

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

IN THE MATTER OF THE WAGE CLAIM OF NATALIE J. WEST,	)	Case No. 368-2016
	)	
	)	
Claimant,	)	
	)	
vs.	)	<b>FINAL AGENCY DECISION</b>
	)	
SENIOR SOLUTIONS, INC., a Montana Corporation,	)	
	)	
	)	
Respondent.	)	

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**I. INTRODUCTION**

1. On August 27, 2015, Natalie West (West) filed a claim with the Wage and Hour Unit of the Montana Department of Labor and Industry (Wage and Hour Unit) alleging Senior Solutions, Inc., a Montana Corporation (Senior Solutions), owed her \$9,800.00 in overtime for work performed January 1 through August 16, 2015.

2. On September 28, 2015, Marie Kagie-Shutey, attorney for Senior Solutions, responded to West’s wage and hour claim.

3. On June 3, 2016, the Wage and Hour Unit issued a determination finding Senior Solutions owed West \$2,416.00 in regular wages and \$7,556.25 in overtime wages. The determination imposed a penalty of 15%, or \$362.40, on the unpaid regular wages and a penalty of 55%, or \$4,155.94, on the unpaid overtime wages if the employer paid the amount owed by June 20, 2016. If the employer did not pay by June 20, 2016, the employer would be assessed a penalty of 55% on the unpaid regular wages and a penalty of 110% on the unpaid overtime wages.

4. On June 20, 2016, Senior Solutions appealed and requested a formal hearing.

5. On July 13, 2017, following unsuccessful mediation efforts, the Wage and Hour Unit transferred the issue of whether Senior Solutions owed Natalie West for regular and overtime wages and penalties to the Office of Administrative Hearings (OAH).

6. On July 21, 2017, OAH issued a Notice of Hearing and Telephone Conference informing the parties a scheduling conference would be held on August 2, 2017. The Notice stated the issue was “Whether Senior Solutions, Inc., a Montana corporation, owed overtime wages, as alleged in Natalie West’s complaint and owes penalties or liquidated damages, as provided by law.”

7. On August 2, 2017, Natalie West and Marie Kagie-Shutey, Senior Solutions attorney, participated in a telephone scheduling conference. The parties agreed to an October 13, 2017 final pre-hearing conference and an October 18, 2017 telephone hearing. A Scheduling Order issued on August 2, 2017 confirmed these dates.

8. On October 18, 2017, Hearing Officer Debra Wise held a contested hearing in this matter. West appeared on her behalf. Marie Kagie-Shutey, attorney at law, represented Senior Solutions. Sheena Hensley, the CFO, testified on Senior Solutions’ behalf. The parties stipulated to admitting the administrative record compiled by the Wage and Hour Unit, Documents 1 through 82. Neither party presented any additional documents. The parties also stipulated the only issue was whether Senior Solutions owed West any overtime wages and penalty amount.

## **II. ISSUE**

Whether Senior Solutions, Inc., a Montana corporation, owes Natalie West overtimes wages for January 1 through August 20, 2015, and owes penalties or liquidated damages, as provided by law.

## **III. FINDINGS OF FACT**

1. On December 14, 2014, Senior Solutions hired West as a personal care attendant. West provided in-home care to Senior Solutions’ clients. West’s work included staying overnight with the client so she was available to assist the client during the night, when needed.

2. West’s starting wage was \$11.00 an hour. Senior Solutions pays employees every two weeks. The pay period is Monday through Sunday.

3. On January 9, 2015, Senior Solutions paid West \$962.50 gross wages for work she performed December 22, 2014 through January 4, 2015 (Document 40).

4. West worked 38 hours from December 23 through 28, 2014. She worked 42 hours from December 29, 2014 through January 4, 2015 (Document 67).

5. From January 5 through May 24, 2015, West worked 39 to 40 hours a week. West did not work any overtime hours during this time frame. The employer paid West for all the hours she worked during this period (Documents 40, 43-45).

6. In May 2015, West asked the employer if she could work more hours. West had personal financial expenses and wanted to make more money. Hensley had more clients and asked if West would accept cash, under the table, for overtime hours. West agreed Senior Solutions would pay West \$12.00 an hour in cash for all overtime hours she worked. In May 2015, West's hourly wage increased to \$12.00 an hour.

7. On May 29, 2017, West started providing services to a second client. Before accepting the second client, West typically worked Monday, Tuesday, Wednesday for one client from 7:00 p.m. to 8:00 a.m. West typically provided services to the second client on Friday, Saturday, and Sunday from 8:00 p.m. to 8:00 a.m. (Documents 46, 47, 48).

8. The following chart shows the number of hours West worked between May 25 and August 20, 2015 (Documents 46-53, 69-82).

Work Week	Total Hours Worked
5-25 through 5-31-2015	67
6-1 through 6-7-2015	75
6-8 through 6-14-2015	75
6-15 through 6-21-2015	75
6-22 through 6-28-2015	75
6-29 through 7-05-2015	75
7-6 through 7-12-2015	67
7-13 through 7-19-2015	84
7-20 through 7-26-2015	68
7-27 through 8-2-2015	76
8-3 through 8-9-2015	50
8-10 through 8-16-2015	76
8-17 through 8-20-2015	47

9. Throughout the course of her employment, West timely received wages for her regular hours of work. Hensley withdrew cash and paid West cash at \$12.00 an hour for some of the overtime hours West worked.

10. Sometimes Hensley did not pay for all the overtime hours West worked for a two-week payroll period. Hensley did not record the amount she paid West in cash for the overtime hours. West did not provide documentation indicating how much Hensley paid her for overtime hours between late May and the end of her employment in mid-August 2015.

11. Senior Solutions initially reported West was paid in cash for 331 hours (Document 55). Later, Senior Solutions estimated West received a total of \$4,080.00 in cash for overtime hours she worked May 29 through August 20, 2015.

12. West worked 390 overtime hours between May 30 and August 20, 2017.

13. Senior Solutions paid West for 331 hours of overtime at \$12.00 an hour.

14. Senior Solutions has paid West \$3,972.00 (331 x \$12.00) in cash, for overtime wages. Senior Solutions did not pay any withholding taxes on this amount that West received in overtime wages.

15. For all overtime hours West worked, she was entitled to receive \$18.00 an hour.

16. West earned a total of \$7,020.00 in overtime wages (390 hours x \$18.00) from May 25 through August 20, 2015.

17. Senior Solutions owes Natalie West an additional \$3,048.00 in unpaid overtime wages (\$7,020.00 - \$3,972.00).

18. Senior Solutions owes West a penalty of \$3,352.80 (110% x \$3,048.00).

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

A. *How many hours of overtime did Natalie West earn between January 1 and August 20, 2015?*

Montana law allows employees owed wages, including wages due under the FLSA, 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. West claimed she is owed overtime so Montana's Minimum Wage and Overtime Compensation Act applies.

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 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 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.

In this matter, Senior Solutions acknowledged West worked overtime since late May 2015. The documentary evidence establishes Senior Solutions did not pay West for all the overtime hours she worked.

From December 29, 2014 through January 4, 2015, West worked 42 hours. On January 9, 2015, the employer paid her gross wages of \$962.50 for hours she worked December 23, 2014 through January 4, 2017. Based on the hours she

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

worked, West earned a total of \$891.00 for these weeks (this includes 2 hours of overtime at \$16.50 an hour). Since Senior Solutions paid her more than \$891.00 (38 hrs. x \$11.00 + 40 hour x \$11.00 - 2 hrs x (\$11.00 x 1.5) or \$962.50, the evidence establishes Senior Solutions paid West for all her regular and overtime hours during this pay period.

The record establishes West worked 390 overtime hours from May 25 to August 20, 2015. The overtime hours are supported by the time logs West and Senior Solutions presented as documentary evidence. During the hearing, the employer asserted West worked varying hours of overtime. The Hearing Officer concludes the employer's initial calculation that Senior Solutions paid West for 331 hours of overtime at \$12.00 an hour is the most credible (Document 55).

*B. How much does Senior Solutions owe West for the overtime she worked May 25 through August 20, 2017?*

When computing overtime for hourly paid employees, Admin. R. Mont. 24.16.2512(2)(a)(i) provides:

(i) Earnings at hourly rate exclusively. If the employee is employed solely on the basis of a single hourly rate, the hourly rate is his "regular rate." For his overtime work he must be paid, in addition to his straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week.

In May 2015, West earned a regular rate of \$12.00. Her overtime work must be paid at \$18.00 an hour.

West admitted she agreed Senior Solutions could pay her in cash, under the table, \$12.00 an hour for all overtime hours she worked. However, Mont. Code Ann. § 39-3-208 provides that any contract or agreement made between an employer and an employee the provisions of which violate, evade, or circumvent this part is unlawful and void. Therefore, Senior Solutions was legally obligated to pay West \$18.00 an hour for all overtime hours she worked May 25 through August 20, 2015.

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 fails to pay the amount due within the time frame prescribed by the determination. Admin. R. Mont. 24.16.7561. The sole exception occurs where none of the special circumstances described in Admin. R. Mont. 24.16.7556 apply. In those cases, a reduced penalty in the amount of 55% may be imposed.

In this case, the June 3, 2016 determination from which Senior Solutions appealed found West was owed overtimes wages and ordered Senior Solutions to pay the amount owed no later than June 20, 2016. Senior Solutions failed to submit payment to the Wage and Hour Unit within the time provided. Applying the penalty provision of Admin. R. Mont. 24.16.7561, the Hearing Officer finds Senior Solutions owes a penalty of 110% in the amount of \$3,352.80.

## V. CONCLUSIONS OF LAW

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

2. Senior Solutions owes Natalie West \$3,048.00 in unpaid overtime wages.

3. A 110% penalty amounting to \$3,352.80 is due on the unpaid overtime wages. Admin. R. Mont. 24.16.7561.

4. Senior Solutions has not withheld any withholding taxes on any of the overtime wages (\$7,020.00) West earned.

## VI. ORDER

Senior Solutions is ORDERED to tender a cashier's check or money order in the amount of \$6,400.80 which represents \$3,048.00 in unpaid overtime wages and \$3,352.80 in a penalty, made payable to Natalie West and mailed to the Employment Relations Division, P.O. Box 201503, Helena, Montana 59620-1503, no later than 30 days after service of this decision. Senior Solutions may deduct applicable withholding from the total amount of overtime wages that West earned (\$7,020.00) but not from the penalty portion of the amount due.

DATED this 8th day of December, 2017.

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. Please send a copy of your filing with the district court to:

Department of Labor & Industry  
Wage & Hour Unit  
P.O. Box 201503  
Helena, MT 59624-1503