

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM)	Case No. 730-2011
OF ROBERT G. THOMPSON,)	
)	
Claimant,)	
)	FINAL AGENCY DECISION
vs.)	
)	
JC BILLION, INC., a Montana Corporation,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On October 25, 2010, Robert G. Thompson filed a claim with the Department of Labor and Industry contending that JC Billion, Inc. (Billion) owed him \$17,014.99 in overtime wages for the time period from March 1, 2009 to July 31, 2010. On November 3, 2010, Billion filed a response to the claim, contending that Thompson was not entitled to any overtime pay because he was in an exempt position as a managerial employee and that he was a salesperson servicing automobiles.

On December 23, 2010, the Department's Wage and Hour Unit issued a determination dismissing Thompson's claim finding that Thompson was a salesperson and mechanic exempt from the Fair Labor Standards Act under MCA 39-3-406. On January 6, 2011, Thompson requested a hearing on the matter.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Department's Hearings Bureau on January 24, 2011. On January 26, 2011, the Hearings Bureau issued a notice of hearing. Following a scheduling conference on February 11, 2011, the matter was set for hearing on May 3, 2011.

On April 26, 2011, the hearing officer conducted a pre-hearing conference with counsel for the parties.

Hearing Officer David A. Scrimm held a hearing in the case 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. Thompson, Joe

Billion, Peter Billion, and Wayne Walker testified. The administrative record compiled at the Wage and Hour Unit (Documents 1-178) and Exhibit B were admitted into evidence. Thompson filed his proposed findings of fact, conclusions of law and brief on June 3, 2011. Billion filed its response on June 17, 2011, and the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether JC Billion, Inc. owes wages for work performed, as alleged in the claim of Robert B. Thompson, and owes penalties or liquidated damages, as provided by law. Specifically, the issue is whether Thompson's employment was exempt from the requirement to pay overtime premium because he was employed as a manager and salesman.

III. FINDINGS OF FACT

1. Thompson was hired as a lube tech at Billion's Pit Stop operation on July 1, 2006. On March 1, 2009, Thompson was appointed to the manager position for the Pit Stop operation.

2. Thompson was not paid overtime for 819.21 hours he worked in excess of 40 hours per week.

3. Thompson's duties as manager were to greet customers, inspect vehicles, tires, alignment, write up work tickets, upsell products, show customers to the waiting room, review the "report card" with the customer and provide an estimate for additional work that may need to be done, check the car and deliver it to the waiting customer, and collect payment. Thompson also took sales reports and sales receipts to the accounting department and put them in the safe. Thompson oversaw the quality of the work performed by the lube techs who did the majority of the work on customers' vehicles. He would set the schedules for the lube techs including vacations and other time off requests.

4. Thompson could recommend discipline and pay, but had no authority to implement either. All substantive disciplinary actions were taken by the management team. Thompson could independently assess minor discipline such as oral warnings. Thompson recommended one employee be disciplined and the management team was going to terminate the employee, but Thompson recommended that the employee be given one more chance. The management team followed Thompson's recommendation.

5. Thompson participated in the hiring of James. This was done primarily to train Thompson in the hiring process and not to seek his active participation. Thompson did not participate in the recruitment of new employees or in the screening process. He only participated in the interview of the person the management team had selected as the finalist for the position. Thompson could recommend hiring an employee, but all hiring was done by the management team.

6. Thompson did not determine whether the Pit Stop would offer sales promotions or whether or how it would advertise its products and services. Thompson did not review Pit Stop employees' time cards. The Pit Stop was part of the service department which was managed by Wayne Walker. Walker would visit the Pit Stop on a daily basis. Ernie, the most experienced lube tech, was responsible for training newly hired lube techs. Thompson did not conduct inventory or develop procedures for the Pit Stop. Thompson did not order supplies, materials, or equipment for the Pit Stop.

7. The day-to-day operation of the Pit Stop was determined by senior management before Thompson was hired as manager. JC Billion's management is headed by Joe Billion, Peter Billion, and Wayne Walker. Thompson only participated in management team meetings when a Pit Stop hiring or disciplinary issue was on the agenda. Marketing plans were developed by others and Thompson was not involved.

8. Thompson was paid a base salary of \$800.00 plus commission. If his combined base salary and commission did not exceed \$2,400.00 per month, he would receive a guaranteed salary of \$2,400.00. Thompson's commissions exceeded the \$2,400.00 guarantee only once during his employment as manager of the Pit Stop. In 2010, Thompson also received \$909.00 in commissions based on a dollar for each report card issued. This amount was over and above his commission sales. Thompson also received an annual bonus in 2009 of \$2,000.00.

9. Thompson's primary duty was to sell services to Billion's Pit Stop customers.

10. JC 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. JC Billion is engaged in interstate commerce.

11. JC Billion is not a manufacturer of automobiles. Billion is primarily engaged in the business of selling vehicles to ultimate purchasers.

12. The Pit Stop is a part of Billion's overall operations and is not a separate business or legal entity.

IV. DISCUSSION AND ANALYSIS¹

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) and (17). 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.

Thompson contends that JC Billion owes him overtime pay for 819.21 hours worked in excess of 40 hours per week. JC Billion contends that Thompson is an exempt employee because he was employed in a bona fide administrative capacity and because he was a salesperson who sold services to owners of automobiles.

A. Thompson is not exempt from the overtime provisions of the FLSA because he is not employed in a bona fide administrative capacity.

Under the FLSA, employers are not required to pay overtime premium pay to “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 parallel exemption at Mont. Code Ann. § 39-3-406(1)(j). “FLSA exemptions are to be ‘narrowly construed against . . . employers’ and are to be withheld except as to persons ‘plainly and unmistakably within their terms and spirit.’” *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).

To establish that an employee is exempt as a bona fide administrative employee, an employer must prove: 1) the employee is compensated on a salary or fee basis at a rate of not less than \$455.00 per week; 2) the employee's primary duty

¹Statements 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.

is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and 3) the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance. 29 CFR § 541.200.

Thompson's minimum annual salary of \$24,000.00 exclusive of the bonus and report card commissions establishes that he was compensated on a salary basis of not less than \$455.00 per week and thus satisfies the first exemption factor.

The regulations of the U.S. Department of Labor provide:

The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement.

29 CFR § 541.200.

However, Thompson's primary duty was sales and not management of the Pit Stop operation. As Joe Billion testified and the hearing officer finds, Thompson's job was 70 percent sales. Billion testified and Thompson agreed that Thompson's duties included: greeting customers, inspecting vehicles, tires and alignment, writing up work tickets, upselling products, showing customers to the waiting room, reviewing the "report card" with the customer and suggesting additional work to be done and providing an estimate for it, checking the status of the car and delivering it to the waiting customer, and collecting payment.

As manager of the Pit Stop, Thompson could recommend discipline and pay, but had no authority to implement either. All significant hiring and disciplinary actions were taken by the management team. Thompson participated in the hiring of

two employees, primarily to train him in the hiring process and not to seek his active participation. Thompson only participated in the interview of the person the management team had selected as the finalist for the position.

The Pit Stop was part of the service department which was managed by Wayne Walker, who in concert with other Billion senior managers determined whether the Pit Stop offered sales promotions and how it advertised its services. Walker, not Thompson, was responsible for inventory, ordering supplies and equipment for the Pit Stop. All procedures for the operation of the Pit Stop were developed prior to Thompson becoming its manager.

Thompson's primary duty was sales and not the management of the Pit Stop. His duties as manager were largely limited to following existing policies and procedures developed by Billion's senior management without Thompson's input. As such, he had very little discretion and exercised very limited independent judgment. Thompson had the knowledge about the products and services offered by the Pit Stop and was personable enough to sell them to Billion's customers. His management duties were ancillary to that function.

Thompson does not clearly and unmistakably fall within the definition of an exempt administrative employee and is therefore not exempt from the overtime provision of the FLSA on that basis.

B. Thompson is exempt under both federal and state law as a salesman 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

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).

Here, Thompson was paid a base salary of \$800.00 plus commission. If his sales were insufficient to earn \$2,400.00 in any month, he received that as a guaranteed minimum salary. In addition, he received one dollar for each “report card” issued by the Pit Stop and an annual bonus. Thompson was clearly paid on a commission basis.

Although Thompson’s testimony on the topic of whether he was involved in sales was somewhat conflicting and confused, he agreed with Joe Billion’s description of his job duties as manager of the Pit Stop. Billion testified that 70 percent of Thompson’s job was selling and Thompson testified that “most of my time was at the counter and selling.” Thompson also agreed that talking to customers at the counter included selling. He also received a commission on sales of oil, tires, and the “report cards.” It is clear Thompson was a salesman and a service advisor for JC Billion. In either case his primary duty was sales and he is exempt from the overtime provisions of both the FLSA and Montana law. *Id.* (All salesmen of an automobile dealership fall within the exemption) (salesmen engaged in servicing automobiles exempt).

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. Robert Thompson's primary duty, between March 1, 2009 through July 31, 2010, was the sale of services and goods to customers of JC Billion.

3. Thompson was not employed in a bona fide administrative capacity, as provided in the federal Fair Labor Standards Act, 29 U.S.C. § 213(1) and (17), and Montana law.

4. Thompson was employed as a salesman, paid on a commission basis, primarily engaged in the servicing of automobiles at a nonmanufacturing establishment primarily engaged in the selling of such vehicles to ultimate purchasers as provided in the federal Fair Labor Standards Act, 29 U.S.C. § 213(1) and (10), and Mont. Code Ann. § 39-3-406(2)(d). As such, he was an exempt employee not entitled to overtime premium pay when he worked more than 40 hours per week.

5. Because Thompson was exempt, Billion does not owe him overtime premium pay, liquidated damages, or penalties for the hours he worked over 40 per week during the period March 1, 2009 through July 31, 2010.

VI. ORDER

The wage claim of Robert G. Thompson for overtime premium pay is hereby **DISMISSED**.

DATED this 30th day of June, 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.