

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 85-2017
OF RYAN J. HARPER,))
))
Claimant,))
))
vs.)	FINAL AGENCY DECISION
))
ROBIN G. BORLAND, individually,))
d/b/a TOUCH OF COUNTRY CATERING,))
))
Respondent.))

* * * * *

I. INTRODUCTION

On July 18, 2016, the Department’s Wage & Hour Unit received a claim for unpaid wages from Ryan Harper alleging he was owed \$1,338.82 in unpaid wages from Robin Borland d/b/a Touch of Country Catering. He alleged he was owed \$1,120.00 in unpaid regular time and \$218.82 in overtime wages. Borland responded to the Wage & Hour Unit’s requests for information in a minimal fashion and did not respond to requests for additional information. See Doc. 19. On October 13, 2016, the Wage & Hour Unit determined Harper was owed \$26.37 in unpaid overtime wages and penalty. Harper filed his appeal on October 20, 2016.

On January 3, 2017, the Hearing Officer issued subpoenas that Harper requested for the purpose of obtaining certain documents from Borland including pay stubs and time sheets. Borland supplied some of the requested information but not all. Subsequently, on February 6, 2017, Harper filed a Motion to Compel the production of the requested documents. Borland refused to accept the certified delivery of Harper’s motion. Doc. 63. On February 9, 2017, the Hearing Officer attempted to hold a telephone conference with the parties to resolve the document production issues. Borland refused to participate. She stated that she had mailed the additional documents to Harper (and Dolores Heinsohn). On February 13, 2017, the Hearing Officer granted Harper’s Motion to Compel. Borland never supplied all the time sheets and pay stubs that she was ordered to produce.

On February 28, 2017, a contested case hearing was held. Ryan Harper appeared by telephone. The Hearing Officer initially contacted Borland but was

disconnected. After several attempts to reach Borland proved unsuccessful, the hearing went forward in her absence. Harper and Dolores Heinsohn presented sworn testimony. Documents 1- 51 and Harper's 51A through 63 were admitted into the evidentiary record.

II. ISSUE

The issue in this case is whether Robin G. Borland, individually, d/b/a Touch of Country Catering, owes wages for work performed, as alleged in the complaint filed by Ryan J. Harper, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Ryan Harper was employed by Borland from April 8, 2016 to June 28, 2016. Harper was paid \$14.00 per hour for his work as a cook.

2. Harper worked 24.5 hours during the time period April 10 to April 14, 2016 and was paid for his time.

3. Harper's pay stub for the period April 17 to April 30, 2016 does not include 11.5 hours he worked on April 15 or 16. Doc. 58. His pay stub incorrectly indicates he worked 81 hours and 42 minutes and that for that time he was owed \$1,143.80. Borland paid straight time for the entire 81 hours and 42 minutes. Borland's calculation did not include any pay at the overtime rate or the 11.5 total hours Harper worked on April 15 and 16. See Doc. 61Q. Harper was paid the net earnings of \$891.30 on May 6, 2016. Harper was paid regular time for the 1 hour and 42 minutes overtime indicated on his pay stub, but should have been paid time and a half. Therefore, he is owed the half time he was not paid or \$11.90 ($1 + 42/60 \times \7.00 per hour). He is also owed \$241.50 for the additional 11.5 hours of overtime he worked on April 15 and 16 and not reflected on his pay stub ($11.5 \times 21 = 241.50$).

4. Document 56 is Harper's pay stub for the time period May 1 to May 14. Document 55 is Harper's pay stub for the time period May 18 to May 31. It indicates he worked 76 hours and 51 minutes or 76.85 hours. Harper worked May 15, 16, and 17. Because Borland did not provide the time sheets, calendars, or work schedules to show otherwise, Harper's estimate of 5 hours and 47 minutes for each day, while somewhat incorrect, is reasonable. Harper reached this number by dividing the number of hours worked by the number of days in the May 18 to 31 pay period ($76.85/14 = 5.49$ hours per day). Harper's calculation must have been $76.51/14 = 5.47$ hours - by using the minutes as a decimal he miscalculated and

misinterpreted the results to be 5 hours and 47 minutes. Nonetheless, this minor calculation error does not undo the reasonableness of the concept. For purposes of calculation, the Hearing Officer is rounding the 5.49 hours to 5.5 hours per day.

5. Harper has proven by just and reasonable inference that he is owed wages for the time period May 15, 16, and 17 totaling 16.5 (76.85 hours/14 x 3). Harper was paid for 76.85 hours. Of the unpaid 16.50 hours, 3.15 is owed as regular wages (\$44.10) and 13.35 hours is owed as unpaid overtime wages (\$280.35).

6. Exhibit 52B is Harper's pay stub that was supplied to him during discovery in this matter. The pay stub shows that Harper was paid for 24:06 of work (or 24.1 hours) for a total of \$337.40. Exhibit 51A, Harper's timesheet that corresponds to the time period covered by Exhibit 52, indicates the total time worked was calculated by totaling the time Harper stopped work, not the number of hours he worked. A proper calculation of the hours worked results in a total of 35.07 hours. However, Harper did not claim these hours.¹

7. Borland did not cooperate in the investigation of Harper's claim.

8. Borland owes a 110% penalty on the \$56.00 unpaid regular wages (\$61.00) due to her failure to cooperate with the investigation and to provide requested information. Borland owes a 110% penalty on the unpaid overtime wages in the amount of \$574.03 ($[\$241.10 + 280.35] \times 1.1$).

IV. DISCUSSION

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).

¹ If Harper only recently discovered this discrepancy, he might be able to file an additional claim for these hours.

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.

Harper has proven through his testimony and the Exhibits admitted into the record that he is owed the unpaid wages found in Findings of Fact 5 and 6. Because Borland refused to participate in these proceedings she could not meet her burden to negate the reasonableness of the inference to be drawn from Harper’s evidence. Because Borland did not appear for the hearing and did not provide all the time sheets, and due to the gaps in her pay stubs, it is impossible to determine the number of hours actually worked. Determining the hours worked by dividing the number shown on the pay stub by 14 and then applying those hours to each of the 14 days in a pay period will not resolve the issue of how many hours were actually worked, it will only result in the same number of hours shown on the pay stub.

V. PENALTIES

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.

Admin. R. Mont. 24.16.7566, in pertinent part, describes the procedure for applying penalties for unpaid regular wages:

(1) For determinations involving claims filed on or after October 1, 1993, if none of the special circumstances of ARM 24.16.7556 apply, penalties are calculated as follows:

(a) a penalty equal to 55% of the wages determined to be due to the employee will be imposed in all determinations issued by the department; but

. . . .

(2) If a claim involves any of the special circumstances of ARM 24.16.7556, the department will impose the maximum penalty allowed by law.

. . .

The special circumstances mentioned in Admin. R. Mont. 24.16.7566 are found in Admin R. Mont. 24.16.7556:

(1) The following conduct by the employer constitutes special circumstances that justify the imposition of the maximum penalty allowed by law:

(a) the employer fails to provide information requested by the department and/or does not cooperate in the department's investigation of the wage claim;

(b) there is substantial credible evidence that the employer's payroll records are falsified or intentionally misleading;

(c) the employer has previously violated similar wage and hour statutes within three years prior to the date of filing of the wage claim; or

(d) the employer has issued an insufficient funds paycheck.

Borland failed to provide information requested by the Department and did not cooperate in the Department's investigation of Harper's claim thereby requiring the imposition of the maximum (110%) penalty on the unpaid regular wages.

Penalties on unpaid overtime wages are governed by Admin. R. Mont. 24.16.7561.

In pertinent part, the rule provides:

(1) For determinations involving minimum wage and overtime that are filed on or after October 1, 1993, penalties are calculated as follows:

(a) a penalty equal to 110% of the wages determined to be due to the employee will be imposed in all determinations issued by the department

.....

VI. 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. Robin Borland owes Ryan J. Harper \$56.00 in unpaid regular wages, and \$521.85 in unpaid overtime wages.

3. Robin Borland owes Ryan J. Harper penalties on the unpaid wages in the total amount of \$635.63. Admin. R. Mont. 24.11.7556; Admin. R. Mont. 24.11.7561; and Admin. R. Mont. 24.16.7566.

4. Robin Borland failed to provide requested information and failed to cooperate in the investigation of Harper's claim.

VII. ORDER

Robin Borland is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,213.48, representing \$577.85 in wages and \$635.63 in penalty, made payable to Ryan J. Harper, 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. Borland may deduct applicable withholding from the wage portion, but not the penalty portion, of the amount due.

DATED this 31st day of March, 2017.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ DAVID A. SCRIMM
DAVID A. SCRIMM
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

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.