FACT

1. BioGrafts, Inc., 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. Cynthia Kawasaki was hired by BioGrafts on July 5, 2004 and worked for the company until her employment ended on June 14, 2005.

3. In 2004, BioGrafts was moving its operations from Minnesota to Montana. Damon Peary, president of BioGrafts, knew of Kawasaki from other contacts he had with her in a previous position she held with a company called BioAlliance. He knew that she had expertise in anatomy, physiology, allografts, and the regulations of the Food and Drug Administration concerning handling of tissue for implantation. He hired her to be customer service manager for his new operation in Montana.

4. Although Peary intended that Kawasaki would be a manager, much of the work she performed during the year she worked for BioGrafts was not managerial in nature, because the operation was just getting started. She had direct customer contact, took orders, tracked orders, shipped and received inventory, and answered questions. She also had management responsibilities, including inventory management, training other employees to perform customer service functions, and assigning and reviewing the work of other employees.

5. BioGrafts hired Kawasaki at an initial salary of \$45,000.00 per year, an hourly rate of \$21.63 based on 2,080 hours in a year, and a weekly rate of \$865.20. Effective on or about August 29, 2005, BioGrafts raised her salary to \$55,000.00, an hourly rate of \$26.44 based on 2,080 hours per year, and a weekly rate of \$1,057.60. Kawasaki's rate of pay at the time her employment ended was \$55,000.00 per year.

6. BioGrafts paid Kawasaki on a salary basis. If she worked fewer than 40 hours in a week, such as for a holiday or when she took time off for an appointment, it did not reduce the amount she was paid.

7. When BioGrafts hired Kawasaki, she was the only customer service employee. It hired a customer service representative named Laurie Larson in the first week of October. Larson, who was subordinate to Kawasaki, left BioGrafts before Thanksgiving of 2004. BioGrafts transferred Heidi O'Harren from an affiliate company to be a customer service representative subordinate to Kawasaki about the end of November 2004. BioGrafts hired Nathan Sherar in mid-March 2005 to be a customer service representative but shortly thereafter assigned him to manage customer service for an affiliate company. Although he continued to have customer service responsibilities for BioGrafts, he was not a full-time subordinate to Kawasaki. BioGrafts had no other full-time customer service representatives subordinate to Kawasaki until it hired Darren Pettyjohn and Ann Bolton in mid-May 2005.<sup>1</sup> Kawasaki trained employees who worked in other parts of BioGrafts or its affiliates to handle customer service calls for BioGrafts, but Kawasaki did not direct or supervise these other employees.

8. Kawasaki worked 416 hours over 40 hours per week during her employment. During nine weeks of her employment, she worked fewer than 40 hours, including the weeks ending December 18, 2004, January 1, 2005, January 15, 2005, January 22, 2005, February 26, 2005, March 5, 2005, April 9, 2005, May 21, 2005, and June 4, 2005. During those weeks, BioGrafts paid her a salary based on 40 hours per week.

9. In April 2005, BioGrafts had a presentation by Wage and Hour Unit staff about the wage and hour laws.

10. Kawasaki was not paid overtime pay because BioGrafts claimed she was exempt as a bona fide executive.

11. The failure of BioGrafts to pay overtime premium was not done in good faith or with reasonable grounds to believe the failure was not a violation of the Fair Labor Standards Act.

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<sup>1</sup>Bolton's status as a full-time subordinate is questionable because she was an employee of a temporary service company.

#### IV. DISCUSSION AND ANALYSIS<sup>2</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 certain employees from the requirement for overtime premium pay. 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.

The FLSA exempts from the requirement for the employer to pay overtime premium pay “any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]. . .).” 29 U.S.C. § 213(a)(1). Montana law has a comparable exception at Mont. Code Ann. § 39-3-406(1)(j). The key question in this case is whether Kawasaki was, as BioGrafts contends, an exempt bona fide executive employee not entitled to overtime premium pay. The parties stipulated that BioGrafts was engaged in interstate commerce, and thus subject to the FLSA. Because of this, if Kawasaki is not exempt under the FLSA, then the remedies available under the FLSA govern her claim. Mont. Code Ann. § 39-3-408.

The U.S. Secretary of Labor has adopted regulations to “define and delimit” the term “employee employed in a bona fide executive capacity” at 29 C.F.R. § 541.100. The regulations provide:

(a) The term “employee employed in a bona fide executive capacity” in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

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<sup>2</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.

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

(b) The phrase “salary basis” is defined at § 541.602; “board, lodging or other facilities” is defined at § 541.606; “primary duty” is defined at § 541.700; and “customarily and regularly” is defined at § 541.701.

The burden of proving an exemption rests on the employer who asserts the exemption. *Holbeck v. Stevi-West, Inc.* (1989), 240 Mont. 121, 125, 783 P.2d 391, 393 ; *Rosebud County v. Roan* (1981), 192 Mont. 252, 627 P.2d 1222. Questions involving exemption from overtime are to be narrowly construed in order to carry out the purposes of the FLSA. *Reich v. Wyoming* (10<sup>th</sup> Cir., 1993), 993 F.2d 739, 741. The employer has the burden of proving all elements of the exemption. *Idaho Sheet Metal Works, Inc. v. Wirtz* (1966), 383 U.S. 190, 206.

The evidence unquestionably established that Kawasaki was paid more than \$455.00 per week on a salary basis. She appeared to suggest that because the employer showed her compensation as an hourly rate on her pay stubs that she was not salaried. However, Kawasaki admitted that BioGrafts did not dock her pay if she worked fewer than 40 hours per week, as when there were holidays or she had medical appointments. The fact that the employer converted her salary to an hourly rate for purposes of its pay system does not change its character as a salary. Kawasaki was paid on a salary basis.

The evidence was conflicting on whether Kawasaki’s primary duty was management and whether her suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight. Kawasaki attempted to portray her responsibilities as purely those of a customer service representative whose recommendations regarding the status of other employees received no weight at all. BioGrafts contended that she was a valued senior employee with important management responsibilities.

Because the business was just starting up, Kawasaki had both management and non-management duties and responsibilities. Had she remained employed, it is likely that the position would have made a transition to the senior management position that Peary envisioned. In the context of this startup business, it is reasonable to characterize Kawasaki's primary duty as management of the customer service function at BioGrafts. Further, although she did not have the authority to hire and fire other employees, her suggestions and recommendations were given weight at least until the last few months of her employment.

Nevertheless, because Kawasaki did not customarily and regularly direct the work of two or more other employees, she does not qualify as a bona fide executive for purposes of the FLSA. For the first four months of employment, she had no subordinates. From October 2004 through mid-March 2005, she directed the work of one employee. For a short period, she also directed the work of Nathan Sherar, but then the employer assigned him other responsibilities. Finally, one month before Kawasaki's employment terminated, BioGrafts hired two additional customer service representatives. But this short period of time is insufficient to find that Kawasaki "customarily and regularly" directed the work of two or more employees.<sup>3</sup> Two or more employees means two full-time employees or their equivalents. 29 C.F.R. § 541.104(a). The fact that Kawasaki cross-trained other employees in the organization or its affiliates to take customer service calls for BioGrafts does not prove customary and regular direction of employees by Kawasaki, even if she supervised them when they performed this function. It is simply not "direction" as contemplated by the regulation, which uses the term to mean supervision. 29 C.F.R. § 541.104.

BioGrafts also defended this claim by denying that Kawasaki worked the hours she claimed. However, in a case involving an overtime claim, the employer not only has the burden of proving that an individual is exempt and not subject to overtime coverage, but also the responsibility of keeping records to establish the number of hours worked. *See Roan v. Rosebud County* (1980), 192 Mont. 252, 627 P.2d 1222. When an employer fails to keep time records on employees subject to the law, the employee need only prove the extent of overtime worked as a matter of just and reasonable inference. In *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473, the Montana court adopted the standard set forth

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<sup>3</sup>Furthermore, as noted above, by the time BioGrafts hired Pettyjohn and Bolton, Peary had lost confidence in Kawasaki as a manager, and no longer accorded particular weight to her recommendations.

first in *Anderson v. Mt. Clemens Pottery* (1946), 328 U.S. 680, wherein the U.S. Supreme Court held:

[W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on the employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that he has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and the extent of the work as a matter of just and reasonable inference . . . .

The Montana court then went on to set a procedure for determining how to address a lack of records, or inadequate records, adopting the reasoning of the Michigan Supreme Court in *Purcell v. Keegan* (1960), 359 Mich. 571, 103 N.W.2d 494:

When the employee shows, as he did here, that he did in fact perform overtime work for which he was not properly compensated and produces sufficient evidence to show the extent and amount of such work as a matter of just and reasonable inference, the burden shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the evidence of the employee. And if the employer fails to produce such evidence, it is the duty of the court to enter judgment for the employee, even though the amount be only a reasonable approximation.

BioGrafts maintained no records of the hours Kawasaki worked, and had no other substantial evidence to negate Kawasaki's testimony that she did work the hours she claimed. The testimony of Mike Hetherington was inconclusive because he did not commence work for Peary until April 2005, and his opportunity to observe Kawasaki was limited. Further, of the 416 overtime hours claimed by Kawasaki, 330 were during the period prior to Hetherington commencing employment. Thus, he simply had no knowledge of how many hours Kawasaki worked. Even giving

evidentiary value to Peary's closing arguments that Kawasaki did not work the hours claimed, Peary also stated that, at the beginning, everyone was working extra hours to get the business started. Kawasaki's claims are not inconsistent with Peary's statements. Her testimony and documents are the only substantial evidence on the question of hours worked, and are entitled to credit in the absence of other evidence.

Even though Kawasaki worked the 416 hours of overtime she claims, the calculation of the overtime premium owed in documents 32 and 33 is incorrect because Kawasaki worked more than 40 hours in some weeks and fewer than 40 in others. Attachment A shows the correct computation of the overtime due to Kawasaki. In order to simplify the calculation, it shows the hours in excess of 40 per week multiplied by 1½ Kawasaki's hourly rate in those weeks in which she worked more than 40 hours and adjusts by a negative amount in the weeks for which Kawasaki worked fewer than 40 hours. The reason for this is to offset the straight time pay for that number of hours for which Kawasaki was paid in another week. To hold otherwise would give her the benefit of being paid on a salary basis in weeks she worked fewer than 40 hours, but then treat her as an hourly employee when she worked more than 40 hours.

As an example of the calculation in this instance, assume a two-week period in which Kawasaki worked 36 hours the first week and 45 hours the second week, as she did in the last two weeks of January 2005. BioGrafts paid Kawasaki \$1,057.60, or \$26.44 per hour, for each week. Even though Kawasaki worked 5 hours of overtime in the second week, she is entitled to only \$92.54 in overtime premium pay (4 hours x \$26.44 x .5 plus 1 hour x 1.5 x 26.44), not \$198.30 (5 hours x \$26.44 x 1.5). This is because the employer paid the straight time portion of 4 of the overtime hours worked the second week when it paid Kawasaki her full salary in the first week. It is necessary to adjust the overtime earned by Kawasaki in this manner in the weeks in which she worked fewer than 40 hours, or she would be overcompensated in the weeks in which she worked more than 40 hours. On attachment A, this circumstance is treated as follows:

Period	Total hours	Overtime hours	Overtime Rate	Overtime wages
Week 1	36	0	n/a	(\$105.76)
Week 2	45	5	\$39.66	\$198.30
Total				\$92.54



Thus, the total amount of overtime premium due to Kawasaki is \$13,887.77, as shown in attachment A.

Kawasaki is also entitled to liquidated damages for BioGrafts' failure to pay overtime premium under the FLSA. Under Montana law, the liquidated damages provision of the FLSA, not the statutory penalty provisions of the state Minimum Wage and Overtime Act, apply to cases subject to FLSA. Mont. Code Ann. § 39-3-408. The FLSA has a liquidated damages provision which states:

Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid . . . wages . . . and in an additional equal amount as liquidated damages.

29 U.S.C. § 216.

However, the Portal to Portal Act alters the liquidated damages provision of the FLSA.

In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 of such Act.

29 U.S.C. § 260. The court may refuse to award liquidated damages if the employer demonstrates it acted reasonably and in good faith.

To demonstrate "good faith" under this exception, an employer must show "the act or omission giving rise to [the violation] was in good faith and that [it] had reasonable ground for believing that [its] act or omission was not a violation of the [FLSA]." *Brock v. Shirk* (9<sup>th</sup> Cir. 1987), 833 F.2d 1326, 1330. This test has both subjective and objective components. *Id.* Good faith requires an honest intention and no knowledge of circumstances which might have put the employer on notice of

FLSA problems. *Id. See also Key West, Inc. v. Winkler*, 2004 MT 186, ¶¶ 29-32, 322 Mont. 184, 191, 95 P.3d 666, 671.

Peary's testimony showed that Kawasaki was well paid, he believed that she was in fact a manager, and that he believed in being generous and fair with his employees. Thus, he maintained that he acted in good faith in Kawasaki's compensation. Nevertheless, the evidence is insufficient to meet the test required by the law. Although the Hearing Officer has no doubt of Peary's honest intention, it was not reasonable for him to believe that Kawasaki qualified as a bona fide executive under the law. There was simply no objective basis on which Peary could have believed that Kawasaki was customarily and regularly supervising the work of two or more employees. Further, there was evidence presented at hearing that BioGrafts had a presentation by Wage and Hour Unit staff about the wage and hour laws, and this presentation should have put Peary on notice of FLSA problems.

Kawasaki also seeks attorney's fees for pursuing this claim. However, attorney's fees are not available in this administrative proceeding. Mont. Code Ann. § 39-3-214; *Chagnon v. Hardy Construction Co.* (1984), 208 Mont. 420, 680 P.2d 932 *and Thornton v. Commissioner* (1980), 190 Mont. 442, 621 P.2d 1062 (attorney's fees are not recoverable at the administrative stage of a wage and hour claim but are available once the case is appealed to the district court).

## 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. Cynthia Kawasaki did not customarily and regularly direct the work of two or more employees during her employment with BioGrafts, Inc., and is therefore not exempt from the requirement that she be paid overtime premium compensation pursuant to the federal Fair Labor Standards Act, 29 U.S.C. § 213(a)(1).

3. BioGrafts, Inc., owes Cynthia Kawasaki \$13,887.77 in overtime premium compensation for the period July 5, 2004 through the end of Kawasaki's employment under 29 U.S.C. § 207(a)(1).

4. BioGrafts, Inc., did not show that it acted reasonably and in good faith when it failed to pay Cynthia Kawasaki overtime premium compensation as required

by law. Kawasaki is therefore entitled to liquidated damages in the amount of \$13,887.77. 29 U.S.C. §§ 216 and 260.

5. Cynthia Kawasaki is not entitled to attorney's fees.

## VI. ORDER

BioGrafts, Inc., IS HEREBY ORDERED to tender a cashier's check or money order in the amount of \$27,775.54, representing \$13,887.77 in overtime premium pay and \$13,887.77 in liquidated damages, payable to the claimant, Cynthia Kawasaki, and delivered to the Wage and Hour Unit, Employment Relations Division, P.O. Box 6518, Helena, Montana 59604-6518 no later than April 30, 2006. BioGrafts, Inc., may deduct applicable withholding from the wage portion but not the liquidated damages portion.

DATED this 6th day of April, 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 service of the decision. See also Mont. Code Ann. § 2-4-702.

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 Mont. Code Ann. § 39-3-212. Such an application is not a review of the validity of this Order.

## Attachment A

Overtime premium pay calculations, Kawasaki v. BioGrafts, Inc.  
Case No. 8-2006

work week ending	hourly rate	total hours	overtime hours	overtime rate	overtime wages
7/10/2004	21.63	42.0	2.0	32.445	64.89
7/17/2004	21.63	55.0	15.0	32.445	486.68
7/24/2004	21.63	55.0	15.0	32.445	486.68
7/31/2004	21.63	55.0	15.0	32.445	486.68
8/7/2004	21.63	57.0	17.0	32.445	551.57
8/14/2004	21.63	55.0	15.0	32.445	486.68
8/21/2004	21.63	55.0	15.0	32.445	486.68
8/28/2004	21.63	55.0	15.0	32.445	486.68
9/4/2004	26.44	55.0	15.0	39.66	594.90
9/11/2004	26.44	48.0	8.0	39.66	317.28
9/18/2004	26.44	60.0	20.0	39.66	793.20
9/25/2004	26.44	57.5	17.5	39.66	694.05
10/2/2004	26.44	57.5	17.5	39.66	694.05
10/9/2004	26.44	57.5	17.5	39.66	694.05
10/16/2004	26.44	57.5	17.5	39.66	694.05
10/23/2004	26.44	57.5	17.5	39.66	694.05
10/30/2004	26.44	45.0	5.0	39.66	198.30
11/6/2004	26.44	45.0	5.0	39.66	198.30
11/13/2004	26.44	45.0	5.0	39.66	198.30
11/20/2004	26.44	45.0	5.0	39.66	198.30
11/27/2004	26.44	46.0	6.0	39.66	237.96
12/4/2004	26.44	45.0	5.0	39.66	198.30
12/11/2004	26.44	51.0	11.0	39.66	436.26
12/18/2004	26.44	36.0	-4.0	39.66	(105.76)
12/25/2004	26.44	40.0	0.0	39.66	-
1/1/2005	26.44	36.0	-4.0	39.66	(105.76)
1/8/2005	26.44	45.0	5.0	39.66	198.30
1/15/2005	26.44	36.0	-4.0	39.66	(105.76)
1/22/2005	26.44	36.0	-4.0	39.66	(105.76)
1/29/2005	26.44	45.0	5.0	39.66	198.30
2/5/2005	26.44	53.0	13.0	39.66	515.58
2/12/2005	26.44	45.0	5.0	39.66	198.30
2/19/2005	26.44	45.0	5.0	39.66	198.30
2/26/2005	26.44	36.0	-4.0	39.66	(105.76)
3/5/2005	26.44	36.0	-4.0	39.66	(105.76)
3/12/2005	26.44	49.0	9.0	39.66	356.94
3/19/2005	26.44	49.0	9.0	39.66	356.94
3/26/2005	26.44	49.0	9.0	39.66	356.94
4/2/2005	26.44	45.0	5.0	39.66	198.30
4/9/2005	26.44	37.5	-2.5	39.66	(66.10)
4/16/2005	26.44	48.0	8.0	39.66	317.28
4/23/2005	26.44	49.0	9.0	39.66	356.94
4/30/2005	26.44	49.0	9.0	39.66	356.94
5/7/2005	26.44	56.5	16.5	39.66	654.39
5/14/2005	26.44	49.0	9.0	39.66	356.94
5/21/2005	26.44	0.0	-40.0	39.66	(1,057.60)
5/28/2005	26.44	50.5	10.5	39.66	416.43
6/4/2005	26.44	37.5	-2.5	39.66	(66.10)
6/11/2005	26.44	47.5	7.5	39.66	297.45

\$ 13,887.77