

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 87-2017
OF DOLORES R. HEINSOHN,)	
)	
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 Dolores R. Heinsohn alleging she was owed \$1,396.27 in unpaid wages from Robin Borland d/b/a Touch of Country Catering. She alleged she was owed \$1,040.00 in unpaid regular time and \$356.27 in overtime wages. The Wage & Hour Unit issued an initial Determination finding Borland owed Heinsohn all the unpaid wages she claimed, plus penalties. Borland requested a redetermination and responded to the requests for information in a minimal fashion and admitted she owed Heinsohn for 11 hours of overtime. She did not submit payment for the wages she admitted she owed Heinsohn or respond to the Department’s requests for additional payroll information. See Doc. 18. On October 13, 2016, the Wage & Hour Unit determined Heinsohn was owed \$941.18 in unpaid regular wages, unpaid overtime wages, and penalty. Heinsohn filed her appeal on October 28, 2016.

On January 4, 2017, the Hearing Officer issued subpoenas that Heinsohn 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, Heinsohn filed a Motion to Compel the production of the requested documents. 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 Heinsohn. On February 13, 2017, the Hearing Officer granted Heinsohn'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. Heinsohn appeared by telephone. The Hearing Officer initially contacted Borland who asserted she had not received the Scheduling Order and was unaware the hearing was scheduled at this time. The Scheduling Order was not returned as undeliverable and Ms. Borland had been reminded in a message from the Hearing Officer at the time of the final pre-hearing conference that the hearing was the following week. Borland participated at the hearing up until the point Ms. Heinsohn had finished her direct testimony. She made a few comments about what she thought and then disconnected from the hearing. Heinsohn presented sworn testimony. Documents 1-46 and Heinsohn's Exhibits 47B through 61Q 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 Dolores R. Heinsohn, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT

1. Robin G. Borland employed Dolores R. Heinsohn as a prep cook and caterer from April 8, 2016 to July 7, 2016, with an hourly wage of \$13.00.

2. Heinsohn worked 32.5 hours during the time period April 8 to April 14, 2016 and was paid for her time.

3. Heinsohn's pay stub for the period April 17 to April 30, 2016 does not include 11.5 hours she worked on April 15 and April 16, 2016. Doc. 15. Her pay stub indicates she worked 89 hours and 27 minutes and was owed \$1,162.85 in gross wages. Borland paid straight time for the entire 89 hours and 27 minutes. Borland's calculation did not include any pay at the overtime rate or the 11.5 total hours Heinsohn worked on April 15 and April 16, 2016. Doc. 15. Heinsohn was owed \$904.90 in net earnings but only was paid \$545.00 on May 3, 2016. Docs. 34 and 35. There remains an unpaid balance of \$359.90. Heinsohn is also owed one-half of her hourly rate for the 9 hours and 27 minutes she was paid at her regular rate, instead of time and one-half or \$61.43 (9 hours + 27/60 x \$6.50 per hour). She is

further owed \$224.25 for the additional 11.5 hours of overtime she worked on April 15 and 16, 2016, which was not reflected on her pay stub (11.5 hours x \$19.50 = \$224.25).

4. Heinsohn's pay stub for the time period May 1 to May 14, 2016 indicates she worked 86 hours and 15 minutes, which was all paid at her regular rate. Ex. 53I and Documents 37-40. As a result, Heinsohn is owed \$40.63 (6.25 hours x \$6.50). Borland issued two checks to cover the \$937.11 Heinsohn was owed for this pay period: one in the amount of \$500.00 and another in the amount of \$437.11. The second check was returned due to insufficient funds. Borland ultimately paid the amount owed in addition to the charges assessed to Heinsohn's account.

5. Heinsohn's pay stub for the time period May 16 to May 31, 2016 indicates she worked 91 hours and 30 minutes and was properly paid straight time for the 80 hours and time and a half for 11.5 hours of overtime. Ex. 55K.

6. Heinsohn worked May 15, 2016, but no payment for that date is indicated on any pay stubs Borland issued. Because Borland did not provide the time sheets, calendars, or work schedules to show otherwise, Heinsohn's average of 5.72 hours worked during this time period is used to determine the number of hours worked on May 15 (91.5 hours /16 days). Thus, Heinsohn is owed \$111.52 in overtime wages.

7. On June 22, 2016, Heinsohn was paid \$816.44 purportedly for work performed during the time period of June 1 to June 14, 2016. Doc. 44. Heinsohn has no claim for unpaid wages during this time period.

8. Heinsohn worked 71 hours and 33 minutes during the time period June 17 to June 30, 2016. Ex. 59O. Her pay stub indicates that Heinsohn was only paid \$11.00 per hour during this time instead of her regular rate of \$13.00 per hour. Id. As a result, Borland owes Heinsohn \$143.10 in regular wages (71.55 hours x \$2.00).

9. Borland did not cooperate in the investigation of Heinsohn's claim.

10. Borland owes a 110% penalty on the \$503.00 in unpaid regular wages amounting to \$553.30 ($[\$359.90 + \$143.10] \times 1.1$) due to her failure to cooperate with the investigation and to provide requested information. Borland owes a 110% penalty on the \$437.83 in unpaid overtime wages in the amount of \$481.61 ($[\$224.25 + \$61.43 + \$111.52 + \$40.63] \times 1.1$).

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).

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.

Heinsohn has proven through her testimony and the exhibits admitted into the record that she is owed the unpaid wages as described in the Findings of Fact. 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 Heinsohn’s evidence. Any miscalculation of the precise number of hours worked is the result of Borland’s failure to provide all of Heinsohn’s pay stubs or time sheets. Moreover, the records Borland did provide regarding the hours worked, wages due, and whether overtime should be paid are inconsistent, at best.¹

¹ One pay period Borland paid regular wages and overtime, another she paid straight wages for all Heinsohn’s hours worked including those that should have been paid at the overtime rate, and in another pay period Borland paid Heinsohn \$2.00 an hour less than her regular rate of pay.

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 referred to 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 Heinsohn's claim. She also issued an insufficient funds paycheck. Therefore, the imposition of the maximum (110%) penalty on the unpaid regular wages is required.

Penalties on unpaid overtime wages are governed by Admin. R. Mont. 24.16.7561, which provides, in pertinent part:

(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 Dolores Heinsohn \$503.00 in unpaid regular wages, and \$437.83 in unpaid overtime wages.

3. Robin Borland owes Dolores Heinsohn penalties on the unpaid wages in the total amount of \$1,034.91. 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 Heinsohn's claim.

VII. ORDER

Robin Borland is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,975.74, representing \$940.83 in wages and \$1,034.91 in penalty, made payable to Dolores Heinsohn, 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 of the amount due, but not the penalty portion.

DATED this 14th day of April, 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.