

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM	)	Case No. 650-2008
OF KENNETH C. NORTON,	)	
	)	
Claimant,	)	
	)	
vs.	)	<b>FINDINGS OF FACT;</b>
	)	<b>CONCLUSIONS OF LAW;</b>
HANSEL D. ZECH d/b/a HIGH COUNTRY	)	<b>AND ORDER</b>
LAWNS, a business name not registered in )	)	
Montana,	)	
	)	
Respondent.	)	

\* \* \* \* \*

**I. INTRODUCTION**

Respondent Hansel D. Zech (Zech), appeals from determinations of the Wage and Hour Unit of the Department of Labor and Industry upholding the claim of Kenneth C. Norton. Hearing Officer David A. Scrimm held a contested case hearing in this matter on September 18, 2008. At the hearing, the parties represented themselves.

Norton and Zech testified. Documents 1-65 submitted to the parties with the Notice of Hearing were admitted into the hearing record along with Zech's Exhibits A-M. Based on the evidence and argument presented at the hearing, the hearing officer makes the following findings of fact, conclusions of law, and final agency decision.

**II. ISSUE**

Is the claimant due additional wages and penalty as provided by law?

**III. FINDINGS OF FACT**

1. Norton began his employment with Zech on or about July 16, 2007. He worked until August 15, 2007. Norton was paid at the rate of \$10.00 per hour.

2. Norton filed his wage claim with the Wage & Hour Division of the Montana Department of Labor & Industry on July 31, 2007.

3. Norton seeks unpaid wages in the amount of \$747.50 for the time period of July 31, 2007 to August 10, 2007.

4. Norton was paid \$182.50 for his 18.25 hours worked on August 9<sup>th</sup> and 10<sup>th</sup>. Thus his claim would be reduced to \$565.00.

5. Norton failed to prove he is owed wages for the time period he claims. By the operation of law he is owed \$10.00, plus penalty.

6. The following table shows the hours Norton worked and the amounts he was paid.

Date	Hours worked	Total Due	Check Date	Amount paid
7-16-2007	5.0			
7-17-2007	9.5			
7-19-2007	9.5*			
7-20-2007	7.0			
7-23-2007	8.25*			
	39.25	\$392.50		
7-24-2007	6			
7-25-2007	1			
7-26-2007	8			
7-27-2007	9		7-27-2007	100.00 <sup>1</sup>
7-30-2007	10		8-3-2007	500.00
	34	\$340.00	8-7-2007	150.00
8-9-2007	12			
8-10-2007	6.5*			
8-14-2007	8.5			
8-15-2007	5.75		8-21-2007	200.00
	32.75	\$327.50	8-24-2007	100.00
Total Earned		\$1060.00	Total Paid	\$1050.00

\* 15minute lunch is work time pursuant to Admin R. Mont. 24.16.1006.

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<sup>1</sup> Paid in cash.

7. Pursuant to Admin. R. Mont. 24.16.7556, Norton is owed a 55% penalty on the unpaid wages in the amount of \$5.50.

#### IV. DISCUSSION<sup>2</sup>

##### A. Wages owed

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 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 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.

Norton testified that he worked a total of 74.75 hours from July 31, 2007 through August 10, 2007 and was not paid for that time. Norton submitted copies of two day planner pages to document these hours (Exhibits 17 & 18). Norton was, in fact, paid for the hours he worked on August 9<sup>th</sup> and 10<sup>th</sup> as those hours were reported on his time card (Exhibit I). Norton also testified that he regularly worked with Chance Chambers. Zech testified Norton only would work when Chance Chambers worked because he knew the routes and the customer needs. Zech further testified that Chambers had left town during the time Norton claimed he was unpaid. While Norton disputed this fact, he provided no evidence to indicate that Chambers was, in fact in town and that he worked independently during the time he claims he was unpaid. Norton provided no other evidence to show that he worked the hours he claimed he was not paid. Norton stated in Exhibit B that he only submitted two time cards while working for Zech. Those cards are identified as Exhibits E, F, I and M. Each side of the card has entries for seven days of work. Exhibit E & F cover the time period of July 16, 2007 to July 30,

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<sup>2</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.

2007. Exhibit I is one side of a time card showing hours worked August 9, 2007 to August 15, 2007. Exhibit L, the reverse side of Exhibit I, is blank showing no hours worked.

Norton bears the burden of proof in this matter to show by a preponderance of the evidence that he is entitled to the additional wages he claims to be due. *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104, 1112. In this matter Norton failed to carry his burden with respect to the eight days for which he claimed he was not paid. Perhaps if he had put on more evidence such as the testimony of his co-worker, Mr. Chambers, the outcome would be different. However the hearing officer can only rely on the actual substantial evidence introduced or admitted at hearing. Norton is only owed wages based on the 15-minute lunch breaks which count as hours worked under Admin R. Mont. 24.16.1006 in the amount of \$10.00.

B. *Penalty.*

Montana law assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. The law requires that Zech pay at least a 55% penalty on the unpaid wages it owes Norton. Admin R. Mont. 24.16.7566. The hearing officer finds that Norton is owed a 55% penalty on the wages owed in the amount of \$5.50.

**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. Zech owes Norton unpaid regular wages in the amount of \$10.00 and a penalty in the amount of \$5.50.

**VI. ORDER**

Zech is hereby ORDERED to tender a cashier's check or money order in the amount of \$15.50, representing \$10.00 in wages and \$5.50 in penalty, made payable to Kenneth Norton.

All payments required above shall be mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision.

DATED this 14th day of November, 2008.

DEPARTMENT OF LABOR AND INDUSTRY

By: /s/ DAVID A. SCRIMM  
David A. Scrimm, Hearing Officer  
Hearings Bureau

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 service of the 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.

NORTON FOF DSP