

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

IN THE MATTER OF THE WAGE CLAIM )	Case No. 1787-2013
OF TEL YATSKO, )	
)	
Claimant, )	
)	
vs. )	<b>FINAL AGENCY DECISION</b>
)	
LIBERTY ELECTRIC, INC., a Montana )	
corporation, )	
)	
Respondent. )	

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**I. INTRODUCTION**

Claimant Tel Yatsko timely appealed from a dismissal issued by the Wage and Hour Unit of the Department of Labor and Industry.

Hearing Officer Caroline A. Holien held a contested case hearing in this matter on March 30, 2015 in Helena, Montana. Tel Yatsko and his sister, Janelle Yatsko, appeared on Yatsko’s behalf. Attorney Cory Laird appeared on behalf of Liberty Electric, Inc. Tel Yatsko; Dale Yatsko; Janice Moog, Vice President of Operations; Daniel Rearden, Vice President of Liberty Electric - Great Falls; Kevin Koehmstedt, Journeyman Electrician and IEC Instructor; Lorren Schlotfeldt, MSU - Northern Instructor and Master Plumber; Levi Fox, Journeyman Electrician; and Mark Maki, former State Director of Apprenticeships and Training with the Montana Department of Labor and Industry and current JATC Training Director, testified under oath.

The parties stipulated to the admission of Claimant’s Exhibits 5, 7, 11, 15, 17, 18, 19, and 32 and Respondent’s Exhibits C, D, J, K, N, O, P, Q, S, T, U, V, and W. Claimant’s Exhibits 3, 4, 9, and 16 were admitted at hearing. Respondent’s Exhibits A, E, F, G, H, I, and R were also admitted at hearing.

The parties provided the hearing officer with oral closing statements at the close of hearing. The parties agreed to submit proposed findings of fact no later than April 22, 2015. Upon the timely receipt of those documents, the case was deemed

submitted for decision. Based on the evidence and argument presented at the hearing, the following findings of fact, conclusions of law, and final order are made.

## II. ISSUE

Whether Liberty Electric, Inc., a Montana corporation, owes wages for work performed, as alleged in the complaint filed by Tel Yatsko, and owes penalties or liquidated damages, as provided by law.

## III. FINDINGS OF FACT

1. Liberty Electric, Inc. (Liberty Electric) employed Tel Yatsko as an apprentice electrician beginning on or about May 29, 2012. Yatsko's last day worked was November 16, 2012.

2. Yatsko worked for a union employer prior to beginning work for Liberty Electric. Yatsko was enrolled in the Montana Electrical JATC (JATC) apprenticeship program as part of his union employment. The JATC apprenticeship program is distinct from Liberty Electric's apprenticeship program in that it requires 180 hours of related instruction each year and the term of the program is five years. Yatsko was required to quit the union's apprenticeship program before he was allowed to enter Liberty Electric's apprenticeship program.

3. Liberty Electric is a member of the association of Independent Electrical Contractors (IEC). Liberty Electric is a non-union electrical contractor that maintains its own apprenticeship program that was approved by the State of Montana in 1990. Liberty Electric's apprenticeship program was required to meet Montana state standards in order to obtain state approval.

4. The Apprenticeship Standards are the rules for Liberty Electric's apprenticeship program. Every applicant for Liberty Electric's apprenticeship program must execute a formal Apprenticeship Agreement, which must then be approved by the State of Montana. Each apprentice applicant must agree to the terms and conditions set forth in the Apprenticeship Standards.

5. Each apprenticeship includes an "apprentice" and a "sponsor" under the Apprenticeship Standards. In this case, Yatsko was the "apprentice" and Liberty Electric was the "sponsor."

6. All applicants selected for an apprenticeship are required to serve a probationary period that cannot exceed 25% of the length of the program or one year, whichever is shorter. Liberty Electric considers the first 2,000 hours of

employment as the apprentice's probationary period. Either party may request termination or cancellation of the Apprenticeship Agreement within the probationary period without stated cause.

7. The term of Liberty Electric's apprenticeship program is no less than 8,000 hours and four years. Apprentices are also required to complete no less than 144 hours of related instruction and to successfully complete all class instruction, homework, and quizzes in order to remain in the program. All Liberty Electric apprentices must successfully complete the related instruction portion of the apprenticeship program. Classroom instruction is offered in Great Falls, Montana, to all apprentices who are employed by electrical contractors who are a part of the IEC.

8. Any apprentice who is absent from related instruction classes, unless officially excused, must satisfactorily complete all course work deficiencies before being advanced to the next period of training under the Apprenticeship Standards. Sponsors are required to take disciplinary action against apprentices who fail to meet their related instruction requirements. In cases where the apprentice is outside of the probationary period, the Apprenticeship Standards state that such disciplinary action may include termination of the apprenticeship after due notice to the apprentice and the opportunity for corrective action.

9. "Lateral transfers" of apprentices from different programs are allowed under Liberty Electric's apprenticeship program. Apprentice applicants seeking credit for previous experience gained outside of Liberty Electric's apprenticeship program are required to submit all records, affidavits, and transcripts when applying for credit for previous experience. Liberty Electric's Apprenticeship Standards for Inside Wireman Residential Wireman states:

Applicants requesting such credit who are selected into the apprenticeship program will start at the beginning rate. The request for credit will be evaluated and a determination made by the Sponsor during the probationary period when actual on-the-job and related instruction performance can be examined. Prior to completion of the probationary period, the amount of credit to be awarded will be determined after review of the Apprentice's previous work and training/education record and evaluation of the Apprentice's performance and demonstrated skill and knowledge during the probationary period. An Apprentice granted credit will be advanced to the wage rate designated for the period to which such credit accrues.

10. Liberty Electric has the sole discretion and authority to grant requests for credit and placing applicants in its apprenticeship program.

11. The initial placement of an apprentice dictates the apprentice's rate of pay at the beginning of his or her apprenticeship. Apprentices are eligible to receive wage increases based upon their performance and related instruction. Liberty Electric had the sole discretion as the sponsor of the apprenticeship program to determine Yatsko's placement in the program.

12. Yatsko was required to complete a placement exam as a condition of his apprenticeship with Liberty Electric. Liberty Electric used the results of this exam to determine Yatsko's apprenticeship level. Placement exams are customarily used in the industry to determine placement of lateral transfers between different apprenticeship programs.

13. On or about July 12, 2012, IEC Instructor Kevin Koehmstedt administered the placement exam to Yatsko. Yatsko scored 62% on the placement exam.

14. In late July 2012, Liberty Electric received the information necessary from Yatsko's previous employer to determine what credit would be granted for his previous work experience.

15. Apprentices in Liberty Electric's apprenticeship program are paid a percentage of the lowest wage paid to a journeyman electrician. Liberty Electric increases apprentices' wages as they progress in the apprenticeship program. Liberty Electric's Apprenticeship Standards set forth the Trade Schedules for Inside Wireman in the different regions of Montana as determined by the Montana Department of Labor and Industry. The applicable Trade Schedule for the period in question is State Prevailing Wage District #4 - Great Falls, Montana, which shows:

0 - 1,000 hours	\$11.30 per hour or 40% of prevailed journeyman wage
1,001 - 2,000 hours	\$13.34 per hour or 50% of prevailed journeyman wage
2,001 - 3,500 hours	\$15.38 per hour or 60% of prevailed journeyman wage
3,501 - 5,000 hours	\$17.42 per hour or 70% of prevailed journeyman wage
5,001 - 6,500 hours	\$19.46 per hour or 80% of prevailed journeyman wage
6,501 - 8,000 hours	\$21.50 per hour or 90% of prevailed journeyman wage

16. On July 31, 2012, Janice B. Moog, Liberty Electric's Vice President of Operations, and Yatsko executed an Apprenticeship Agreement. This agreement specifically stated the Apprenticeship Standards were incorporated into the Apprenticeship Agreement. The Apprenticeship Agreement included Liberty Electric crediting Yatsko for 6,412 hours of previous experience and noting Yatsko had 1,588 hours left to complete the 8,000 hour program. The agreement noted Yatsko's probationary period was the "1<sup>st</sup> 2000 Hours." Mark Maki, who was then the State Director of Apprenticeships and Training, approved the agreement on July 31, 2012.

17. Yatsko's probationary period with Liberty Electric was the first 2,000 hours of work performed after execution of the Apprenticeship Agreement. Either party was free to terminate the apprenticeship without penalty during the first 2,000 hours of work performed by Yatsko.

18. During this period, Moog purchased books for the third year related instruction for Yatsko. Yatsko assumed he did not need to complete the third year related instruction due to his having successfully completed similar course work during his JATC apprenticeship, which is separate and distinct from Liberty Electric's apprenticeship program. No one with Liberty Electric advised or encouraged Yatsko to not complete the third year course work.

19. From May 29, 2012 through July 27, 2012, Liberty Electric paid Yatsko a regular hourly wage of \$15.38, which was 60% of the hourly wage of a prevailed journeyman under Liberty Electric's Apprenticeship Standards. Yatsko complained to Moog that his wage was incorrect and demanded he be paid at the 70% or 80% rate based upon the number of hours he had received credit for under the Apprenticeship Agreement.

20. From July 31, 2012 through November 2, 2012, Liberty Electric paid Yatsko a regular hourly wage of \$17.42, which was 70% of the hourly wage of a prevailed journeyman under Liberty Electric's Apprenticeship Standards. Liberty Electric elected to pay Yatsko at the 70% rate due to his previous work experience. Under the Apprenticeship Agreement, Liberty Electric could have paid Yatsko at the 60% rate based upon the results of his placement exam.

21. From November 4, 2012 through November 16, 2012, Liberty Electric paid Yatsko a regular hourly wage of \$19.46, which was 80% of the hourly wage of a prevailed journeyman under Liberty Electric's Apprenticeship Standards.

22. During this period, Yatsko attended IEC school and completed the course work and quizzes for sections 301, 302, and 303. Yatsko failed to attend the other required classes or complete any of the course work. Kevin Koehmstedt, an instructor at the IEC school, orally warned Yatsko that he needed to attend class and complete the homework and quizzes. Koehmstedt suggested to Yatsko that his attendance was not that great of a priority if he completed all of the course work and quizzes in a timely fashion. Yatsko assured Koehmstedt that he would improve his completion of course work and quizzes.

23. On November 5, 2012, Dan Rearden, who was then a Project Manager for Liberty Electric, gave Yatsko a letter advising him that he was four weeks behind in his assignments and quizzes and had two unexcused absences from the IEC school. Liberty Electric had previously given Yatsko books for the third year of the

apprenticeship program. Yatsko thought he did not have to complete the instruction as he had already completed his third year with a previous employer. No Liberty Electric employee advised Yatsko that he did not have to complete the third year segment of the apprenticeship program or that he was otherwise excused from attending classes. Respondent's Exhibit F.

24. During this period, Yatsko and his father, Dale Yatsko, were in frequent contact with Maki to express their concerns with Liberty Electric's decisions regarding Yatsko's pay structure. Maki spoke with Moog about Yatsko's concerns and suggested Liberty Electric increase Yatsko's hourly wage so he could successfully continue and complete Liberty Electric's apprenticeship program. Maki did not have the authority to mandate a wage increase. Maki's suggestion was out of concern that the situation appeared to be escalating and both parties were in need of a quick resolution in order to salvage the working relationship.

25. On November 16, 2012, Dan Rearden, Vice President of Liberty Electric's Great Falls location, informed Yatsko that he was being discharged. Yatsko had not previously received any warnings regarding his job performance but had been warned that he was not completing his related instruction in a timely manner.

#### IV. DISCUSSION<sup>1</sup>

An employee seeking unpaid wages has the initial burden of proving work performed 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 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).

Once an employee has shown as a matter of just and reasonable inference that he or she 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

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<sup>1</sup> Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

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.

Yatsko argued he should have been paid at an hourly rate of \$19.46 per hour, which was 80% of the prevailed journeyman wage, based upon his having received credit for 6,412 hours of previous experience under the Apprenticeship Agreement. Yatsko argued that any hours of work he performed in excess of 6,500 hours should have been paid at a rate of \$21.50 per hour, which was 90% of the prevailed journeyman wage.

Moog testified Liberty Electric started Yatsko at \$15.38 per hour, or 60% of the prevailed journeyman rate, due to Yatsko's previous work experience. Moog testified Liberty Electric increased Yatsko's rate of pay to \$17.42, or 70% of the prevailed journeyman rate, upon execution of the Apprenticeship Agreement despite Yatsko having scored only 62% on the placement exam based upon his demonstrated work performance. Liberty Electric raised Yatsko's hourly wage to \$19.46, which was 80% of the prevailed journeyman rate, effective November 4, 2014.

The Apprenticeship Agreement clearly states applicants will start out at the beginning rate, which at the time of Yatsko's apprenticeship was \$11.30 per hour or 40% of the prevailed journeyman rate. At all times, Liberty Electric had the discretion under the Apprenticeship Standards to determine Yatsko's rate of pay based upon not only his previous experience, but also his satisfactory completion of related instruction and work performance.

Moog testified Yatsko's pay was based, in part, on his placement exam result of 62%, which Moog testified would have qualified Yatsko to be paid at the 60% rate. There was a good deal of debate at the time of hearing regarding the exam admitted as Exhibit L. Yatsko testified he recalled taking a test that had a signature page, which Exhibit L did not. Yatsko also recalled the test he took as having more pictures than the one admitted as Exhibit L. Both Moog and Koehmstedt testified Exhibit L was the test taken by Yatsko and both testified Yatsko scored 62%. Yatsko did not offer any credible or substantial evidence showing Exhibit L was not in fact the test he took in July 2012. Even if Exhibit L was to be excluded, as encouraged by Yatsko in his post-hearing filing, the consistent and straightforward testimony offered by Moog and Koehmstedt regarding the test result is more credible than the vague and rambling denials offered by Yatsko.

Yatsko has not shown by a just and reasonable inference that Liberty Electric owes him any additional wages for work performed from May 29, 2012 through November 16, 2012. The evidence shows Liberty Electric paid Yatsko pursuant to the terms of the Apprenticeship Standards. Even if Yatsko was found to have met his

burden, Liberty Electric presented sufficient credible evidence negating the reasonableness of the inference to be drawn from evidence presented by Yatsko. Liberty Electric presented the Apprenticeship Agreement; Apprenticeship Standards; paystubs, ledger card report; and classwork results report showing it paid Yatsko appropriately for all time worked and at a rate of pay consistent with the Apprenticeship Agreement and Apprenticeship Standards. Further, the sworn testimony of Lorren Schlotfeldt, MSU - Northern Instructor and Master Plumber, and Mark Maki, former State Director of Apprenticeships and Training with the Montana Department of Labor and Industry and current JATC Training Director, shows Liberty Electric acted according to the standards of the industry in determining Yatsko's placement within its own apprenticeship program and setting his rate of pay. Yatsko has not shown by a preponderance of the evidence that he is owed for unpaid wages for work performed beginning May 29, 2012 through November 16, 2012.

## V. CONCLUSIONS OF LAW

1. The State of Montana and the Commissioner of the Department of Labor and Industry have jurisdiction over this complaint under Mont. Code Ann. § 39-3-201 et seq. *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. Tel Yatsko has not shown he is owed additional wages for work performed during the period beginning May 29, 2012 through November 16, 2012.

DATED this 8th day of May, 2015.

DEPARTMENT OF LABOR & INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CAROLINE A. HOLIEN

CAROLINE A. HOLIEN

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.