

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

IN THE MATTER CONCERNING THE ) Case No. 1115-2017  
PREVAILING WAGE CLAIM INVOLVING )  
THE DEPARTMENT OF LABOR AND )  
INDUSTRY AND JAMES EMBLETON, )  
 )  
 ) Claimant, )  
 ) )  
 ) vs. ) **FINAL AGENCY DECISION**  
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 )  
CENTRAL PLUMBING AND HEATING, )  
INC., a Montana corporation, )  
 )  
 ) Respondent. )

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**I. INTRODUCTION**

On January 30, 2017, Claimant James Embleton (Embleton) filed a wage claim with the Wage and Hour Unit alleging Central Plumbing and Heating, Inc. (Central Plumbing) owed him \$7,272.78 for unpaid time filling out time cards, in prevailing wages, unpaid travel time, and additional wages for work performed in June, 2015, at Calumet Refinery.

On April 13, 2017, the Wage and Hour Unit determined Central Plumbing owed Embleton \$179.40 in unpaid wages for travel time on July 27, 2016, and August 1, 2016 when he was told to drive a Central Plumbing truck from Belgrade, Montana, to Great Falls, Montana. The Wage and Hour Unit denied all of Embleton's other claims, and noted that, pursuant to Admin. R. Mont. 24.17.514(3), delivery of equipment or materials to a work site was not considered onsite work and was not subject to prevailing wages.

On April 26, 2017, Embleton requested a redetermination, asserting he was still entitled to \$2,090.00 of unpaid time for filling out timecards and \$4,725.00 for unpaid travel time. On July 7, 2017, the Wage and Hour Unit issued a redetermination that Central Plumbing owed Embleton a total of \$517.50, which included additional unpaid wages for time spent traveling.

Embleton filed an appeal on July 19, 2017.

On September 15, 2017, the Wage and Hour Unit transferred the case to the Office of Administrative Hearings for hearing after an unsuccessful attempt at mediation.

On January 23 and 24, 2018, Hearing Officer Chad Vanisko conducted a hearing. James Embleton participated in the hearing with sworn testimony from himself and former employees Kyle Lesofski, Victor Lesofski, and Brandon Michels. Central Plumbing participated in the hearing with sworn testimony from Alecia Malek, Austin Rosenbaum, Jesse Waldenberg, Randy Ritter, Patrick Quintana, Cody Loch, and expert witness Gary Richerson.

File Documents 14, 15, 18-23, 27-29, 30-36, 116-199, 221-223, 227-360, and 361 were admitted into evidence, as were Claimant's Documents CL 400-582, and Respondent's Documents CPH 600-650, 1046-1048, 1056-1067, 1075-1089, and 1091-1100.

Embleton presently claims he is owed a total of \$7,564.00 in unpaid wages, including \$2,116.00 for filling out time cards and \$5,430.00 for unpaid travel time and meeting attendance. There are no prevailing wage claims.

## **II. ISSUE**

Whether Central Plumbing owes Embleton wages for work performed, as alleged in the complaint filed by Embleton, and owes penalties, as provided by law.

## **III. FINDINGS OF FACT**

1. Central Plumbing and Heating (Central Plumbing) is a plumbing contractor based in Great Falls, Montana.

2. Jesse Waldenberg (Waldenberg) is the Vice President of the Great Falls branch of Central Plumbing, and is in charge of the Great Falls mechanical and civil division.

3. Alecia Malek (Malek) was the CFO for Central Plumbing. She had held this position for over five years at the time of the hearing. Malek oversaw all of the financial matters for Central Plumbing, including payroll and Department of Labor compliance, and was responsible for sending two checks to the Montana Department of Labor, payable to Embleton. Malek would regularly consult with the Department of Labor to make certain that Central Plumbing was acting correctly under the wage and hour laws, including when Embleton raised issues regarding his hours and pay.

4. Embleton was an employee of Central Plumbing from approximately January 27, 2014, through November 23, 2016. His pay periods went from Sunday through Saturday, and his paychecks were electronically deposited on the Thursdays following the close of each pay period.

5. Embleton filed the present wage and hour claim on January 30, 2017. His complaints concern hourly wage claims from January 31, 2015, through November 23, 2016. Although he originally made prevailing wage and fringe benefit claims from April 25, 2016, through October 12, 2016, they are no longer part of his claim.

6. During the periods claimed, Embleton's primary foremen were Buck Kamps (Kamps) and Austin Rosenbaum (Rosenbaum). Only Rosenbaum was called to offer testimony.

7. In 2015, Central Plumbing was hired to install water systems on 15 different Missile Alert Facilities (MAF), none of which are located in Great Falls.

8. Employees were expected to report to work at the MAF sites. There was no regular work site for purposes of the MAF projects, but the actual place of performance for work was at the MAF sites themselves. Gary Richerson (Richerson), a superintendent with James Talcott Construction, was qualified as an expert witness and credibly testified that, for MAF site work, the geographic location of the MAF site is the job site.

9. Except when an employee was mobilizing (*i.e.*, moving or hauling) equipment, the work day for the MAF project both started and ended at the job sites.

10. As a convenience to employees—including Embleton—Central Plumbing provided transportation for employees in a company vehicle to the MAF sites. Employees were not required to take the company vehicle, but had to drive to job sites at their own expense if they took a personal vehicle.

11. Central Plumbing's time card policy required all employees to keep time and attendance records for each pay period. Employees were responsible for making sure that hours were recorded accurately. Time cards were to be approved by the employee's supervisor before processing by the payroll department.

12. The time card policy was updated in 2016 to document Central Plumbing's practice with respect to commuting to out of town job sites. Although it was a change insofar as the practice was then documented, it was not a change in Central Plumbing's historical practice.

13. The 2016 time card policy was delivered to employees either in a meeting or with their paystubs or paychecks, as was Central Plumbing's typical means of communicating with employees.

14. Employees who were passengers in company vehicles were not paid by Central Plumbing for travel time.

15. In addition to his normal work, Embleton was paid for mobilizing equipment to job sites, for loading equipment, and for travel between MAF job sites.

16. Embleton's time cards were rounded to the nearest hour or half-hour. There was no credible evidence presented showing that employees were directed to round up, not round down, and to the extent any rounded down, it was entirely of their own volition and not at the direction of the employer.

17. It was Central Plumbing's expectation that employees were to fill out their time cards during the day while on the clock. Central Plumbing did not direct employees to perform work off the clock.

18. Management did not advise employees they were not allowed to complete time cards on paid time.

19. Embleton alone was responsible for recording his time, and he completed his own time cards without help or supervision. He kept contemporaneous track of his time during the day as he was performing each duty and he was paid to keep track of his time.

20. Embleton independently identified the classification of work he performed, and was responsible for checking the appropriate class of work on his time cards. The boxes on the time cards included classifications such as laborer, truck driver, flagger, operator (backhoe, loader, excavator, skid), and other. As reflected by certified payroll records, Embleton was paid different wage rates for different tasks that he performed daily. For example, if Embleton drove equipment to a MAF site, he noted that classification on his time card and received compensation for driving that equipment to the job site.

21. No one questioned or altered any of the hours recorded on Embleton's time cards. No foreman reviewed, signed, or approved the hours Embleton independently and individually recorded.

22. Embleton was paid for all of the hours he recorded on his time cards, including all overtime. The majority of Embleton's timecards reflect overtime hours on a weekly basis.

23. In addition to his regular pay, Embleton received "zone pay" from Central Plumbing, even though Central Plumbing was not required to do so in some situations.

24. Embleton also received "subsistence pay" from Central Plumbing, even though it was not required to offer such pay.

25. The total amount of zone and subsistence compensation Embleton received from Central Plumbing for which it asserts it was not legally required to pay amounted to approximately \$2,924.80.

26. Embleton approached Jesse Waldenberg (Waldenberg) about zone pay in August, 2016, which Waldenberg explained to him.

27. Each foreman kept prevailing wage sheets in a 3-ring binder. The payroll office also had a copy of the prevailing wage sheets. Employees did not, however, need the prevailing wage sheets to complete their time cards.

28. The reverse sides of time cards included cost codes.

29. The payroll office accepted copies of time cards in several different ways, including electronically. Employees were required to submit time cards for their own benefit so they could be paid, but they did not have to be submitted in person.

30. In July, 2016, Embleton asked to review his time cards. In response, Central Plumbing paid Embleton 17 hours just to review his own time cards.

31. Embleton made complaints with Central Plumbing management regarding his wage claims. Central Plumbing investigated, and Embleton met with Waldenberg, Malek, Trent Short, and Stacey Peterson to discuss the issues on October 28, 2016, and again with Trent Short on November 7, 2016. Embleton was not scheduled to work on either date. The meetings were held to address Embleton's wage claims, but Central Plumbing asserted they were not part of his work, and so he was not paid to participate in the meetings. Embleton was not required to attend the meetings, albeit he had to do so in order to address his wage claims.

32. Quintana was and is a heavy equipment operator for Central Plumbing, and had held the position for approximately four years at the time of the hearing. Embleton and Quintana performed essentially the same job for Central Plumbing.

33. As with Embleton, Quintana reported to foreman Austin Rosenbaum (Rosenbaum). Also as with Embleton, Quintana worked at the MAF sites.

34. Quintana credibly testified that he completed the time cards daily, and that it took him only a couple minutes to do so. Quintana also credibly testified that he completed his time cards on the clock and was not told he could not do so on paid time.

35. Randy Ritter (Ritter) had worked for Central Plumbing for approximately ten years at the time of the hearing. He credibly testified that it did not take him more than a minute to complete this entry or any of his daily entries. Ritter also credibly testified that he completed his time cards on the clock, no supervisor ever told him he was required to complete his time cards off the clock, and he was never told to round down his hours.

36. Cody Loch, a foreman, had worked for Central Plumbing for approximately ten years at the time of the hearing. He recorded his time while on the clock and completed his time card while on the clock. Loch credibly testified that it took him about a minute to complete his time card on a daily basis, and would in no case take him more than three minutes even if there were multiple entries on a daily time card. Loch also credibly testified that he had never been directed to round down to the nearest hour on his time card, nor had he ever directed any of the employees he supervised that they could not complete their time cards on the clock.

37. Loch, like other foremen, carried the prevailing wage determinations in his company vehicle. Loch went over the prevailing wage sheets with Embleton.

38. Rosenbaum had worked for Central Plumbing for approximately eight years at the time of the hearing. He was originally hired as a laborer and operated heavy equipment, then moved to the position of foreman. Rosenbaum worked predominantly for the Civil Division of Central Plumbing, and worked at the MAF sites.

39. Rosenbaum, as a foreman, had the prevailing wage determinations with him in his company vehicle. Rosenbaum also kept spare blank time cards in his truck so that the employees he supervised would have access to them. Testimony of AR.

40. Rosenbaum credibly testified that he kept time cards on a daily basis and it took him two to three minutes on average to complete them.

41. From time-to-time, Rosenbaum would help other employees with their time cards at their request or to ensure that time was coded properly. For example, Victor Lesofski (V. Lesofski) and Kyle Lesofski (K. Lesofski) asked Rosenbaum for assistance in completing time cards, which Rosenbaum did. At no time did Rosenbaum insist on completing someone else's time cards.

42. Loch also helped V. Lesofski with his time cards at his request.

43. Central Plumbing had no way of knowing if Embleton was not completing his time card while on the clock because employees, including Embleton, did not annotate their time cards with that information.

44. Rosenbaum did not see the vast majority of Embleton's time cards and did not approve them.

45. Although Rosenbaum was Embleton's foreman, Rosenbaum did not direct Embleton in the recording of his hours on a daily basis.

46. Compared to Rosenbaum's time cards for identical time periods, Embleton's time cards show a substantial number of hours (and overtime) Rosenbaum did not record. (*See, e.g.*, CPH Exhibits 604-605 (Rosenbaum) versus Documents 253-254 (Embleton).)

47. Rosenbaum and Embleton did not hold the same positions, and performed different work from one another. Rosenbaum was the job foreman, while Embleton was a laborer/operator. As such, Rosenbaum's time cards do not match Embleton's.

48. Rosenbaum completed daily reports as a record of what happened on the job, but they were not an accurate measure for purposes of an individual employee's time spent on the job.

49. The testimony of K. Lesofski, V. Lesofski, and Brandon Michels (Michels) offered by Embleton was largely irrelevant to his individualized and unique claims.

50. Michels did not work on the MAF projects and had no first-hand knowledge of the place of performance or the work performed.

51. To the extent Michels discussed preliminary activities he performed at the shop, he admitted that he was not asked to perform the activities by anyone at Central Plumbing.

52. Michels credibly testified that it took him one to one-and-a-half minutes to complete his daily time sheets.

53. Richerson credibly testified that it only takes him a couple minutes to review employees' time cards.

54. On April 26, 2017, after the issuance of an administrative determination on April 13, 2017, Central Plumbing sent a check in the amount of \$153.29 to the Wage and Hour Unit to cover the wages awarded to Embleton. On July 17, 2017, after the issuance of an administrative redetermination on July 7, 2017, Central Plumbing sent another check in the amount of \$135.76 to the Wage and Hour Unit to cover additional wages awarded to Embleton.

#### IV. DISCUSSION

##### A. Travel Time

###### 1. Timeliness of 2015 Claims

The burden of proof is on the employee in an action to recover compensation to establish, by a preponderance of the evidence, the elements of a prima facie case entitling him to recovery, including: that the employee has performed work for which he has received inadequate compensation. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946); *see also Garsjo v. Dep't of Labor & Indus.*, 172 Mont. 182, 188-89, 562 P.2d 473, 476-77 (1977). Wage and hour claims are limited in duration by statute. The Montana Code provides that an employee may recover all wages and penalties provided for the violation of Mont. Code Ann. § 39-3-206 by filing a complaint within 180 days of default or delay in the payment of wages. Mont. Code Ann. § 39-3-207(1). The 180-day clock does not begin to run until the *last* date on which the employer fails to pay. *Harrell v. Farmers Educ. Coop. Union*, 2013 MT 367, ¶ 29, 373 Mont. 92, 314 P.3d 920 (citing *Jensen v. State*, 2009 MT 246, ¶ 11, 351 Mont. 443, 214 P.3d 1227); *see also* Mont. Code Ann. § 39-3-205(1) (regarding wages due upon an employment separation). A continual, repeated failure to pay wages is relevant for penalties, but is not relevant for determining accrual dates. *See* Mont. Code Ann. § 39-3-207(3).

Central Plumbing argues that, because the last date Embleton alleges he was not paid travel time was November 13, 2015, his claim with regard to travel time is

untimely given his January 30, 2017, wage claim filing date. Given that the pay period including November 13, 2015, would have ended on Saturday, November 14, 2015, the claim for this time would have accrued when Embleton was not remunerated on the next pay day, Thursday, November 19, 2015. Embleton claims additional dates for unpaid travel time, but only for July 29 and August 1, 2016, over eight months after the prior alleged violations. The alleged violations were therefore distinct and not ongoing. Because of this distinct separation in time, the Hearing Officer agrees with Central Plumbing that the claims prior to 2016 are untimely, and that this tribunal does not have jurisdiction to hear the claims. As discussed in both the *Harrell* and *Jensen* cases, *supra*, where an employer last fails to pay wages accruing on a specific date, an employee has 180 days from that date in which to file a claim. Embleton's claims related to travel time occurring on or before November 13, 2015, are therefore time-barred based on his January 30, 2017, wage claim filing date (providing a 180-day cutoff of August 3, 2016). *See* Mont. Code Ann. § 39-3-207.

No factors exist which would alleviate Embleton of the duty to file his claim within 180 days. The 180-day time limit is not permissive, and there is no good cause standard for waiving the requirement. *See* Mont. Code Ann. § 39-3-207(1). Embleton has not asserted any circumstances which would justify staying the time limit. *See* Mont. Code Ann. §§ 27-2-401 *et seq.* Furthermore, ignorance of the law concerning Embleton's potential remedies is not a defense to filing an untimely claim.

## 2. Compensability of 2016 Claims

As stated, Embleton's unpaid travel time claims for 2016 occurred on July 29 and August 1, 2016. These dates would have fallen under the pay periods ending July 30 and August 6, 2016, respectively, which correspond with pay dates of August 4 and 11, 2016. Although the time worked occurred prior to the cutoff, because the claims did not accrue until the pay dates, both are within 180 days (i.e., August 3, 2016) of the claim filing date of January 30, 2017. *See* Mont. Code Ann. § 39-3-207(1).

With regard to the travel time claimed by Embleton for July 29<sup>1</sup> and August 1, 2016, Embleton's factual rendition is somewhat convoluted. To the best of the Hearing Officer's ability, it appears that Embleton asserts he traveled between the Central Plumbing shops in Belgrade and Great Falls, Montana, on those dates. Whereas he was—it appears—a passenger on July 29 and on August 1, 2016, he was a

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<sup>1</sup>The findings of the Wage and Hour Unit reference July 27, 2016, but Embleton's time cards appear to show July 29, 2016. Furthermore, the Wage and Hour Unit appears to have interpreted Embleton's statements that he was in a company vehicle on that date to mean he was driving it, which is not evident from the evidence submitted at hearing.

driver directed to drive a Central Plumbing truck from Great Falls to Belgrade. As an initial matter, it must be noted that none of this time was ever claimed by Embleton on his time cards. Rather, every claim for travel time arose after-the-fact as part of the present claim. Embleton offers some explanation for this by asserting that, on these dates, he was directed by Waldenberg not to record his travel time. If this is correct, it leads the Hearing Officer to believe that he may have been a passenger on both dates, but Central Plumbing has offered no evidence contradicting Embleton's assertion.

Pursuant to Montana rules, “[a]n employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel, which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.” Admin. R. Mont. 24.16.1010(2). In Embleton's situation, the MAF sites were the work sites. The overwhelming weight of the evidence presented at the hearing showed that Embleton was not required to report to a Central Plumbing shop at the beginning or end of a day unless he was told to do so as part of mobilizing or loading equipment. By going to a shop, however, Embleton received the advantage of being able to travel free of charge to work sites in a company vehicle. There is nothing under the law requiring travel time in a company vehicle to be compensable unless it falls under certain exceptions, such as where Embleton was driving and/or mobilizing equipment or the travel essentially was the work.

Embleton argues that his commuting time, even if not as a driver at times, was nonetheless compensable pursuant to Admin. R. Mont. 24.16.1010(5) (time spent traveling from or returning to an employer's premises is compensable if employees are required to do so), 24.16.1010(6) (travel time that keeps an employee away from home overnight or cuts across an employee's workday when they would otherwise be working), and 24.16.1010(8) (travel time is compensable if employees are required to work during travel, such as driving). The Hearing Officer does not dispute the plain meaning of these rules, but does not believe they are applicable with regard to the July 29, 2016, travel time claim. However, insofar as Embleton asserts he was driving a Central Plumbing vehicle on August 1, 2016, that would fall under the ambit of Admin. R. Mont. 24.16.1010(8).

With regard to August 1, 2016, Embleton asserts he was driving a Central Plumbing vehicle. In driving a company vehicle to move not only himself and the vehicle but also other co-workers, Embleton was performing work while driving. See Admin. R. Mont. 24.16.1010(8). As stated, the records are not entirely clear to show that Embleton was, in fact, driving on this date, but there was nothing offered by Central Plumbing to specifically contradict Embleton. See *Arlington v. Miller's*

*Trucking, Inc.*, 2015 MT 68, ¶¶ 15-16, 378 Mont. 324, 343 P.3d 1222 (employee must present sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference) (citations omitted). Embleton is therefore entitled to 3.5 hours of unpaid travel time at \$24.00 per hour, or \$84.00, exclusive of penalties.

## **B. Time Spent Filling Out Time Cards**

Embleton alleges he was told he could not fill out his time cards on the clock, and that it took him ten minutes per day on average to do so. He requests additional compensation in the amount of \$2,108.00 for 2015 and 2016. For the reasons set forth below, there is no basis to grant the relief sought.

Pursuant to Montana's rules, "[i]n recording working time under the law, insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours working time or practically ascertainable periods of time he is regularly required to spend on duties assigned to him. . . ." Admin. R. Mont. 24.16.1012(2); *see also Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069, 1081-82 (9th Cir. 2016) (applying de minimis rule to an employee for one minute spent loading computer program prior to logging into time system, and noting the 9th Circuit has adopted a three-prong test which considers (1) the practical administrative difficulty of recording the additional time, (2) the aggregate amount of compensable time, and (3) the regularity of the additional work) (citations omitted).

The overwhelming weight of the evidence shows that Embleton was not, in fact, told that he could not fill out time cards on the clock, and that he chose of his own accord not to record the time—although the Hearing Officer suspects that, when taking rounding into account, this time was effectively recorded. Even if Embleton was told he could not record the time, however, the overwhelming weight of the evidence also shows that ten minutes is a greatly exaggerated and arbitrary amount, and undermines Embleton's own credibility.

The testimony of Rosenbaum, Loch, Ritter, Quintana, Waldenberg, and Richerson firmly established that it would take only one to two minutes to complete time cards. The veracity of these individuals' testimony is borne out by a review of Embleton's daily time cards. The time cards generally consisted of a line entry on a larger sheet. The job classifications were already listed on the card itself, and only

required that Embleton check a box. In total, Embleton only needed to fill out the date, job number, cost code (which could be found on the back of the time card), hours, and a very brief description and comments, as well as check a box. Most of these things were repetitious from one entry to the next. Embleton also indicated he kept contemporaneous track of time spent on various tasks during the day so that he could record that time. It is therefore inconceivable that filling out this limited amount of information took Embleton anything close to ten minutes to complete on a daily basis.

Although a regular task, the time taken to fill out time cards was nonetheless de minimis. It involved very little work, did not amount to much time overall, and would have created a great deal of administrative difficulty for Central Plumbing since prevailing wages differed based on the task and the MAF sites were remote with no way to provide a minute-by-minute time clock for all employees. Embleton has not shown by a just and reasonable inference that Central Plumbing owes him any additional wages for filling out time sheets. *See* Admin. R. Mont. 24.16.1012(2).

### C. Meetings

Although it was initially part of his travel time claim, Embleton since separated out a portion of that claim which concerns a meeting he had with Central Plumbing management on October 28 and November 7, 2016. The purpose of the meetings was to discuss various aspects of Embleton's wage claims. Central Plumbing does not dispute that the meetings occurred, but relies on a defense that the meetings were not compulsory and were not related to Embleton's work.

Montana wage and hour laws do not appear to directly address the issue, but federal laws provide guidance. Under federal rules, attendance at meetings and similar activities need not be counted as working time if the following four criteria are met:

- (a) Attendance is outside of the employee's regular working hours;
- (b) Attendance is in fact voluntary;
- (c) The course, lecture, or meeting is not directly related to the employee's job; and
- (d) The employee does not perform any productive work during such attendance.

29 C.F.R. § 785.27. All four criteria are met in this case.

Embleton made complaints with Central Plumbing management regarding his wage claims. Central Plumbing investigated, and Embleton met with various

individuals to discuss the issues on October 28, 2016, and again on November 7, 2016. The meetings were held to address Embleton's wage claims, but there is a lack of clarity as to who exactly called for the meetings. What is clear is that the meetings were outside of Embleton's regular work hours, as he had no scheduled work and no other timecard submissions on these days. Furthermore, the meetings were only held because of the issues raised by Embleton, and attendance was voluntary. He would not have suffered any adverse employment action had he not attended. While the meetings related to Embleton's pay, they had no direct relation to his job and he did not perform any productive work related to his job at the meetings. These meet all the criteria set forth under 29 C.F.R. § 785.27, making the October 28 and November 7, 2016, meetings uncompensable.

#### **D. Central Plumbing is Subject to Penalties**

The Montana Code provides in relevant part that, “[a]n employer who fails to pay an employee as provided in this part or who violates any other provision of this part is guilty of a misdemeanor. A penalty must also be assessed against and paid by the employer to the employee in an amount not to exceed 110% of the wages due and unpaid.” Mont. Code Ann. § 39-3-206(1). However, the Administrative Rules also provide that, “[i]n cases where the wages claimed are paid by the employer either before or after receipt of the initial letter commencing the claim . . . and prior to the issuance of a determination, no penalty will be imposed unless any of the special circumstances described in ARM 24.16.7556 apply.” Admin. R. Mont. 24.16.7551(1).

On April 26, 2017, after the issuance of an administrative determination on April 13, 2017, Central Plumbing sent a check in the amount of \$153.29 (based on a gross amount of \$179.40) to the Wage and Hour Unit to cover the wages awarded to Embleton. On July 17, 2017, after the issuance of an administrative redetermination on July 7, 2017, Central Plumbing sent another check in the amount of \$135.76 (based on a gross amount of \$158.70, though it should have been \$338.10, discussed below) to the Wage and Hour Unit to cover additional wages awarded to Embleton. It appears that this latter amount was issued in error, with \$179.40 for the prior payment having been subtracted from \$338.10 when, in fact, the \$338.10 amount already took into account a credit for the prior payment, since the total award was \$517.50 (*i.e.*,  $\$517.50 - \$179.40 = \$338.10$ ). Because these amounts were deposited following the issuance of administrative determinations, pursuant to Admin. R. Mont. 24.16.7551(1), Central Plumbing is liable for penalties under Mont. Code Ann. § 39-3-206 in the amount of 55%, or \$46.20.

## 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. Unpaid travel time claimed by Embleton for 2015 accrued on November 19, 2015. Embleton is therefore time barred with respect to this portion of his claim as a result of the 180-day filing requirement set forth in Mont. Code Ann. § 39-3-207(1). Embleton may not collect for unpaid travel time accruing prior to August 3, 2016.

3. Travel time claimed by Embleton for July 29, 2016, and August 1, 2016, accrued on August 4, 2016, and August 11, 2016, respectively. *See* Mont. Code Ann. § 39-3-207(1).

4. Embleton met his burden of proving he performed work without proper compensation and proved the extent of that work as a matter of just and reasonable inference for travel time occurring on August 1, 2016, but not July 29, 2016. Embleton is therefore entitled to 3.5 hours of unpaid travel time at \$24.00 per hour, or \$84.00. *See* Admin. R. Mont. 24.16.1010(8).

5. Embleton has not shown by a just and reasonable inference that Central Plumbing owes him any additional wages for filling out time sheets. *See* Admin. R. Mont. 24.16.1012(2); *see also Corbin*, 821 F.3d at 1081-82.

6. Embleton has not shown by a reasonable and just inference that Central Plumbing owes him any additional wages for attending meetings. *See* 29 C.F.R. § 785.27.

7. Central Plumbing is liable for penalties of 55% of the amount awarded herein, or \$46.20. *See* Mont. Code Ann. § 39-3-206; Admin. R. Mont. 24.16.7551(1).

## VI. ORDER

A total of \$130.20 in unpaid wages and penalties (\$84.00 + \$46.20) is hereby awarded to Embleton. Central Plumbing has already deposited \$289.05 with the Wage and Hour Unit. The Wage and Hour Unit is therefore hereby ORDERED to tender a cashier's check or money order in the amount of \$130.20, representing \$84.00 in wages and \$46.20 in penalty, made payable to James Embleton, 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. The remaining \$158.85 (\$289.05 - \$130.20) shall be returned to Central Plumbing and Heating, Inc.

DATED this 14th day of December, 2018.

DEPARTMENT OF LABOR & INDUSTRY  
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CHAD R. VANISKO  
CHAD R. VANISKO  
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.