

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1289-2015
OF DONALD HAGER,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
DWM BUILDERS, LLC, a Montana)	
limited liability company,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On January 9, 2015, Donald Hager filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging the respondent, DWM Builders, LLC, a Montana limited liability company (DWM Builders), owed him a total of \$707.50 (\$400.00 plus \$307.50 overtime) in wages for work he performed December 6 through 11, 2014. On February 4, 2015, Dale Myers, the registered agent of DWM Builders, submitted a response to Hager’s claim.

On April 29, 2015, the Wage and Hour Unit issued a determination that concluded DWM Builders owed Hager \$400.00 in unpaid wages. Pursuant to Mont. Code Ann. § 39-3-206, the Wage and Hour Unit also imposed a 15% penalty on the unpaid amount which amounted to \$60.00. The April 29, 2015 determination further stated a penalty of 55% would be imposed if DWM Builders failed to pay this amount (\$460.00) by May 14, 2015.

Following mediation efforts, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings (OAH) on June 9, 2015. On June 12, 2015, OAH issued a Notice of Hearing and Telephone Conference that stated:

Each party has the right to be represented by an attorney. Individuals are not required to be represented by an attorney. Corporations, partnerships, limited liability companies (LLCs), and similar entities are

required to be represented by an attorney. Any party that is represented by an attorney must hire and pay for that counsel.

A June 30, 2015 Scheduling Order set the final pre-hearing telephone conference for September 15, 2015 and a hearing on October 1, 2015. Both Hager and Myers made an appearance at the September 15, 2015 telephone conference. Neither party was prepared for the conference. During the conference, Myers informed the Hearing Officer that DWM Builders had an attorney. Myers provided the name and address of the attorney, Mark Hilario, later that day. Hilario received several voice messages and notice that another final pre-hearing conference was scheduled on September 25, 2015. On September 15 and 25, the Hearing Officer advised Myers that legal counsel had to represent DWM Builders at the October 1 scheduled hearing.

On September 25, the Hearing Officer called Mark Hilario but had to leave a message for him. He was asked to provide a notice of appearance if he was representing DWM Builders in this matter. He was also informed a hearing was scheduled on October 1, 2015. Mark Hilario did not send a notice of appearance to the Office of Administrative Hearings.

On October 1, 2015, the Hearing Officer convened a telephone hearing in this matter. Myers was contacted several times in an attempt to have him testify at the hearing. Even though messages were left for him, Myers did not respond to the messages left for him on October 1, 2015. Hager participated at the October 1 hearing. The Hearing Officer did not dismiss DWM Builders' appeal for failing to participate at the hearing because Hager disagreed with the amount the Wage and Hour Unit held him eligible to receive.

The documents that were sent to both parties, Documents 1 through 43, were admitted into the record as evidence. Hager presented sworn testimony.

Based on the evidence and arguments presented at the hearing, the Hearing Officer makes the following findings of fact, conclusions of law, and final agency decision.

II. ISSUES

A. Does DWM Builders owe wages to Hager for work he performed December 6 through 11, 2014?

B. Does DWM Builders owe Hager overtime wages?

C. Does DWM Builders have legal authority to withhold wages from Hager for missing materials?

D. Does DWM Builders owe a penalty for Hager's unpaid wages or any other monetary damages?

III. FINDINGS OF FACT

1. DWM Builders, a Montana limited liability company, hired Hager as a concrete worker in October 2014. DWM Builders agreed to pay Hager \$10.00 an hour for work he performed for DWM Builders.

2. Prior to December 6, 2014, Hager had no problems receiving wages from DWM Builders for work he performed.

3. The employer directed Hager and Wade, a supervisor, to complete some unfinished projects in early December 2014. Hager worked with Wade on the projects. Hager recorded the number of hours his supervisor told him to record. The hours Hager recorded included travel time, which the employer paid him at the rate of \$10.00 an hour.

4. Hager worked December 1 through 5 and received wages for the 24 hours he worked.

5. Hager and DWM Builders reported to the Wage and Hour Unit variances in hours Hager worked December 6 through 11:

Date	DWM Builders Reported Hours	Hager Reported Hours
December 6, 2014	none	8 hours
December 7, 2014	8 hours	11.5 hours
December 8, 2014	10 hours	10 hours
December 9, 2014	9.5 hours	9.5 hours
December 10, 2014	9.5 hours	11.5 hours
December 11, 2014	4.5 hours	10 hours
Total hours worked	41.5 hours	60.5 hours

6. DWM Builders did not dispute that Hager had not been paid for 40 hours or \$400.00 in wages he earned from December 7 through 11, 2014 (Document 32). Hager worked eight hours on December 6 and worked a total of 52.5 hours from December 7 through 11, 2014.

7. DWM Builders defined a work week as Sunday through Saturday, or in this case December 7 through 11, 2014 (Document 32).

8. On December 11, 2014, Hager drove a loaded trailer with decking material tied onto it from the work site, Winnett, Montana, back to the DWM Builders' shop in Lockwood. Hager's supervisor tied down the decking material. While driving back to Lockwood, Hager stopped at least three times to tighten the ropes around the decking material. When Hager arrived at the Lockwood shop, straps that tied down the decking material were loose. Some of the decking material that had been tied onto the trailer was gone.

9. Myers knew on December 11, 2014 some decking material was missing. Myers estimated the value of missing decking material at \$549.00 (Document 32).

10. On February 11, 2015, Myers filed a complaint against Hager for theft of the decking material. Law enforcement officials investigated, but did not charge Hager with any offense. DWM Builders has not pursued a small claims action against Hager for the missing material.

11. On May 12, 2015, DWM Builders filed a timely appeal from the Wage and Hour Unit's April 29, 2015 determination. There is no evidence showing that DWM Builders paid Hager \$460.00 by May 14, 2015.

IV. DISCUSSION AND ANALYSIS¹:

Issue A - DWM Builders Owes Hager \$480.00 in Regular Wages for Work Performed December 6 through 11, 2014

An employee seeking unpaid wages has the initial burden of proving he performed work without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Department of Labor and Industry* (1977), 172 Mont. 182, 562 P.2d 473. To meet this burden, the employee must produce evidence to "show the extent and amount of work as a matter of just and reasonable

¹ 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.

inference.” Id. at 189, 562 P.2d at 476-77, citing Anderson, 328 U.S. at 687, and Purcell v. Keegan (1960), 359 Mich. 571, 103 N.W. 2d 494, 497; see also, Marias Health Care Srv. v. Turenne, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 422, 28 P.3d 494, 495 (holding that the lower court properly concluded that the plaintiff’s wage claim failed because she failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract).

Based on the evidence presented at the hearing, Hager established DWM Builders owes him unpaid wages for 60.5 hours of work he performed December 6 through 11, 2014. DWM Builders admitted to the Wage and Hour Unit that Hager was not paid \$400.00 in wages for work he performed December 7 through 11. Based on the record DWM Builders sent to the Wage and Hour Unit, Hager worked a minimum of 41.5 hours for the employer from December 7 through 11 (Documents 34-36).

Once an employee has shown as a matter of just and reasonable inference that he is owed wages, “the burden shifts to the employer to come forward with evidence of the precise amount of the 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’ . . .” Garsjo, 172 Mont. at 189, 562 P.2d at 477, quoting Purcell v. Keegan, supra, 359 Mich. at 576, 103 N.W. 2d at 497.

Hager’s sworn testimony, in addition to the records he submitted (Documents 42, 43), establish he worked a total of 60.5 hours (December 6 through 11, 2014) for DWM Builders. DWM Builders did not appear for the October 1, 2015 hearing. As a result, the employer failed to meet its burden to negate Hager’s testimony. Based on the evidence presented at the hearing, DWM Builders owes Hager \$80.00 in **regular** pay for work he performed on December 6 and \$400.00 in **regular** pay for work he performed December 7 through 11, 2014.

Issue B - DWM Builders Owes Hager Overtime Wages

Montana law requires employers to pay overtime at a rate of not less than 1.5 times the hourly wage rate when a worker works more than 40 hours in one work week. Mont. Code Ann. § 39-3-405. Montana law allows employees owed wages 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 evidence does not establish that Hager worked outside of Montana. Therefore, FLSA does not apply in this case.

Hager asserted that from December 6 through 11, 2014 he worked a total of 20.5 overtime hours. The evidence shows he worked eight hours on December 6 and 52.5 hours between December 7 and 11. The employer's work week is Sunday through Saturday (Document 32). When the eight hours Hager worked on December 6 are added to the hours he worked between December 1 and 5, he worked a total of 32 hours this week. Hager is not entitled to any overtime wages for the week ending December 6, 2014.

Since Hager worked a total of 52.5 hours between December 7 and 11, he worked 12.5 hours of overtime this week. There was no dispute that Hager earned \$10.00 an hour. This means he receives \$15.00 an hour for overtime pay (\$10.00 x 1.5). DWM Builders owes Hager \$187.50 in overtime wages (12.5 hours x \$15.00 an hour) for hours he worked the week ending December 11, 2014.

Issue C - Employer's Argument for Withholding Wages from Hager is not Supported by the Law

DWM Builders did not participate at the October 1, 2015 hearing. Therefore, DWM Builders did not meet its burden to establish any legal justification to withhold wages from Hager.

The law provides that when an employee is laid off or is discharged, all wages are due immediately unless the employer has a pre-existing written personnel policy that extends the time for payment. If an employee has been discharged for allegations of theft connected to the employee's work, an employer may withhold the value of the theft if:

1. The employee agrees in writing to the withholding, or;
2. Charges have been filed with law enforcement officials within seven business days of separation.

If no charges are filed with a court of competent jurisdiction within 30 days of the filing of the report with law enforcement, the wages are due within the 30-day period. If the employee is found not guilty of the charges or the employer withholds in excess of the value of the theft, the court may order the employer to pay the withheld amount plus interest. Mont. Code Ann. § 39-3-205.

The Attorney General also issued an opinion that wages cannot be withheld for shortages, damages, or mistakes. Attorney General Opinion No. 17, Volume 36 dated August 27, 1975.

The Wage and Hour records reveal that the employer did not file a complaint against Hager until February 11, 2015. Since DWM Builders did not file a complaint within seven days or by December 18, 2014, the employer cannot legally withhold Hager's wages he earned December 6 through 11, 2014.

DWM Builders owes Donald Hager a total of \$667.50 in wages (\$80.00 for December 6; \$400.00 for 40 hours of work, December 7 through 11; and 12.5 hours of overtime for December 7 through 11 or \$187.50 ($\$400.00 + 80.00 + 187.50 = \667.50)).

Issue D - DWM Builders is Assessed a Penalty on the Amount of Wages Owed, but Cannot Be Assessed Punitive Damages for Defamation of Character or Damages for Hardship in a Wage and Hour Claim

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. Imposition of the penalty is mandatory. *Id.* For cases involving overtime claims, a penalty of 110% will be imposed where a determination has been made that overtime wages are owed and the employer failed to pay the amount due within the time frame prescribed by the determination. Admin. R. Mont. 24.16.7561. The exception to this rule occurs when none of the special circumstances described in Admin. R. Mont. 24.16.7556 apply. In those cases, a reduced penalty of 55% may be imposed.

The April 29 Wage and Hour determination did not conclude that the employer owed Hager overtime pay. Under similar circumstances, the Montana District Court found that the lesser of the penalties available under the rules should be imposed. *Smith v. TYAD, Inc.*, 2007 Mont. Dist. Lexis 348, ¶¶54,55, *aff'd* 2009 MT 180, ¶33, 351 Mont. 12, 209 P.3d 228 (holding that it was error for the agency to impose the higher penalty available under the applicable administrative rule where the agency had not before accorded the employer the opportunity to comply with the rule's requirements for payment of a lower penalty). None of the special circumstances requiring imposition of the maximum penalty of 110% exist in this case. In accordance with the penalty provisions of Admin. R. Mont. 24.16.7561, the hearing officer finds that the employer owes a 55% penalty in the amount of \$367.13 ($\$667.50 \times .55$).

If the employer does not pay the penalty within the time period specified in the order of this decision, a 110% penalty as mandated in Admin. R. Mont. 24.16.7561(b) must be imposed on the overtime pay. This means the employer must pay a penalty of \$206.25 ($\187.50×1.1). The 55% penalty does not change for the

regular pay. The total penalty would then equal \$470.25 (\$264.00 for regular pay and \$206.25 for overtime pay).

In addition to being entitled to unpaid wages, Hager also argued he was entitled to receive hardship damages because DWM Builders refused to pay him wages for work he completed from December 6 through 11, 2014. He also asserted he should be awarded punitive damages for defamation of his character. These additional remedies are not recoverable under the wage and hour statutes. *Johnson v. K & T Manufacturing, Inc.* (1981), 191 Mont. 458, 652 P.2d 66. The Department cannot award Hager punitive damages or hardship damages he may have suffered because the Montana Wage Payment Act does not provide for such penalties.

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. A corporation can only appear in a legal proceeding through a licensed attorney. *Audit Services, Inc. v. Frontier West, Inc.*, (1992), 252 Mont. 142, 148, 827 P.2d 1241, 1246. A corporation is a separate legal entity and cannot appear on its own behalf through an agent other than an attorney. *Weaver v. Graybill*, (1990), 246 Mont. 175, 178, 803 P.2d 1089, 1091, quoting Annotation, Propriety and Effect of Corporation's Appearance Pro Se, Through Agent Who is Not Attorney, 19 A.L.R. 3d 1073 (1968). Only licensed attorneys may practice law or represent others in legal proceedings. *Traders State Bank v. Mann*, (1993), 258 Mont. 226, 852 P.2d 604 (overruled on other grounds).

3. There is no evidence Hager worked outside of Montana. Therefore, the FLSA does not apply in this case.

4. DWM Builders, LLC owes Donald Hager \$667.50 in wages he earned from December 6 through 11, 2014.

5. A 55% penalty amount of \$367.13 is due in addition to the unpaid wages if DWM Builders pays this amount within the time period specified in the order below. Admin. R. Mont. 24.16.7561. This means the total amount to be paid is \$1,034.63.

6. If DWM Builders, LLC fails to pay the wages and penalty within the time frame indicated in the order below, a penalty of 110% shall be imposed on the

overtime wages. The total penalty that must be paid would be \$470.25 in addition to the unpaid regular and overtime wages, for a total of \$1,137.75.

VI. ORDER

Based on the foregoing, the Department's April 29, 2015 determination is modified.

It is **ORDERED** that DWM Builders, LLC tender a cashier's check or money order in the amount of \$1,034.63. This represents \$480.00 in unpaid regular wages, \$187.50 in unpaid overtime wages, and \$367.13 in a penalty. This shall be made payable to Donald Hager. All payments shall be mailed to the **Employment Relations Division, P.O. Box 201503, Helena, MT 59620-1503**, no later than 30 days after service of this decision.

In the event DWM Builders, LLC fails to pay the amount found due in this decision no later than 30 days of service of this decision, the penalty for overtime wages increases to 110% and the total penalty in the amount of \$470.25 will be payable in addition to \$667.50 in wages due to Donald Hager, for a total of \$1,137.75.

DATED this 21st day of October, 2015.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DEBRA L. WISE
DEBRA L. WISE
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 the date of mailing of the hearing officer's 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.