

DECISION OF ADJUDICATOR  
IN THE MATTER OF AN ADJUDICATION  
PURSUANT TO SECTIONS 2-75 and 4-6 OF  
**THE SASKATCHEWAN EMPLOYMENT ACT**  
LRB FILE No. 076-15.



COMPLAINANT: Warren Hill  
Represented by Ron Byers,  
Labour Standards Officer

RESPONDENT: Sim & Stubbs Holdings Limited  
Represented by Doug Sim and Gordon Stubbs

DATE OF HEARING: June 24, 2015, 10:00 a.m.

PLACE OF HEARING: Rosetown Civic Centre, Room 59

**I. INTRODUCTION**

This is an appeal by the Employer, Sim & Stubbs Holdings Limited, from a Wage Assessment in the amount of \$15,318.14 in favour of the Employee, Warren Hill, dated February 11, 2015.

Warren's claim was for unpaid overtime for the period September 1, 2012 to September 14, 2013.

The Department of Labour Relations and Workplace Safety received notice from the Employer on April 8, 2015 of the Employer's intention to appeal the Wage Assessment on the following grounds:

- 1) Mr. Warren Hill did verbally agree to the wages that he was paid.
- 2) According to the Saskatchewan Employment Act, overtime for oil haulers is accrued on an annual basis and Mr. Warren Hill did not meet the cumulative hour limit that would merit overtime pay over that period.
- 3) Upon looking into the matter of the hours Mr. Warren Hill did drive, the Employer found discrepancy between the hours Mr. Warren Hill stated he worked and those shown on the bills of lading over that time period.

At the Hearing, the Employer further claimed the Employee owed them \$9,657.00 for hours that he was paid but that were not charged to the Employer's customers. (Letter dated April 6, 2015, Exhibit #2)

## II. PRELIMINARY MATTERS

The period of employment under consideration in this hearing is September 2012 to September 2013. *The Saskatchewan Employment Act* came into effect April 29, 2014; therefore the legislation governing the employment relationship in this case is *The Labour Standards Act*.

## III. ISSUES

First of all, was Warren Hill an "oil truck driver" pursuant to *The Labour Standards Regulations, 1995* s. 2(1)(h), and therefore exempt from being paid overtime in the manner mandated by section 6 of *The Labour Standards Act*?

Secondly, did the Employee have an agreement with his Employer that prevents him from claiming overtime pay?

Thirdly, did the evidence show that there were discrepancies between the hours the Employee worked and those shown on the bills of lading over that time period?

Fourthly, can the Employer collect from the Employee money for hours that were not properly billed to the Employer's customers?

## IV. EVIDENCE

Doug Sim and Gordon Stubbs presented evidence on behalf of the Employer, their company Sim and Stubbs Holdings Limited.

Warren Hill testified as the Employee.

No other witnesses were called.

There were few, if any, discrepancies between the evidence presented by the Employer and the Employee.

Under a contract with Wrangler Tanker Service, Sim & Stubbs Holdings provides trucks and drivers to haul oil from oil fields to a battery, or from a battery to a pipeline terminal. A battery is a set of tanks or equipment that stores crude oil products extracted from wells before delivery to a refinery or pipeline terminal. The battery may include equipment for measuring and separating gas, oil and water, and for cleaning the crude oil.

Warren Hill was hired by the Employer in August 2012 to operate one of its trucks. Both parties referred to Warren's occupation as 'oil truck driver'. Warren's initial wage was \$20/hour during a training period of approximately one month, which increased to \$26 in September 2012 then to \$28 in August of 2013. Warren was also paid a per diem to cover meal expenses: \$25/day when he worked less than 12 hours and \$50/day when he worked over 12 hours. There was no arrangement for payment of overtime; Warren was paid the number of hours he worked x his hourly rate. He testified that he asked both Gordon and Doug about overtime but was told they did not have to pay it.

Gordon Stubbs testified that all of the Employer's truck drivers worked under similar agreements, which were oral, not written. He said this was a common type of employment agreement found in the industry. Warren stated he knew some drivers working for other companies were paid overtime, although others were paid on a commission basis. The employer he works for now pays him overtime when he works more than 8 hours a day.

While working for Sim & Stubbs, Warren made several deliveries of product in the course of a day and rarely worked fewer than 12 hours. However, the number of days he worked in a week varied significantly, from 1 to 7 days. The number of hours he worked in a week also varied substantially, from 0 to 97.6 hours. During an eight-week period in April to May of 2013 Warren worked only 6 hours. In other words, the Employee's work schedule varied both daily and seasonally.

Warren was required to keep track of his hours in a daytimer both parties referred to as 'the bible'. In this book, Warren recorded by hand the following information for each load he transported during the day:

- the truck ticket number
- the location where the load was picked up
- the location where it was unloaded
- the amount of product delivered
- the length of time, if any, he had to wait in line to deliver the product ('wait time')
- mileage on the truck at the beginning and end of the day
- the total number of hours worked

The time Warren worked usually equaled the hour meter on the truck, unless he had an exceptionally long 'wait time' when he turned off the truck engine.

Warren was also required to complete a 'truck ticket' when he picked up the product for delivery. Along with a safety checklist, the truck ticket included room for information such as who was to be charged, the land location of the pick-up, driver name, unit number, destination and product details. At the bottom of the page was a space for "Additional Charges". This was where Warren was supposed to record any 'wait time' at the drop-off; the customer would be charged at a reduced rate for the wait time. There were four copies of the truck ticket: one left at the pick-up location, one left at the drop-off and two copies were sent to the customer, Wrangler. The Employer did not keep a copy of the truck ticket to compare to the 'bible' although one could be requested from Wrangler. (This process has since changed – a 5<sup>th</sup> copy now must remain with the truck)

The Employer used the hours recorded in the 'bible' to pay Warren. The truck tickets were not consulted.

Warren also kept a record of his hours worked; he transferred the hours he recorded in the 'bible' to his own calendar.

Gordon Stubbs dispatches truck drivers for the Employer. When asked what kind of supervision the Employer exercised over its employees' hours, Gordon testified that he has an idea of how long it takes to make the delivery runs. If the time noted by the driver looks too long, he has a talk with the driver. Otherwise, he trusts the employees to record their hours accurately, including 'wait time'. Wait time is impossible to predict and can't be monitored by the employer.

Gordon never spoke to Warren about taking excessive time on any of his routes and Warren's reported hours were never challenged. On one or two occasions, Gordon told Warren that Warren forgot to include the wait time on the truck ticket, but joked that Doug sometimes forgot, too.

The Employer does not take issue with the hours recorded by Warren in the 'bible'. However, Doug Sim stated that after receiving notice of the wage claim, the company reviewed all the truck tickets linked to Warren's work, and found that Warren frequently wrote down 'wait time' in the 'bible', but did not record it on the 'additional charges' section of the truck ticket. Therefore, the customer was not charged for the wait time.

A total of 47 truck tickets and the corresponding pages from the 'bible' were produced by the Employer at the Hearing and labelled as Exhibit #1. They reveal, according to the Employer, a total of 92.5 hours they paid Warren, but which are not recorded on the truck tickets. These discrepancies were not noticed by the Employer until after they received the Wage Assessment in March 2015 -- 18-30 months after the fact.

The Employer queried what Warren was actually doing for the 'wait time' hours he failed to record on the truck tickets. Warren testified that he simply forgot to write it down on the truck tickets. The Employer had no evidence whatsoever to rebut this.

Sim & Stubbs is now claiming from Warren lost revenue for these hours. Billed at \$104.40/hour, the total would be \$9,657.00 (Exhibit #2). The claim itself implies that the Employer believes Warren worked those hours -- they just were not charged out.

The Employer received monthly reconciliations from Wrangler, including wait times, and had an opportunity to catch Warren's missing wait times at that point. They did not do so. Gordon acknowledged that he now cross-checks his employees' hours as recorded in the 'bible' against the truck tickets, to ensure that wait times are charged to the customer.

Both parties eventually agreed that the 'bible' contains the correct hours that the Employee worked. The Employer acknowledged that if Warren recorded the hours from the 'bible' onto his own calendar, and this information was used by the Labour Standards Officer in

calculating the claim, the information is correct. The Labour Standards Officer's Worksheet was marked as Exhibit E-2.

Although the Employer claimed during the hearing that Warren was paid extra time when he worked on statutory holidays, the Labour Officer Standards officer pointed out that was not reflected on the Warren's Statements of Earnings; Warren's gross pay only equaled the number of hours worked x his hourly wage.

The Employee's wage claim therefore is for overtime at the rate of 1.5 x hours worked for days when he worked more than 8 hours, which totals 914.5 hours, plus public holiday pay and annual holiday pay. The total claim is for \$15,318.14.

The rest of the testimony and argument during the hearing focused on the type of product carried by the truck driven by Warren. As discussed below, this may affect whether the Employee fits within the exemption for "oil truck driver" set out in *The Labour Standards Regulations, 1995*.

Doug and Gordon testified that the crude oil was usually partially cleaned at the battery, removing sand and water, which was a form of refining. They felt this meant the product Warren was hauling was a "petroleum product" and a battery was a "refinery"; therefore Warren would fit within the definition of 'oil truck driver' in s. 2(1)(h) of the *Regulations*.

## V. ANALYSIS

### A. Overtime Exemption for "oil truck driver"

The first issue to examine is the Employer's contention that Warren Hill was an "oil truck driver". Pursuant to the *Regulations*, overtime for oil haulers is accrued on an annual basis and the Employer argues Warren Hill did not meet the cumulative hour limit that would merit overtime pay.

The law concerning hours of work and overtime pay is set out in section 6 of *The Labour Standards Act*:

6(1) Subject to sections 7, 9, and 12, no employer shall, unless he complies with subsection (2), require or permit any employee to work or to be at his disposal for more than eight hours in any day or 40 hours in any week.

(2) Subject to sections 7 and 9, an employer who requires or permits an employee to work or to be at his disposal for more than eight hours in any day or 40 hours in any week shall pay to that employee wages at the rate of time and one-half for each hour or part of an hour in excess of eight hours in any day, or 40 hours in any week, during which he requires or permits the employee to work or to be at his disposal.

A number of exemptions from section 6 of the *Act* are contained in *The Labour Standards Regulations, 1995*. This Wage Assessment Appeal concerns the following section in the *Regulations*:

6(1) Subject to subsection (2) to (8), section 6 of the *Act* does not apply to persons employed as oil truck drivers.

(2) Subject to subsection (8), the employer of an oil truck driver shall show in the records kept pursuant to section 70 of the Act the number of hours, during which the oil truck driver is required or permitted to work or to be at the disposal of the employer, that are in excess of 40 hours in any week and, for the purposes of this section, all of those hours shall accumulate to the credit of the oil truck driver unless they are cancelled in accordance with subsection (3).

(3) Where an oil truck driver is required or permitted to work or to be at the disposal of the employer for less than 40 hours in any week, each hour by which the number of hours during which the oil truck driver is required or permitted to work or to be at the disposal of the employer in that week is less than 40 hours cancels one hour that has already accumulated or may in future accumulate to the credit of the oil truck driver.

(4) On July 1 in each year, the employer of an oil truck driver shall:

(a) determine the number of hours that, as of that date, have accumulated to the credit of the oil truck driver during the previous 12 months and have not been cancelled; and

(b) within 14 days after that date, pay to the oil truck driver wages at the rate of time and one-half for every hour or part of an hour determined pursuant to clause (a).

The *Regulations* define “oil truck driver” as follows:

2(1) (h) “oil truck driver” means an employee who is employed principally in delivering gasoline, lubricating oils and other petroleum products by truck from a refinery, bulk filling station or other similar premises to farms, garages or automobile service stations, but does not include an employee who regularly travels in the course of his or her duties to two or more cities, towns or villages that are at least 20 kilometres apart.

If Warren’s employment with the Employer falls within this exemption (which allows the Employer to set-off overtime hours worked in one week against weeks when less than 40 hours were worked) then one looks at the hours Warren worked from July 1, 2012 to June 30, 2013. For the 10 months for which overtime is being claimed, according to the Labour Standard’s Officer’s figures, Warren worked 1,723.25 hours. Pro-rating the 2080 hour work year (52 weeks x 40 hours) over 10 months gives us 1,733.4 available hours. Therefore, Warren would be exempted from overtime pay as he worked fewer hours. [The Employer’s figures set out in Exhibit #3 and Exhibit #4 are slightly different, showing 1720 available hours, while Warren worked 1,713.4 hours. Using either set of calculations, Warren would not be eligible for overtime if his job qualified for the exemption.]

The Labour Standards Officer the Employer’s contention that Warren was an “oil truck driver” within the meaning of the *Regulations*. In Sim & Stubbs’s business, he argued, the drivers do not pick up “gasoline, lubricating oils and other petroleum products”. Rather, they transport crude oil that at most, has minimal chemical added to it or minimal cleaning performed.

The driver, furthermore, does NOT pick up the product ‘from a refinery, bulk filling station or other similar premises’. It is picked up at a battery. A battery is located at or near the production field and provides facilities to remove sand and water and perhaps add chemical to ready the product for the oil refinery.

And finally, it is argued that Sim & Stubbs’s employees did not deliver the product to “farms, garages or automobile service stations”. The Employer’s trucks haul the product to the pipeline depot or terminal from where it goes on to a refinery or upgrader.

In summary, the Employee's position is that the exemption in the *Regulations* only applies to bulk fuel dealers that traditionally haul gas, oil and diesel fuel to farmers and service stations. It does not have a generic application in the oil patch. The work Warren performed for Sim & Stubbs therefore does not fall under the exemption in the *Regulations*.

Gordon Stubbs claimed that cleaning the product at the battery equates to refining it, and therefore the exemption in the *Regulations* should apply. As well, he felt the common sense definition of 'oil truck driver' would imply someone who hauled oil in all its forms and the legislative definition should reflect that. He noted that when the company licences its trucks, it must indicate that it is hauling clean oil. "Petroleum products", in his opinion, should include not just refined petroleum products, but oil in all its forms.

*The Labour Standards Act* sets out minimum standards of employment, including overtime pay, for employers and employees in Saskatchewan. Some exemptions specified in the *Act* and *Regulations* remove or restrict an employee's right to overtime pay. Any definition which takes away rights guaranteed in the *Act* to all other Saskatchewan employees must be strictly construed.

The label "oil truck driver" used in the legislation is perhaps overbroad and confusing, but, the definition which accompanies the label is specific as to the type of product to be delivered, where it is picked up and where it is delivered to. Warren's employment primarily involved delivering crude oil from an oil field battery to a pipeline depot. He did not deliver "gasoline, lubricating oils and other petroleum products" from "a refinery, bulk filling station or other similar premises to farms, garages or automobile service stations". If the legislators wished to extend the exemption to include the product and services provided by Sim & Stubbs, the definition in the *Regulations* would have to be expanded. I note that the definition now set out in section 2(1)(p) of *The Employment Standards Regulations* is identical to the wording under consideration here.

Even if there were ambiguity in the definition, it must be resolved in favour of preserving the employee's rights.

I find that Warren Hill was not employed as an "oil truck driver" as defined in *The Labour Standards Regulations* and does not fit within the exemption. He was entitled to be paid overtime as required by section 6 of *The Labour Standards Act*.

### **B. Agreement Between the Employer and Employee**

The Employer argues that Warren Hill agreed to be paid an hourly wage plus per diem, with no provision for overtime, and this agreement should govern the relationship between them.

This agreement, if it existed, is in violation of *The Labour Standards Act*.

The *Act* states as follows:

72(1) Nothing in this Act or in any order or regulation made under this Act affects any provision in any Act, agreement or contract of service or any custom insofar as it ensures to any employee more favourable conditions, more favourable hours of work or a more favourable rate of wages

than the conditions, the hours of work or the rate of wages provided for by this Act or by any such order or regulation.

(2) Where any provision in this Act or in any order or regulation made under this Act requires the payment of wages at the rate of time and one-half, no provision in any Act, agreement or contract of service, and no custom, shall be deemed to be more favourable than the provision in this Act or in the order or regulation if it provides for the payment of wages at a rate less than the rate of time and one-half.

(3) Any provision in any Act, agreement or contract of service or any custom that is less favourable to an employee than the provision of this Act or any order or regulation made under this Act is superseded by this Act or any order or regulation made under this Act insofar as it affects that employee.

...

75(1) No agreement, whether heretofore or hereafter entered into, has any force or effect if it deprives an employee of any right, power, privilege or other benefit provided by this Act.

Warren could not, and did not, agree to forgo overtime pay.

### **C. Discrepancy in Hours and Money Owed to Employer**

The Employer's third ground of appeal was that they found discrepancies between the hours Mr. Warren Hill stated he worked and those shown on the bills of lading over that time period. The Employer claimed the Employee owed them \$9,657.00 for hours that he was paid but that were not charged to the Employer's customers.

Both parties agreed the document referred to as the 'bible' should be an accurate record of the work performed by Warren. The Employer's claim related to 'wait time' found in the 'bible' but not recorded on the truck tickets from which the customer was billed. Warren admitted in his testimony that he sometimes forgot to record the wait times. No evidence was presented to support any other explanation.

It is management's role to establish and enforce policies and procedures in the workplace. Doug and Gordon had ample opportunity to double-check Warren's record-keeping and failed to do so. They never questioned Warren's hours during the period he worked for them, and it was their responsibility to bill the customer accurately, not Warren's.

I find the Employer did not substantiate its claim for a discrepancy in hours, and I dismiss the Employer's claim against Warren for money not billed to its customers.

## **VI. CONCLUSION**

I find that Warren Hill was entitled to be paid overtime, and I dismiss the Employer's appeal from the Wage Assessment.

The Labour Standards Officer's Assessment of unpaid overtime wages, holiday pay, and public holiday pay in the amount of \$15,318.14 in favour of the Employee, Warren Hill, is upheld. A copy of the Wage Assessment is attached and forms part of this decision.



The Employer testified that the Employee was paid on the first of each month for the previous month's work. I award the Employee pre-judgement interest on each month's claim from the date the pay cheque was due to the date of this decision.

Dated at North Battleford, Saskatchewan, July 10, 2015.



Karen C. Ulmer  
Adjudicator

The Parties are hereby notified of their right to appeal this decision pursuant to Sections 4-8, 4-9 and 4-10 of *The Saskatchewan Employment Act* (the "Act").

The information below has been modified and is applicable only to Part II and Part IV of the Act. To view the entire sections of the legislation, the Act can be accessed at [www.saskatchewan.ca](http://www.saskatchewan.ca).

#### **Right to appeal adjudicator's decision to board**

**4-8(1)** An employer, employee or corporate director who is directly affected by a decision of an adjudicator on an appeal or hearing pursuant to Part II may appeal the decision to the board on a question of law.

(3) A person who intends to appeal pursuant to this section shall:

- (a) file a notice of appeal with the board within 15 business days after the date of service of the decision of the adjudicator; and
- (b) serve the notice of appeal on all persons mentioned in clause 4-4(1)(b) who received the notice setting the appeal or hearing.

(4) The record of an appeal is to consist of the following:

- (a) in the case of an appeal pursuant to Part II, the wage assessment or the notice of hearing;
- (c) the notice of appeal filed with the director of employment standards pursuant to Part II;
- (d) any exhibits filed before the adjudicator;
- (e) the written decision of the adjudicator;
- (f) the notice of appeal to the board;
- (g) any other material that the board may require to properly consider the appeal.

(5) The commencement of an appeal pursuant to this section does not stay the effect of the decision or order being appealed unless the board orders otherwise.

(6) The board may:

- (a) affirm, amend or cancel the decision or order of the adjudicator; or
- (b) remit the matter back to the adjudicator for amendment of the adjudicator's decision or order with any directions that the board

#### **Appeal to Court of Appeal**

**4-9(1)** With leave of a judge of the Court of Appeal, an appeal may be made to the Court of Appeal from a decision of the board pursuant to section 4-8 on a question of law.

(2) A person, including the director of employment standards, intending to make an appeal to the Court of Appeal shall apply for leave to appeal within 15 business days after the date of service of the decision of the board.

(3) Unless a judge of the Court of Appeal orders otherwise, an appeal to the Court of Appeal does not stay the effect of the decision being appealed.

#### **Right of director to appeal**

**4-10** The director of employment standards has the right:

- (a) to appear and make representations on:
  - (i) any appeal or hearing heard by an adjudicator; and
  - (ii) any appeal of an adjudicator's decision before the board or the Court of Appeal; and
- (b) to appeal any decision of an adjudicator or the board.