

JUN 08 2006

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

6	In re:	)	BAP No.	NC-04-1522-SZMa
7	COLLIN STONE,	)	Bk. No.	03-33382
8	Debtor.	)		
9	_____	)		
10	JAMES YETT,	)		
11	Appellant,	)		
12	v.	)	<b>MEMORANDUM<sup>1</sup></b>	
13	COLLIN STONE; E. LYNN	)		
14	SCHOENMANN, Chapter 7 Trustee,	)		
15	Appellees.	)		
16	_____	)		

Argued and Submitted on November 16, 2005  
at San Francisco, California

Filed - June 8, 2006

Appeal from the United States Bankruptcy Court  
for the Northern District of California

Honorable Thomas E. Carlson, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: SMITH, ZURZOLO<sup>2</sup> and MARLAR, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Vincent Zurzolo, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 Appeal is taken from two orders made by the bankruptcy  
2 court: 1) an order, entered July 22, 2004, sustaining in part an  
3 objection to proof of claim ("Claim Objection Order"); and 2) an  
4 order, entered October 8, 2004, denying in part a motion for its  
5 reconsideration ("Reconsideration Order"). We REVERSE in part,  
6 VACATE and REMAND in part, and AFFIRM in part.

7 **I. FACTS**

8 Collin Stone ("Debtor") was the sole proprietor of a web  
9 design business known as Cogneo. Debtor employed James Yett  
10 ("Yett") as a consultant between September 1999 through early  
11 2002. During this period, Debtor failed to maintain Yett's  
12 employment time records in an organized fashion, and paid him on  
13 a fairly irregular basis. In addition, Yett's salary structure  
14 was not determined up front, but was subject to ongoing  
15 negotiations during the tenure of his employment.

16 Debtor filed his chapter 13 petition<sup>3</sup> on November 17, 2003,  
17 which was subsequently converted to a chapter 7 on May 5, 2005.  
18 During the pendency of the chapter 13, both Yett and the chapter  
19 13 trustee filed separate objections to the confirmation of  
20 Debtor's plan. Yett also appeared at the § 341(a) creditors  
21 meeting and at a subsequent pre-trial hearing (held on February  
22 11, 2004) to assert the objection and a claim for unpaid wages.  
23 At the pre-trial hearing, the bankruptcy court instructed Yett to  
24 file a proof of claim and to communicate any information that

25 \_\_\_\_\_  
26 <sup>3</sup> Unless otherwise indicated, all Code, chapter and section  
27 references are to the United States Bankruptcy Code, 11 U.S.C.  
28 §§ 101-1330 prior to its amendment by the Bankruptcy Abuse  
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,  
119 Stat. 23 (2005).

1 Yett may have with regard to Debtor's property, income, and/or  
2 expenses to the trustee.

3 On March 9, 2004, Yett filed his proof of claim for unpaid  
4 wages in the amount of \$261,330.50. The claim reflected that  
5 Debtor owed Yett for: 1) unpaid wages, including overtime, for  
6 the month of December 1999 and all of 2000 in the amount of  
7 \$138,710; 2) wages earned in 2001 in the amount of \$53,954.50  
8 (earned \$75,954.50, but \$22,000 was paid); 3) a statutory wage  
9 penalty in the amount of \$13,200; and 4) interest in the amount  
10 of \$55,466. Debtor objected on the grounds that the wages were  
11 disputed and unliquidated.

12 A pre-trial hearing (continued from February 11, 2004) was  
13 held on March 10, 2004, where the trustee informed the bankruptcy  
14 court that the amount of Yett's claim was substantial and the  
15 total debt may be outside the maximum limits for a chapter 13 as  
16 imposed by § 109(e). The court inquired as to whether the claim  
17 was readily determinable, and advised Yett that if he wanted to  
18 pursue a § 109(e) objection to either file a motion with the  
19 court (with supporting documents) or give the documents to the  
20 trustee to allow him to determine the direction of the case.<sup>4</sup>

21 On April 26, 2004, a scheduling order was entered that  
22 indicated that a trial was to be held on the "objections to [the]  
23 confirmation of Debtor's chapter 13 plan by Creditor James Yett  
24 and the Chapter 13 Trustee." However, the trial briefs, and  
25 later, the written memorandum issued by the court, construed the  
26 matter to be the liquidation of Yett's proof of claim for  
27 purposes of § 109(e).

28 

---

<sup>4</sup> Neither Yett, nor the trustee, filed formal motions to  
dismiss the chapter 13 case pursuant to § 109(e).

1           The matter went to trial on July 7, 2004. The evidence  
2 presented at trial consisted of, among other things, Yett's palm  
3 pilot time records and a 605-page employee "chat log." Debtor  
4 presented his testimony, as well as that of two employee  
5 witnesses: Todd Markle and Anna Englewood. Markle was employed  
6 in the latter part of 2000 and testified generally about Yett's  
7 working habits - that he often arrived around 10:00 or 11:00 a.m.  
8 and usually left by 6:00 p.m. Markle conceded that he could not  
9 testify about weekend hours or work performed outside the office.  
10 Englewood, who did not become employed full-time until 2001  
11 (after the overtime claim period) but worked as a bookkeeper,  
12 testified about Yett's work hours, as well as the ongoing  
13 negotiations over his compensation rate.

14           The bankruptcy court determined that Yett had an allowable  
15 general unsecured claim in the amount of \$105,627. More  
16 specifically, the bankruptcy court ruled

17           I find that in 1999 Yett worked an equivalent  
18 of 35 hours per week for 10 weeks. His  
19 resulting earnings are \$19,250. I find that  
20 Debtor paid Yett \$10,000 for 1999 work. Yett  
21 is thus entitled to recover \$9,250, plus  
22 prejudgment interest in the amount of \$4,162.

23           I find that in 2000 Yett worked an equivalent  
24 of 40 hours per week for 48 weeks. His  
25 resulting earnings are \$105,600. I find that  
26 Debtor paid Yett \$60,389 for 2000 work. Yett  
27 is thus entitled to recover \$45,211, plus  
28 prejudgment interest in the amount of  
\$18,804.

          The parties agree that Yett would be paid on  
commission basis in 2001. He would be paid  
an hourly rate only for certain maintenance  
work. I find that Yett was paid all the  
commissions he earned. Yett was not paid for  
290 hours of maintenance work. Yett contends  
that he was to be paid \$100 per hour for that  
work, Debtor contends Yett was to be paid \$40  
per hour. I find that the parties agreed

1 that Yett was to be paid \$40 per hour for the  
2 work in question. Yett is entitled to  
3 recover \$11,600, plus prejudgment interest in  
4 the amount of \$3,400.

5 See Memorandum Decision, July 16, 2004, p. 2-3.

6 On July 26, 2004, Yett filed a motion for reconsideration,  
7 or in the alternative, to either amend the Claim Objection Order  
8 or for a new trial. He argued that reconsideration was warranted  
9 as the bankruptcy court: 1) made calculation errors as to the  
10 2001 wage findings; 2) overlooked the number of hours worked,  
11 including overtime hours during the 1999-2000 period; and 3)  
12 mislead Yett as to the purpose of the trial.

13 Debtor opposed the motion on the ground that Yett had not  
14 presented evidence of a manifest error of law or mistake of fact,  
15 but merely provided the court the same evidence he submitted for  
16 trial.

17 The hearing on the reconsideration motion was held on  
18 September 30, 2004. The bankruptcy court acknowledged its error  
19 with regard to certain mathematical calculations and amended the  
20 Claim Objection Order, changing the 2001 commission amount from  
21 \$11,600 to \$42,476.50 plus prejudgment interest in the amount of  
22 \$13,274.<sup>5</sup> The remaining portions of the reconsideration motion  
23 were denied.<sup>6</sup>

24 \_\_\_\_\_  
25 <sup>5</sup> The court found that Yett earned \$64,476.50 (\$15,580  
26 maintenance, \$49,896.50 commission) in 2001, but that he was only  
27 paid \$22,000 for his work.

28 <sup>6</sup> The Reconsideration Order fails to state the grounds for  
which the other portions of the motion were denied. However, a  
tentative ruling was issued by the court, which indicates that  
the basis of the court's decision was due to Yett's failure to  
demonstrate any manifest error of law or fact.

1 Yett appeals both orders.<sup>7</sup>

2 **II. ISSUES ON APPEAL**

3 A. Whether the bankruptcy court erred when it disallowed a  
4 portion of Yett's proof of claim.

5 B. Whether the bankruptcy court erred when it denied in  
6 part a motion to reconsider the Claim Objection Order.

7 **III. JURISDICTION**

8 Federal subject matter jurisdiction is founded under 28  
9 U.S.C. § 1334(b). An objection to a claim is an enumerated core  
10 proceeding that the bankruptcy court has the authority to  
11 determine. 28 U.S.C. § 157(b)(2)(B). The bankruptcy court may  
12 also reconsider a disallowed claim under Rule 3008 and  
13 § 502(j). We have appellate jurisdiction over final orders  
14 pursuant to 28 U.S.C. § 158(c).

15 **IV. STANDARD OF REVIEW**

16 We review the bankruptcy court's legal conclusions de novo,  
17 findings of fact for clear error, and mixed questions of law and  
18 fact de novo. In re Roberts, 331 B.R. 876, 880 (9th Cir. BAP  
19 2005). A bankruptcy court's interpretation of state law is also  
20 reviewed de novo. Id.

21 We also "give due regard to the opportunity of the  
22 bankruptcy court to judge the credibility of witnesses." In re  
23 Carolan, 204 B.R. 980, 984 (9th Cir. BAP 1996). "If two views of  
24 the evidence are possible, the bankruptcy court's choice between  
25 them cannot be clearly erroneous." Id.; Anderson v. Bessemer  
26 City, 470 U.S. 564, 573 (1985).

27 Denial of a motion for reconsideration of the allowance or  
28 disallowance of a claim under Rule 3008 and § 502(j) is reviewed

---

<sup>7</sup> Yett was represented by counsel during the bankruptcy proceedings, but appears before the panel pro se.

1 for abuse of discretion. In re Negrete, 183 B.R. 195, 197 (9th  
2 Cir. BAP 1995); In re Edelman, 237 B.R. 146, 150 (9th Cir. BAP  
3 1999); In re Cleanmaster Industries, Inc., 106 B.R. 628, 630 (9th  
4 Cir. BAP 1989). A court abuses its discretion if it bases its  
5 ruling on either an erroneous view of the law or a clearly  
6 erroneous assessment of the evidence. In re Captain Blythers,  
7 Inc., 311 B.R. 530, 534 (9th Cir. BAP 2004).

## 8 V. DISCUSSION

### 9 A. Notwithstanding the Subsequent Conversion to a Chapter 7, 10 the Appeal is Not Moot

11 A preliminary issue is whether the appeal is rendered moot  
12 in light of Debtor's subsequent voluntary conversion to a chapter  
13 7 following the filing of this appeal. The record reflects that  
14 the underlying purpose of the trial was to determine the  
15 liquidation of Yett's claim, and whether that amount would impel  
16 Debtor out of a chapter 13 bankruptcy due to the debt limitations  
17 imposed under § 109(e)<sup>8</sup>.

18 To this limited extent, we indeed believe the issue is moot  
19 as the case has now been converted to a chapter 7. However,

---

20 <sup>8</sup> Section 109(e) provides

21 Only an individual with regular income that  
22 owes, on the date of the filing of the  
23 petition, noncontingent, liquidated, secured  
24 debts of less than \$922,975, or an individual  
25 with regular income and such individual's  
26 spouse, except a stockbroker or a commodity  
27 broker, that owe, on the date of the filing  
28 of the petition, noncontingent, liquidated,  
unsecured debts that aggregate less than  
\$307,675 and noncontingent, liquidated,  
secured debts of less than \$922,975 may be a  
debtor under chapter 13 of this title.

§ 109(e).

1 notwithstanding the conversion, the bankruptcy court made certain  
2 findings and conclusions at trial as to Yett's proof of claim for  
3 unpaid wages that is relevant to the bankruptcy case. Further,  
4 as nothing in the bankruptcy court docket, or record, reflects  
5 that this is a no asset case, we believe the merits of the appeal  
6 are worthy of adjudication.<sup>9</sup>

7 B. The Bankruptcy Court Erred in Disallowing a Portion of  
8 Yett's Proof of Claim

9 In support of his position that the bankruptcy court erred  
10 in disallowing a portion of Yett's proof of claim, Yett proposes  
11 the following arguments (set forth as "issues on appeal" in his  
12 briefs):

- 13 1) The contemporaneous and reconstructed hourly records,  
14 unrefuted by Debtor, were authoritative and binding on  
15 the court;
- 16 2) The testimony of Debtor's witnesses should not have  
17 been admitted;
- 18 3) The court erroneously relied on a single, isolated  
19 commission invoice, which did not accurately reflect  
20 the agreed upon rate in making its finding as to the  
21 commission portion of the claim; and,
- 22 4) The court mislead Yett, to his detriment, into  
23 believing that the issue to be determined at trial was  
24 merely whether his claim could be "readily liquidated"  
25 - not the liquidation of the claim itself.

---

26  
27 <sup>9</sup> We note that the docket reflects 1) a notice of possible  
28 dividends (filed June 16, 2005); and 2) an adversary proceeding  
filed by Yett against Debtor objecting to his discharge pursuant  
to §§ 727(a)(2) and (a)(3).



1. Yett's Contemporaneous and Reconstructed Work Records for  
1999 and 2000

In Hernandez v. Mendoza, 199 Cal. App. 3d 721 (1988), a dispute arose as to a former employee's overtime compensation against an employer. The employee introduced a self-created calendar that he had filled out from memory that purported to reflect his work log. The employer introduced time cards (that he subsequently admitted were falsified). The trial court entered judgment for the employer holding that the employee did not carry his burden of certainty since the court could not tell how much overtime was worked. The Court of Appeal reversed, holding

Although the employee's evidence was imprecise as to the amount of overtime he had worked, the consequences of the employer's failure to keep accurate records as required by statute should fall on the employer, not the employee. The employee carried out his burden, the court held, by proving that he had performed work for which he was improperly compensated and by producing sufficient evidence that showed the amount and extent of that work as a matter of just and reasonable inference. The burden then shifted to the employer to produce evidence either of the precise amount of work or evidence to negate the reasonableness of the inference to be drawn from the employee's evidence.

Id.

The bankruptcy court expressly adopted the approach in Hernandez, noting that

[w]here an employer fails to meet its state-law obligation to keep time records, an employee may satisfy his burden of proof by submitting his own estimate of hours worked, and the burden then shifts to the employer to introduce "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence."

1 See Memorandum Decision, July 16, 2004, p. 2. Applying the  
2 standard in Hernandez, the bankruptcy court found that Yett had  
3 not been fully compensated for regular work hours completed in  
4 1999 and 2000, but determined that he was not entitled to  
5 overtime wages for the same period. Yett disagrees.

6 Yett asserts that the bankruptcy court erred in not  
7 crediting him with overtime (45-hour weeks) for 1999 and 2000.  
8 More specifically, he complains that the court's determination  
9 that he worked only 35-hour weeks for 10 weeks in 1999 and 40-  
10 hour weeks for 48 weeks in 2000 is not supported by the record  
11 and reflects a misapplication of the very case upon which it  
12 relies (Hernandez v. Mendoza, 199 Cal. App. 3d 721 (1988)). By  
13 illustration, Yett claims that his palm pilot records (as  
14 corroborated by evidence presented by Debtor<sup>10</sup>) shows that he  
15 worked 780 hours from December 1, 1999 through March 31, 2000, or  
16 45 hours per week. Since Debtor did not oppose the evidence,  
17 Yett maintains that the bankruptcy court should have given him  
18 credit for all the overtime hours asserted.

19 In addition, Yett argues that the bankruptcy court  
20 erroneously included months (October and November 1999) for which  
21 he was fully paid and did not include in his proof of claim. By  
22 including these months into the calculation, the bankruptcy court  
23 effectively drove down the average number of hours worked from 45  
24 hours per week to 35 hours per week.

25  
26  
27 <sup>10</sup> A letter, written by Yett (dated June 15, 2000), and  
28 submitted as part of Debtor's trial exhibits, references an  
agreement that Yett worked 780 hours during the respective  
period.

1 We agree. The record does reflect that Debtor failed to  
2 offer viable evidence to refute Yett's contemporaneous and  
3 reconstructed hourly records for December 1999 and 2000.

4 a. Overtime Claim for December 1999

5 Debtor submitted no evidence to counter Yett's evidence for  
6 December 1999. Neither of Debtor's witnesses testified about  
7 Yett's work hours during the month of December 1999. Further,  
8 the June 15, 2001 letter (the content of which was not challenged  
9 by Debtor at trial), supports a 45-hour average for December  
10 1999. In addition, Yett's unrefuted testimony and records  
11 showing payment of \$20,000 for October and November 1999 also  
12 advances his position that he earned overtime. Finally, his palm  
13 pilot records for December 1999 demonstrate that he worked a  
14 total of 186 hours (which averages to approximately 45 hours a  
15 week).

16 It is not clear from the record how the bankruptcy court, in  
17 the face of this evidence, calculated a weekly average of only 35  
18 hours over a ten-week period for 1999. We, therefore, conclude  
19 that the bankruptcy court erred in disallowing Yett's claim for  
20 overtime for December 1999.

21 b. Overtime Claim for 2000

22 The record does not clearly reflect the basis of the  
23 bankruptcy court's findings (that Yett worked 40 hours for 48  
24 weeks) with regard to wage claims for 2000. Yett's  
25 documentation, submitted with his proof of claim, indicates that  
26 he worked a total of 2796.5 hours (deducting 186 hours worked in  
27 December 1999) for 51 weeks, which averages to 54.83 hours per  
28

1 week.<sup>11</sup> While direct witness testimony (the only evidence  
2 provided by Debtor) may refute Yett's claim and support the  
3 court's findings, the hearing on the motion for reconsideration  
4 reflects that the bankruptcy court did not consider the testimony  
5 significant:

6           The Court: Well, I'll just tell you this.  
7           They [witnesses] - they quoted various  
8           sections of [the chat log]. I didn't rely on  
9           that at all. I did a sample of a good number  
10          of a good period of time in this log. And I  
11          relied on my own sample of this log during  
12          the period in question, not anybody's  
13          testimony.

14          The testimony only raised the question for me  
15          that I should go look at this and see - and  
16          see what it showed. So they sort of did a  
17          sample, and I just ignored their sample and  
18          did my own.

19 Transcript of Proceeding, September 30, 2004, p. 9.

20          The bankruptcy court's failure to identify the "sample," as  
21          well as other factors for which it relied on in arriving at its  
22          decision to ultimately reduce Yett's overtime claims for 2000 can  
23          only lead us to believe that the court erred. Therefore, we  
24          vacate and remand for further findings consistent with this  
25          memorandum as to the wage claims for 2000.

## 26 2. Weight of Witnesses' Testimony

27          Yett claims that the bankruptcy court erred in considering  
28          the testimony of Debtor's witnesses because neither had personal  
29          knowledge of Yett's work records for the time periods in question  
30          (December 1999 - 2000). In particular, Yett asserts that

---

31                 <sup>11</sup> Yett's computations are as follows: 1) Q1 2000, worked  
32                 780 hours for 17 weeks; 2) Q2 2000, worked 754 hours for 13  
33                 weeks; 3) Q3 2000, worked 968.5 hours for 13 weeks; and 4) Q4  
34                 2000, worked 480 hours for 12 weeks.

1 Englewood was not employed by Cogneo during this period, and  
2 Markle was only present for the final month of the coverage  
3 period and, even then, he did not have personal knowledge of  
4 Yett's work schedule.

5 Yett's assessment of the evidence provided by Debtor is  
6 partially correct. Although the record does reflect that the  
7 witnesses were not employed with Cogneo - for the most part -  
8 during the time periods in question, Englewood was a part-time  
9 bookkeeper and was, therefore, in a position to provide testimony  
10 as to documents relevant to Yett's claim, i.e., bills and  
11 invoices for 2000 and 2001. Nevertheless, as the court relied on  
12 its own sample and not anyone's testimony in calculating the  
13 number of hours Yett worked, we find Yett's challenge to the  
14 weight placed on the testimony by the court to be immaterial.

15 We do note, however, that even if the court did rely to some  
16 extent on the testimony of Debtor's witnesses, we are bound to  
17 give deference to its findings as the bankruptcy court is in a  
18 much better position to evaluate and weigh the evidence than the  
19 appellate courts. Fed. R. Civ. P. 52(a); See United States v.  
20 McConney, 728 F.2d 1195 (9th Cir. 1984) (cert. denied, 469 U.S.  
21 824 (1984)). And, unless there is a showing that the bankruptcy  
22 court clearly erred in assessing the credibility and evidentiary  
23 content of witness testimony, we will not overturn its ruling.  
24 In re Hawley, 51 F.3d 246, 248 (11th Cir. 1994). In this case,  
25 we find nothing in the record to warrant such an action. The  
26 bankruptcy court did not err in considering, or not considering  
27 for that matter, the testimony of Debtor's witnesses.

28

1 3. Mistaken Commission Invoice

2 Yett contends that the \$40 hourly rate the bankruptcy court  
3 determined as part of the invoice in connection with the VTA  
4 Maintenance Work<sup>12</sup> was improper. According to Yett, there was no  
5 such agreement to lower his agreed upon hourly rate from \$55 to  
6 \$40 per hour.<sup>13</sup> Moreover, even if he had consented to such  
7 terms, the Fair Labor Standards Act and California Labor Code  
8 prohibits such reductions in wages.<sup>14</sup>

9 In the Summary of the 2001 Invoices submitted with Yett's  
10 proof of claim, Invoice 0204 reflects 290 hours of work performed  
11 as part of the "VTA Maintenance Work for \$22,787 (\$40/hr.= \$11,600.  
12 See Labor Code sect. 206)." An examination of the invoice itself,  
13 however, indicates the billable rate to be \$100 per hour.  
14 Although Yett testified that the work for the VTA Maintenance Work  
15 was to be billed at \$55 per hour, Englewood testified that the  
16 hourly rate was never settled:

17 Q<sup>15</sup>: Do you remember sitting in a meeting with  
18 Mr. Yett and your brother [Debtor] in which  
19 you said - or which the fact that VTA  
20 maintenance work would not be paid on a  
21 commission basis but on a \$40-an-hour basis  
22 was discussed; do you remember those  
23 discussions?

24 A: Yes.

25 \_\_\_\_\_  
26 <sup>12</sup> "VTA Maintenance Work" references miscellaneous work done  
27 for Cogneo's primary client, Valley Transportation Agency.

28 <sup>13</sup> Yett maintains that he asserted the hourly rate for  
commission compensation to be \$55 per hour, not \$100 per hour.

<sup>14</sup> As Yett's argument with regard to the Fair Labor  
Standards and California Labor Code is void of any analysis  
whatsoever, we decline comment on the issue.

<sup>15</sup> Questions were asked by Mr. Ronald P. St. Clair, Yett's  
counsel at trial.

1 Q: Can you - can you describe - did Mr. Yett  
2 agree to earn \$40 an hour for VTA maintenance  
work?

3 A: Once again, I don't think that there was  
4 ever a clear agreement to any of this. It was  
- it was a working document. We were still  
5 negotiating when Mr. - Mr. Yett chose to  
leave.

6 Transcript of Proceeding, July 7, 2004, p. 82.

7 Based on calculations from portions billed to clients from  
8 the other invoices, the bankruptcy court made its own  
9 determination that the VTA Maintenance Work hourly rate was \$40.  
10 At the hearing on the motion for reconsideration, the court  
11 reasoned

12 The Court: [Omitted] And I didn't find it was  
13 a hundred dollars an hour. All the invoices  
for 2001, except the invoice for the 290 hours  
14 [for VTA Maintenance Work], claim compensation  
built on the commission which is a portion of  
the amount billed the client.

15 Mr. Hibbard<sup>16</sup>: Correct.

16 The Court: The hundred hours did not have such  
17 a commission calculation. It was just sought  
for the whole amount. And on the basis of  
18 that I determined that this was not commission  
work, that it was \$40 an hour work. But I  
19 didn't find anything was compensated to the  
claimant at a hundred dollars an hour.

20  
21 Transcript of Proceeding, September 30, 2004, p. 6-7.

22 Our own review of the documentation supporting Yett's proof  
23 of claim reflects that the VTA Maintenance Work was listed at \$40  
24 per hour. Though it may prove inconclusive, we cannot, with firm  
25 conviction, find that the bankruptcy court erred.

26 Moreover, Yett has the burden on appeal to demonstrate that  
27 the bankruptcy court clearly erred. See In re Hongisto, 293 B.R.

28  

---

<sup>16</sup> Mr. Howard L. Hibbard represented Debtor at trial.

1 45, 48 (Bankr. N.D. Cal. 2003) (the "[b]urden is on appellant, with  
2 respect to any challenged findings of fact by bankruptcy court, to  
3 demonstrate that challenged findings are clearly erroneous; mere  
4 showing that bankruptcy court could have reached another  
5 conclusion based upon evidence presented is insufficient."). As  
6 he fails to direct us to any specific facts in the record to  
7 illuminate the court's error, we affirm the court's decision with  
8 regard to the \$40 hourly rate for VTA Maintenance Work.

9 4. Misleading Trial Instruction

10 Yett believes that the bankruptcy court misled him (and  
11 apparently his attorney as well) when it commented at a pre-trial  
12 hearing that the purpose of the trial was to determine if the  
13 claim was able to be "readily liquidated," and not with regard to  
14 the liquidation of the claim itself. Had Yett known that the  
15 court would allow Debtor to make substantive arguments against the  
16 claim itself, he asserts that he would have presented counter  
17 evidence in his defense.

18 Although the scheduling order indicates that the trial was to  
19 be held on the objections to the confirmation of Debtor's plan, it  
20 is clear that at trial the bankruptcy court construed the purpose  
21 of the proceeding to include a determination as to whether the  
22 amount of Yett's claim was subject to easy calculation. In  
23 addition, the written memorandum (following trial) describes the  
24 trial as a hearing on Debtor's objection to Yett's claim.

25 Nonetheless, amidst the ambiguity, the record is clear: Yett  
26 was represented by counsel at both the trial and the hearing on  
27 the motion for reconsideration. At no time during the proceedings  
28 did Yett, or his attorney, convey to the court that the trial



1 instructions were misleading. Furthermore, Yett made no attempt  
2 to preserve the issue on appeal. See Perry v. O'Donnell, 759 F.2d  
3 702, 706 (9th Cir. 1985). Consequently, we consider the issue  
4 waived.

5 C. The Bankruptcy Court Abused Its Discretion in Denying in Part  
6 the Motion to Reconsider the Claim Objection Order

7 The bankruptcy court denied the motion to reconsider the  
8 Claim Objection Order based on Yett's failure to demonstrate a  
9 manifest error of law or fact. For the reasons consistent with  
10 our determination herein, we find that the bankruptcy court abused  
11 its discretion when it denied a portion of the motion for  
12 reconsideration.

13 **VI. CONCLUSION**

14 The bankruptcy court's decision as to the Claim Objection  
15 Order is

- 16 1. REVERSED with regard to the overtime wages for 1999;
- 17 2. VACATED and REMANDED for further findings consistent  
18 with this decision with regard to the overtime wages for  
19 2000;
- 20 3. AFFIRMED as to the weight the bankruptcy court placed on  
21 the testimony of Debtor's witnesses;
- 22 4. AFFIRMED as to the bankruptcy court's finding of a \$40  
23 hourly rate for the VTA Maintenance Work;
- 24 5. AFFIRMED with regard to the alleged misleading trial  
25 instructions.

26 The Reconsideration Order is also REVERSED in part, VACATED  
27 and REMANDED in part, and AFFIRMED in part consistent herewith.