EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Michael Olynick
("Olynick")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/283

DATE OF HEARING: August 26, 1999

DATE OF DECISION: September 10, 1999

DECISION

APPEARANCES

Michael Olynick	on his own behalf
Chris Thibedeau	on behalf of Chris Thibedeau operating C.J. Express (via teleconference)

OVERVIEW

This is an appeal by Michael Olynick ("Olynick") under Section 112 of the *Employment Standards Act* (the *"Act"*), against a Determination dated April 20, 1999 issued by a delegate of the Director of Employment Standards (the "Director"). Olynick alleges that the delegate of the Director erred in the Determination by concluding that Chris Thibedeau operating as C.J. Express ("Thibedeau") owed overtime wages in the total amount of **$210.79** (includes interest). Olynick further alleges that he is owed wages for lunchbreaks not taken and for reimbursement of boots which he was required to purchase.

ISSUES

The issues to be decided in this appeal are:

1. Are the boots that Olynick was required to purchase "special clothing" as defined in the *Act* ?

2. Did Olynick receive meal breaks as required pursuant to Section 32 of the *Act* ?

3. Was the calculation of wages owing by the delegate of the Director correct ?

FACTS

The following facts are not in dispute:

- Olynick was employed by Thibedeau as a "swamper" on a delivery truck;
- Olynick was employed from October 21, 1997 to January 31, 1998;
- Olynick was paid on a flat rate of pay for each day worked;
- Thibedeau did not keep records of the hours worked each day by Olynick;
- Olynick was paid on a bi-weekly basis;
- Olynick was required to purchase a pair of black boots with non-marking soles for making deliveries;

- Olynick began to keep records of his hours worked commencing Nov. 16, 1997 until Jan. 31, 1998;

Olynick testified that:

- he bought the boots as specified by Thibedeau;
- he paid $136.76 for the boots;
- the amount of earnings recorded on his T-4 don't match the earnings reported on his Record of Employment ("ROE");
- his employment start date on the ROE is not correct;
- he had no opportunity for a 1/2 hour lunch break except for about 5 times, as he would eat while being driven between delivery jobs;
- he did not record the dates on which he had the lunch break but believes most of those occasions were prior to Nov. 16, 1997 when he began to keep records;
- Thibedeau did not specify a particular brand of boot, nor did Thibedeau specify where those boots were to be bought;
- after he bought his boots, he was told by Thibedeau that he should have gone to the Army and Navy store;

Thibedeau testified that:

- the average workday would include anywhere from 2 hours to 4 hours of time spent driving between deliveries and Olynick would be able to eat his lunch during those times as he was just riding in the truck;
- the only requirement for boots were that they were black with a non-marking sole to protect customer's property;

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, Olynick.

The relevant special clothing requirements are set forth in Section 25 (1) of the *Act* which provides:

> *Section 25, Special clothing*
>
> *(1) An employer who requires an employee to wear special clothing must, without charge to the employee,*
>
> *(a) provide the special clothing, and*
> *(b) clean and maintain it in a good state of repair, unless the employee is bound by an agreement made under subsection (2).*

Further, special clothing is defined in Section 1 of the *Act* as follows:

> *"special clothing" includes a uniform and a specified brand of clothing;*

The evidence of Olynick was very clear in that the only requirement Thibedeau specified was that the boots be black and have a non-marking sole. Olynick further testified that Thibedeau did not direct him to purchase a particular brand of boot nor did Thibedeau direct him to any particular store for the purchase.

For all of the above reasons I conclude that the boots Olynick was required to purchase for employment purposes were not 'special clothing' as defined by the *Act.*

I must now consider the next issue, that is, did Olynick receive 'meal breaks' as defined by the *Act* ?

The requirement for a 'meal break' is set forth in Section 32 of the *Act* which provides:

> *Section 32, Meal breaks*
>
> *(1) An employer must ensure*
>
> *(a) that no employee works more than 5 consecutive hours without a meal break, and*
> *(b) that each meal break lasts at least a 1/2 hour.*
>
> *(2) An employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.*

Among the requirements an employer is to follow is the requirement to post hours of work pursuant to Section 31 (1) and (2) of the *Act* which provide:

> *Section 31, Hours-of-work notices*
>
> *(1) An employer must display hours-of-work notices in each workplace in locations where the notices can be read by all employees.*
>
> *(2) An hours-of-work notice must include*
>
> *(a) when work starts and ends,*
> *(b) when each shift starts and ends, and*
> ***(c) the meal breaks scheduled during the work period.***

(emphasis added)

Furthermore, 'work' is defined in Section 1 of the *Act* as follows:

> *"work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.*
>
> *(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.*

There was no evidence that Thibedeau posted 'hours-of-work notices' as required pursuant to Section 31 of the *Act.* The evidence of both Olynick and Thibedeau was that with the odd exception, meals were consumed while driving between deliveries. Even though Olynick was not the driver but only rode along, the fact that Olynick was required to be in the truck in order to be available for the next delivery constitutes 'work' as defined by the *Act.* Therefore, pursuant to Section 32 (2) *supra*, any meal break taken while riding between jobs must be considered as work time.

For all of the above reasons, I conclude that any meal breaks taken while riding between deliveries is considered to be work time and must therefore be paid for.

The delegate of the Director states in the Determination that a meal break was deducted from each days hours as recorded by Olynick. Those deductions must now be reversed and the meal break time added to the wages owing. I have reviewed the payroll records supplied and recalculated the additional wages owing as follows:

Pay Period	hourly rate	straight time	time and one-half	double time	total
Nov. 18 - 22	11.09	.5	2		
		$5.54	$33.27		$38.81
Nov, 25 - Dec. 6	10.66	.75	3.75	.5	
		$7.99	$59.96	$10.66	$78.61
Dec. 9 - 20	12.21	1	2.5		
		$12.21	$45.78		$78.61
Dec. 22 - Jan. 3	11.55	1	2.5		
		$11.55	$43.31		$54.86
Jan. 6 - 17	11.37	2	2.5		
		$22.74	$42.63		$65.37
Jan. 20 - 31	11.72	1.5	2.5		
		$17.58	$43.95		$61.53

TOTAL					**$377.79**

The total of the additional wages for the meal breaks deducted is **$377.79.**

I now turn to the final issue, that is, were the wages calculated correctly by the delegate of the Director ?

Olynick's concern with respect to the calculation of wages was centered on the difference between the wages reported on the T-4 slip and the wages reported on the ROE. The panel indicated to Olynick that these issues are matters to be discussed with Revenue Canada / Employment Insurance and are not within the jurisdiction of the *Act*.

There was no evidence presented in respect to the allegation of improper calculation of wages.

I conclude therefore, except for the additional wages for meal breaks as calculated above, the wages owing as calculated by the delegate of the Director are correct.

The appeal of Olynick is allowed with respect to the additional wages for meal breaks but is dismissed with respect to the other issues.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated April 20, 1999 be varied to be in the amount of **$572.89** ($195.10 + $377.79) together with whatever interest has accrued pursuant to Section 88 of the *Act.*

Hans Suhr
Adjudicator
Employment Standards Tribunal