

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1047-2018
OF KEVIN A. HAWLEY,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
W B, INC., a Montana corporation)	
d/b/a MISSOURI RIVER MARINE)	
a/k/a KALISPELL MARINE,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

On December 29, 2017, Kevin A. Hawley filed a wage and hour claim with the Wage & Hour Unit of the Montana Department of Labor & Industry (Wage & Hour Unit) alleging W B Inc., a Montana Corporation, d/b/a Missouri River Marine, a/k/a Kalispell Marine (Kalispell Marine) owed him \$5,499.69 in unpaid wages, including overtime wages and vacation wages, for work performed from April 19, 2014 through December 4, 2017.

Kalispell Marine submitted a check for \$6.70 as acknowledgment of wages due to Hawley, as well as Hawley’s final paycheck in the gross amount of \$1,125.00 for a total of \$1,131.70, prior to the issuance of the Wage & Hour Unit’s determination.

On August 3, 2018, the Wage & Hour Unit issued a determination concluding Kalispell Marine was an employer subject to the overtime provisions of the Fair Labor Standards Act (FLSA). The Wage & Hour Unit further determined that Hawley’s claim was limited to the two-year recovery period provided for under Mont. Code Ann. § 39-3-207. Ultimately, the Wage & Hour Unit determined Kalispell Marine owed Hawley \$4,977.32 in unpaid wages. A 15% administrative penalty amounting to \$117.05 was also imposed upon the amount of unpaid regular wages as required by Mont. Code Ann. § 39-3-206.

The Wage & Hour Unit's determination also awarded Hawley liquidated damages for unpaid overtime wages in the amount of \$3,065.31, for a total of \$7,027.98.

Following mediation efforts, the matter was transferred to the Office of Administrative Hearings (OAH) on September 25, 2018. On September 27, 2018, OAH issued a Notice of Hearing and Telephone Conference.

On October 11, 2018, Hearing Officer Caroline A. Holien convened a scheduling conference in this matter. Hawley appeared, as did Larry Houck, Registered Agent for Kalispell Marine. The Hearing Officer advised Houck that Kalispell Marine, as a corporation registered in the State of Montana, was required to be represented by an attorney licensed in Montana. The parties agreed to a schedule of proceedings at that conference and a Scheduling Order was issued on October 12, 2018. Gregory A. Smith, Attorney at Law, subsequently filed his Notice of Appearance on behalf of Kalispell Marine.

The pre-hearing deadlines and contested case hearing dates were rescheduled a number of times due to various discovery disputes and other issues. For the sake of brevity, the various orders rescheduling the matter will not be recited in this decision. However, on July 5, 2019, the Hearing Officer issued an order limiting the recovery period for Hawley's claim to two years as provided for under Mont. Code Ann. § 39-3-207(2). Therefore, the relevant period of Hawley's claim is December 4, 2015 through December 4, 2017. *See Order Regarding Respondent's Motions* (07/05/2019).

A hearing was held in this matter on August 14, 2019. Hawley appeared by telephone, as did witnesses Kristy Hawley (a/k/a Kristy Cline), Laura Mooney, and Aaron Harris. Houck appeared personally as Kalispell Marine's designated representative, as did Gregory A. Smith, Attorney at Law. Marva Pingree, Kalispell Marine's bookkeeper and Houck's wife, also appeared personally. Hawley, Kristy Hawley, Mooney, Harris, Houck, and Pingree testified under oath.

Exhibits 38, 66, 90, 91, 114, 118 through 158, 181 through 183, and 222 through 270 from the Administrative Record compiled by the Wage & Hour Unit were admitted into the record. Respondent's Exhibits A, B, C, G, H, I, and K were also admitted. The record closed at the end of the contested case hearing.

Upon the timely filing of the final brief in this matter, the matter was deemed submitted for decision.

II. ISSUE

Whether W B, Inc., a Montana corporation d/b/a Missouri River Marine a/k/a Kalispell Marine, owes wages for work performed, as alleged in the complaint filed by Kevin A. Hawley, and owes penalties or liquidated damages, as provided by law.

III. FINDINGS OF FACT¹

1. Kalispell Marine employed Kevin A. Hawley as a parts man helper beginning in early-April 2014, with an hourly wage of \$10.00. Hawley's hourly wage was later increased to \$12.50. Hawley received a \$500.00 bonus in July, August, and September of 2014.

2. Kalispell Marine is located in the Flathead Valley where it sells and services boats. Its busy season typically starts Memorial Day and concludes Labor Day.

3. Kalispell Marine's annual gross sales are in excess of \$500,000.00. Kalispell Marine's employees engaged in interstate commerce during the normal course of business.

4. Owner Larry Houck owns a second business, Missouri River Marine, which is located in Great Falls, Montana. Houck resides in Great Falls and relies heavily on the staff at Kalispell Marine to operate the business on a day-to-day basis.

5. Hawley became Kalispell Marine's Parts Manager within a week or two of his hire. Hawley only worked at Kalispell Marine and performed no work at Missouri River Marine.

6. Hawley's duties primarily included:

Coordination of service department personnel, parts department upkeep, computer updates on parts inventory, inventory reports through computer, daily or week cash reports from computer.

Ex. 114.

¹ 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.

7. Kalispell Marine's Employee Information Manual addressed its lunch break policy during Hawley's employment. Ex. I. The policy provided:

May 1 thru Labor day: Friday, Saturday and Monday are very busy days during the boating season. On Friday, Saturday and Mondays, **NO** "away from the store" lunch hours.

On Tuesday, Wednesday and Thursday, please advise your co-workers of your impending absence/departure for lunch. Prior arrangements are required for more than a 60 minute lunch.

Please leave a note on the magnet by the time clock if more than 60 minutes is to be taken.

Id. at p. 15.

8. Hawley was required to punch in and out using a time clock at the beginning and end of his shift, and for any breaks taken. The time clock was located in the parts department and easily accessible by all employees, including Hawley.

9. Marva Pingree is the bookkeeper for W B, Inc. Pingree is also Houck's wife and serves as a secretary for the corporation. Pingree has prepared the payroll for both Kalispell Marine and Missouri River Marine since approximately 1988.

10. Pingree issues payroll checks using the checking account for W B, Inc., which is accessible by only Pingree and Houck and is kept at the Missouri River Marine Store. Kalispell Marine has its own checking account and the checkbook is kept at the Kalispell Marine store. Hawley had access to the Kalispell Marine checkbook and often prepared checks for Pingree's signature using that account.

11. If Hawley or other Kalispell Marine employees did not punch out for a lunch break, Pingree deducted 30 minutes from the employee's time card for that day. Pingree's practice of deducting 30 minutes from an employee's time card was known by the employees of Kalispell Marine, including Hawley.

12. Kalispell Marine employees were allowed one hour each day for a lunch break during the off season. If Hawley or other Kalispell Marine employees did not take a lunch break, they were directed to write "No Lunch" or "N/L" on their time card entry for that day. If Pingree observed a notation of that type, she would not deduct the 30 minutes from the employee's time card. Neither Pingree nor Houck

ever confirmed that such a practice was proper under either the FLSA or the MWPA before implementing the practice several years earlier.

13. Pingree adopted this approach because it was difficult to manage employees at Kalispell Marine and to track the hours employees actually worked.

14. Hawley often failed to take a lunch break or ate at his desk while performing work for the employer. Hawley regularly failed to note when he skipped lunch or ate at his desk while continuing to work on his time card.

15. Hawley picked up his child from school at least once per week. This typically took Hawley 20 to 30 minutes, which he failed to note on his time card.

16. Hawley went home to tend to his dog two to three times per week. Hawley often took 30 minutes or more to complete this personal chore. Hawley did not note when he performed this chore on his time card.

17. Hawley would write the total number of hours he worked each day and the total number of hours he worked each week on his time card before faxing it to Pingree the following Monday. Pingree would prepare payroll the next day.

18. Hawley's weekly hours should properly be reduced by 120 minutes each week to account for the occasions he left the store for personal reasons for more than 30 minutes at a time, which occurred at least four times per week. Hawley did not note these personal breaks on his time card.

19. Hawley was paid in cash for overtime at his hourly rate for some, but not all, weeks he worked more than 40 hours per week. Hawley was paid at his regular hourly wage of \$12.50 rather than the proper overtime wage of \$18.75.

20. During the week ending January 28, 2017, Hawley traveled to Tennessee for employment-related training. On Sunday, January 22, 2017, Hawley flew out of Kalispell at approximately 5:00 a.m. and arrived in Tennessee at approximately 10:00 p.m. Accounting for the time zone difference of two hours, Hawley should have received travel time in the amount of 15 hours for that day. *See Addendum A.*

21. On Thursday, January 26, 2017, Hawley flew out of Tennessee at approximately 4:00 p.m. and arrived in Kalispell at approximately midnight. Again, accounting for the two hour time difference, Hawley should have received travel time in the amount of six hours for that day. *Id.*

22. Hawley worked a total of 2,535.93 hours, including 151.21 in overtime hours, during the period beginning December 4, 2015 through the week ending March 4, 2017. Hawley was paid cash for hours worked over 40 hours per week at his regular rate. Hawley was overpaid approximately \$471.03 in wages during this period. Hawley is not owed any additional regular or overtime wages for the period of December 4, 2015 through March 4, 2017. *See* Addendum A.

23. Beginning in January 2017, Hawley negotiated with Owner Larry Houck regarding his wages. Hawley ultimately signed a Salary Contract in March 2017, which called for him to receive a monthly salary of \$2,250.00 to be paid on a bi-weekly basis in the amount of \$1,125.00. The Salary Contract also called for Hawley to work six days per week, 55 hours per week, for a total of 220 hours per month minimum. It also provided, “Guarantee hours for salary includes overtime considerations and seasonal considerations.” Ex. 114.

24. The Salary Contract resulted in Hawley being paid straight time for 40 hours each week and half of his regular rate for all hours worked in excess of 40. Hawley’s weekly wage under the Salary Contract was \$562.50. *See* Addendum B for a fuller accounting.

25. There was a clear and mutual understanding between the parties that Hawley would be paid a monthly salary of \$2,250.00 regardless of the number of hours he worked each week.

26. Hawley’s regular rate varied from week to week under the Salary Contract. However, Hawley’s regular rate for each week exceeded Montana’s minimum wage of \$8.15 in 2017-19.²

27. Hawley is owed overtime wages in the following amounts:

Work Week Ending	Total Hours	Regular Rate	Overtime Rate	Overtime Wages Due
3/18/2017	45.52	\$ 12.36	\$ 18.54	\$ 34.11
4/1/2017	40.60	\$ 13.85	\$ 20.78	\$ 4.16
4/8/2017	42.70	\$ 13.17	\$ 19.76	\$ 17.78
4/29/2017	41.08	\$ 13.69	\$ 20.54	\$ 7.39
5/6/2017	42.00	\$ 13.39	\$ 20.09	\$ 13.39
5/20/2017	48.49	\$ 11.60	\$ 17.40	\$ 49.24
5/27/2013	47.87	\$ 11.75	\$ 17.63	\$ 46.24

² Source: <http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/minimum-wage-history>

Work Week Ending	Total Hours	Regular Rate	Overtime Rate	Overtime Wages Due
6/3/2017	48.05	\$ 11.71	\$ 17.56	\$ 47.12
6/17/2017	49.24	\$ 11.42	\$ 17.14	\$ 52.78
6/24/2017	53.73	\$ 10.47	\$ 15.70	\$ 71.87
6/31/2017	55.11	\$ 10.21	\$ 15.31	\$ 77.11
7/22/2017	50.35	\$ 11.17	\$ 16.76	\$ 57.81
7/29/2017	49.94	\$ 11.26	\$ 16.90	\$ 55.98
8/5/2017	51.87	\$ 10.84	\$ 16.27	\$ 64.36
8/12/2017	54.41	\$ 10.34	\$ 15.51	\$ 74.49
8/19/2017	51.72	\$ 10.88	\$ 16.31	\$ 63.73
8/26/2017	45.51	\$ 12.36	\$ 18.54	\$ 34.05
9/2/2017	46.23	\$ 12.17	\$ 18.25	\$ 37.90
9/9/2017	48.07	\$ 11.70	\$ 17.55	\$ 47.22
9/16/2017	40.60	\$ 13.85	\$ 20.78	\$ 4.16
9/23/2017	49.79	\$ 11.30	\$ 16.95	\$ 55.30
9/30/2017	53.29	\$ 10.56	\$ 15.83	\$ 70.14
10/7/2017	56.28	\$ 9.99	\$ 14.99	\$ 81.36
10/14/2017	50.18	\$ 11.21	\$ 16.81	\$ 57.06
10/28/2017	43.99	\$ 12.79	\$ 19.18	\$ 25.51
TOTAL:				\$ 1,150.26

28. Hawley's regular rate for purposes of determining his proportionate salary for the final day of his employment, Monday, December 4, 2017, when he worked 2.53 hours is \$10.22 (\$562.55 / 55 hours). Hawley is owed \$25.87 for the time he worked on his final day of employment.

29. Kalispell Marine discharged Hawley on December 4, 2017 based upon the suspicion that he had stolen parts and/or equipment from the business. As of the date of hearing, no charges have been filed against Hawley for any alleged criminal activity related to his employment with Kalispell Marine.

30. Kalispell Marine's vacation policy provides:

A regular employee who has been continuously employed for one year is entitled to one week's paid vacation after completion of the year. A regular employee who has been continuously employed for a period of five years is titled [sic] to two weeks paid vacation per year after the completion of five years. Vacation time must be approved by the office to arrange and distribute the work load you normally carry out. This does not include employees on a part-time basis.

Ex. I.

31. Hawley earned one week of paid vacation that he could use as of April 5, 2015, which was one year after his date of hire. Hawley earned one week of paid vacation April 5, 2016 and April 5, 2017.

32. Hawley earned 15 days of vacation throughout his employment for a total of 120 hours. Hawley used 16 hours of vacation in February 2016 (Doc. 120); 14.94 hours in November 2016; and 40 hours of vacation in December 2016 for a total of 80 hours thereby leaving Hawley with 49.06 hours of paid vacation owed to him when he separated from employment. Hawley is owed \$501.39 in unpaid wages for his accrued vacation time ($\$10.22$ regular rate x 49.06 hours).

33. Kalispell Marine provided Hawley with a \$300.00 Visa cash card when he traveled to Tennessee. Hawley did not turn in any receipts; nor did he return any portion of the cash credit on the card. Kalispell Marine improperly withheld \$300.00 from Hawley's pay to cover the cost of the cash card without having any formal agreement that such an amount would be deducted from Hawley's pay.

34. Kalispell Marine owes Hawley a total of \$801.39, representing the improperly withheld amount for the Visa cash card and \$501.39 in unpaid vacation time.

35. Kalispell Marine submitted a check to the Wage & Hour Unit in the amount of \$6.70 prior to the issuance of the determination in this matter and submitted Hawley's final check for the period of November 12, 2017 through November 30, 2017, in the gross amount of \$1,125.00 prior to the issuance of the determination dated August 3, 2018.

36. Kalispell Marine owes Hawley a total of \$1,951.65, representing \$1,150.26 in unpaid overtime wages, \$501.39 in unpaid wages for accrued vacation time, and \$300.00 improperly withheld from his pay.

37. Liquidated damages in the amount of \$1,150.26 are appropriate in this matter to compensate Hawley for the overtime wages he did not receive for work performed during the period of his wage claim, as well as recognizing the failure of Kalispell Marine to ensure its practice of unilaterally reducing employees' pay was in compliance with state and federal law.

38. A 55% penalty on the amount of unpaid regular wages owed to Hawley, which includes \$501.39 for Hawley's accrued vacation and \$300.00 for the wages improperly withheld, amounts to \$440.76 and is appropriate in this matter.

IV. DISCUSSION

Hawley contends he is owed overtime wages for the period of time he worked under the Salary Contract. Hawley further contends he is owed unpaid wages for 49.06 hours for vacation time and travel time incurred while traveling to an employer mandated training in January 2017. Hawley also argues Kalispell Marine improperly withheld \$300.00 given to him to cover travel expenses related to the January 2017 training trip and the employer is not entitled to a credit or offset for the monies given to him upon request throughout his employment.

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 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.

A. KALISPELL MARINE OWES HAWLEY UNPAID WAGES.

Hawley argues Kalispell Marine violated the overtime provisions of the FLSA in failing to pay him overtime for work performed during the period beginning December 4, 2015 through December 4, 2017. Kalispell Marine counters that Hawley was paid appropriately both prior to and after the Salary Contract was in place beginning on or about March 5, 2017.

1. *Hawley is Covered by the FLSA.*

The FLSA requires employers to pay minimum wages and overtime to each employee who “is employed in an enterprise engaged in commerce or in the production of goods for commerce.” 29 USC §§ 206(a)(1), 207(a)(1).

There is no dispute Hawley was an employee of Kalispell Marine. “Enterprise coverage” under the FLSA is defined as an “enterprise engaged in commerce or in the production of goods for commerce” that:

- (i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and
- (ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated)

29 U.S.C. § 203(s)(A)(i)-(ii).

Kalispell Marine’s annual gross volume of sales or business exceeds \$500,000.00. Kalispell Marine and its employees regularly handle, sell, or otherwise work on goods or materials that have been moved in or produced for commerce by any person. Therefore, because Kalispell Marine meets both elements of enterprise coverage, Hawley is covered under the FLSA.

2. *Kalispell Marine has not shown Hawley is subject to exemption under either the FLSA or the Montana Wage Protection Act.*

Hawley’s coverage under the FLSA now raises the question of whether there is any provision under either the FLSA or the Montana Wage Protection Act (MWPA) that would exempt him from either act’s minimum wage and overtime wage requirements. The burden of proving that an employee is excluded from overtime requirements falls upon the employer who asserts it. *Kemp v. Board of Personnel Appeals*, 1999 MT 255, 296 Mont. 319, 989 P.2d 317. To meet this burden, an employer must present evidence to show that the employee falls “plainly and unmistakably within the exemption’s terms.” *Kemp*, ¶16, citing *Public Employees Ass’n v. Dept. of Transportation*, 1998 MT 17, 287 Mont. 229, 954 P.2d 21.

The FLSA outlines specific exemptions from its minimum wage and overtime requirements. While there is no exemption from minimum wage requirements under the FLSA that would apply in this case, the exemption for parts man may arguably apply. 29 USCS § 213(b)(10) provides:

- (A) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers; or
- (B) any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers;

29 U.S.C. § 213(b)(10).

Hawley does not meet any of the elements set forth in 29 U.S.C. § 213(b)(10). Kalispell Marine's business does not deal in automobiles, trucks, or farm implements. There is no evidence Kalispell Marine ever engaged Hawley as a salesman or that his duties as a Parts Manager had a sales component. Therefore, there are no exemptions under the FLSA that would absolve Kalispell Marine of its duty to pay Hawley overtime wages.

Similarly, no such exemption exists under MWPA. Montana Code Ann. § 39-3-406(2)(d) excludes the following workers from Montana's overtime protections:

salesperson, parts person, or mechanic paid on a commission or contract basis and primarily engaged in selling or servicing automobiles, trucks, mobile homes, recreational vehicles, or farm implements if the salesperson, parts person, or mechanic is employed by a nonmanufacturing establishment primarily engaged in the business of selling the vehicles or implements to ultimate purchasers;

Id.

The burden of proving that an employee is excluded from overtime requirements falls upon the employer who asserts it. *Kemp v. Board of Personnel Appeals*, 1999 MT 255, 296 Mont. 319, 989 P.2d 317. To meet this burden, an employer must present evidence to show that the employee falls "plainly and unmistakably within the exemption's terms." *Kemp*, ¶16, citing *Public Employees Ass'n v. Dept. of Transportation*, 1998 MT 17, 287 Mont. 229, 954 P.2d 21.

There is no specific provision for a parts person working for a business primarily engaged in the business of selling boats. There is no evidence showing Kalispell Marine ever sold or serviced “automobiles, trucks, mobile homes, recreational vehicles, or farm implements.” Therefore, the exclusion set forth in Mont. Code Ann. § 39-3-406(2)(d) does not apply. Kalispell Marine has failed in its burden of establishing there is an exemption under either the FLSA or MWPA that would allow it to be free of either act’s minimum wage and/or overtime wage requirements. Therefore, the issue becomes whether Hawley was properly compensated for all work performed during the period of his wage claim.

3. *The terms of the Salary Contract do not meet the maximum hour requirements under either federal or state law.*

Hawley contends the Salary Contract is unenforceable and is contrary to public policy and inconsistent with the terms of either the FLSA or the MWPA. Kalispell Marine counters Hawley voluntarily agreed to the Salary Contract and worked under its terms for several months. Kalispell Marine notes there was never an issue until after Hawley was terminated from his employment.

Kalispell Marine and Hawley entered into a formal agreement that gave rise to an executed Salary Contract that required Kalispell Marine to pay Hawley a monthly salary of \$2,250.00 to be paid on a semi-monthly basis at the rate of \$1,125.00. In exchange for a set monthly wage, Hawley was to work six days per week, “[u]p to 55 hours/week-spring, summer and into fall (less during winter months - 40 hours).” Ex. 114. The Salary Contract further provided, “This contract is for 55 hr/week (220 hrs/month minimum)[.] Guaranteed hours for salary includes overtime considerations and seasonal considerations.” *Id.*

The minimum wage for this period of Hawley’s claim was \$8.15. The Salary Contract complies with the minimum wage requirements of the FLSA and MWPA. Hawley’s weekly salary under the Salary Contract was \$519.23 ($\$2,250.00 / 12 \text{ months} / 52 \text{ weeks} = \519.23). Assuming Hawley worked 55 hours per week, his regular rate for those 55 hours would be \$9.44, which was greater than the applicable minimum wage. Therefore, the Salary Contract meets the minimum wage requirements of both the FLSA and the MWPA. *See* 29 USC § 206(a); Admin. R. Mont. 24.16.2512(2)(e)(i).

However, the Salary Contract does not meet the maximum hour requirement in that there is no specific provision requiring Kalispell Marine pay Hawley overtime (1 1/2 his regular rate) for all hours worked in excess of 40. Rather, the contract only

mentions, “Guaranteed hours for salary includes overtime considerations and seasonal considerations.”

An exemption to the FLSA’s maximum hour requirement (29 USC § 207(a)) is set forth in 29 USC § 207(f), which provides:

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 6 [29 USCS § 206(a) or (b)] (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

Id.

The Salary Contract does not meet the elements set forth above. As noted above, the Salary Contract itself provides for no guarantee of compensation of not less than one and one-half times Hawley’s regular rate for all hours worked in excess of 40 hours in a workweek.

Further support for the conclusion that the Salary Contract does not meet the requirements of section 7(f) can be found in the Code of Federal Regulations. The guaranty of a semi-monthly salary of \$1,125.00 is not the weekly guaranty required by section (f). *See* 29 CFR § 778.410(a) (“The statute provides that the guaranty must be a weekly guaranty. A guaranty of monthly, semimonthly, or biweekly pay (which would allow averaging wages over more than one workweek) does not qualify under this paragraph.”). Further, there was no great fluctuation in the number of regular hours Hawley worked from week to week. Rather, the only fluctuation that occurred was in the number of overtime hours Hawley worked from week to week. *See* 29 CFR § 778.406 (“Nothing in the legislative history of section 7(f) suggests any intent to suspend the normal application of the general overtime provisions of section 7(a) in situations where the weekly hours of an employee fluctuate only when overtime work in excess of the prescribed maximum weekly hours is performed.”). Further, nature of the work Hawley performed was not such that the number of

hours he may be required to work from week to week could not be determined with a reasonable degree of certainty. See 29 CFR § 778.405 (“Even if an employee does in fact work a variable workweek, the question must still be asked whether his duties necessitate irregular hours of work. The subsection is not designed to apply in a situation where the hours of work vary from week to week at the discretion of the employer or the employee . . .”). Therefore, the Salary Contract does not meet the exemption to the maximum hours requirement of the FLSA.

The Montana Supreme Court addressed a similar issue in *Lewis v. B & B Pawnbrokers, Inc.*, 1998 MT 302, ¶¶ 22, 23, 292 Mont. 82, 968 P.2d 1145. In *Lewis*, the plaintiff received a monthly wage of \$1,100.00 on the understanding he would be paid \$1.00 more than the applicable minimum wage and working a 48 hour workweek every other week with 16 of those hours being paid at an overtime rate of 1 1/2 times his regular rate. *Lewis*, ¶ 9. The plaintiff subsequently received a \$100.00 per month raise and given an additional day off each month. Irrespective of the days and hours, the plaintiff received the monthly pay of \$1,200.00. *Lewis*, ¶ 10. In considering whether the plaintiff was estopped from later claiming compensation for overtime work, the court noted:

Parties cannot privately waive statutes enacted to protect the public in general. *Phoenix Phys. Ther. v. Unemployment Ins. Div.* (1997), 284 Mont. 95, 104, 943 P.2d 523, 528; see also § 1-3-204, MCA (“a law established for a public reason cannot be contravened by a private agreement”). In the context of Montana’s employment laws, we long ago recognized that an employee may waive the advantage of any provision of law that was intended solely to benefit that employee, provided that such a waiver is not violative of public policy. *Shea v. North-Butte Mining Co.* (1919), 55 Mont. 522, 535, 179 P. 499, 503.

More recently, however, we cautioned that “an employee may not enter into an agreement which operates to waive compensation for overtime actually worked.” *Garsjo v. Department of Labor and Indus.* (1977), 172 Mont. 182, 188, 562 P.2d 473, 476. Because “overtime premiums are for the protection and benefit of the general public, private waiver is contrary to public policy.” *Hoehne v. Sherrodd, Inc.* (1983), 205 Mont. 365, 370 668 P.2d 232, 234 (citing *State ex rel. Neiss v. District Court* (1973), 162 Mont. 324, 328, 511 P.2d 979, 981; § 1-3-204, MCA).

Lewis, 1998 MT at ¶¶ 22, 23.

The court, in specifically noting its ruling in *Hoehne*, ruled that, “[a] claimant may not, of his or her own accord, contractually bargain away the statutory right to overtime compensation.” *Lewis*, ¶ 25. The court declared:

[An] employee’s right to receive overtime pay . . . are expressions of public policy created to protect workers, and restraining those from withholding overtime pay is vindication of a public right rather than a private right. Withholding wages due, such as overtime pay, is considered a continuing public offense.

Lewis, ¶24 (quoting *Hoehne*, 205 Mont. at 369, 668 P.2d at 234).

Therefore, the Salary Contract does not meet the exemption requirements set forth in 29 USC § 207(f). Further, it violates the policy considerations set forth in Mont. Code Ann. § 39-3-405(1), which provides, “An employer may not employ any employee for a workweek longer than 40 hours unless the employee receives compensation for employment in excess of 40 hours in a workweek at a rate of not less than 1.5 times the hourly wage rate at which the employee is employed.” A “workweek” is defined as a “regularly recurring period of 168 hours in the form of seven consecutive 24-hour periods . . . Employment for two or more workweeks cannot be averaged out for the sake of figuring overtime or minimum wage.” Admin. R. Mont. 24.16.501(1).

It is therefore determined that the Salary Contract violates the overtime requirements of both the FLSA and the MWPA. There being no applicable exemption, it is now necessary to determine the amount of unpaid overtime wages owed to Hawley.

B. KALISPELL MARINE OWES HAWLEY UNPAID OVERTIME WAGES.

An employee seeking unpaid wages under either the FLSA or MWPA has the initial burden of proving work performed without proper compensation. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686-87 (1946). 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. *Anderson*, 328 U.S. at 687. To ensure employees are paid overtime when it is owed, the law requires employers to keep records of employee’s hours. 29 U.S.C. § 211(c). In *Anderson, supra*, the U.S. Supreme Court held that when the employer fails to record the employee’s hours, the employee’s records may be used to determine the amount of time worked. *Anderson*, 328 U.S. at 687. As the Supreme Court stated in *Anderson*:

[W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. . . . In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Anderson, 328 U.S. at 687-88.

The Montana Supreme Court adopted the U.S. Supreme Court's approach to determining an employee's claims for unpaid overtime when the employer's records are inadequate in *Garsjo*, 172 Mont. at 189. The court held, "The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated" *Id.*

The Montana Supreme Court confirmed this to be the proper approach in *Arlington v. Miller's Trucking, Inc.*, 2015 MT 68, 378 Mont. 324, 343 P.3d 1222. In *Arlington*, the court was tasked with determining whether an employee was owed unpaid wages when both the employee and the employer failed to maintain adequate records regarding the number of hours worked. The court noted the FLSA imposes the ultimate responsibility of ensuring the maintenance of accurate records of hours worked upon the employer. *Arlington*, ¶ 17. An employee's failure to track his or her hours does not absolve the employer of this duty. *Arlington*, ¶ 18. "If plaintiff's evidence of hours worked is inaccurate or imprecise because the employer's time-keeping practices made it difficult to ascertain the truth, the employer rather than the employee must suffer the consequences." *Id.* "[I]f 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." *Mitchell v. Caldwell*, 249 F.2d 10, 11 (10th Cir. 1957) (emphasis added) (citing *Anderson, supra*; *Porter v. Poindexter*, 158 F.2d 759 (10th Cir. 1947); *Handler v. Thrasher*, 191 F.2d 120 (10th Cir. 1951)).

1. *Hawley has shown he performed work for which he was not properly paid as a matter of just and reasonable inference.*

Hawley may substantiate the claim by showing that he has, in fact, performed work for which he was improperly compensated and by producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. Once Hawley shows as a matter of just and reasonable inference that he is owed wages, the burden shifts to Kalispell Marine to produce evidence either showing the precise amount of work performed or negating the reasonableness of the inference raised by the evidence presented in this case.

Admitted into evidence were a copy of many, but not all, of Hawley's time cards from the period in question. Also admitted were a number of Hawley's pay stubs. Neither party offered specific evidence as to the number of hours Hawley worked during each week or the precise nature of his daily duties. As a result, the Hearing Officer has been left to her own calculations based upon a review of the time cards and pay stubs. *See Addendums A, B.* Hawley's testimony, in conjunction with the time cards and pay stubs, shows by a reasonable and just inference that he performed work for Kalispell Marine during the period of his wage claim, December 4, 2015 through December 4, 2017. The deductions made by Pingree raises the inference that Hawley was not paid for all hours he worked during this period. Therefore, the burden now shifts to Kalispell Marine to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence.

2. *Kalispell Marine has negated the reasonableness of the inference raised by Hawley's evidence establishing he performed work for which he was not paid.*

The difficulty in this case is that Kalispell Marine maintained a time clock that was not used by Hawley if and when he either took a 30-minute lunch break or left the store for personal reasons. Hawley admitted in his deposition that he left Kalispell Marine two to three times per week for up to 30 minutes at a time to tend to his dog without clocking out. Hawley Dep. Tr. 49:10-19; 51:19-23; 53:9-22. Hawley also admitted he would pick up his son from school without punching out at least once per week for approximately 15 minutes. *See* Hawley Dep. Tr. 28:1-12. Hawley persisted in his contention that Pingree unlawfully deducted 30 minutes from his time card despite his admission he regularly left the store for personal reasons several times per week without punching out.

Hawley's testimony and subsequent arguments are perplexing. Hawley argues he rarely, if ever, took a 30-minute lunch break. Hawley conceded the employer

required him to write, “No Lunch,” or, “N/L,” when he did not take a lunch break. However, there are very few notations on the time cards, but for Pingree’s calculations, indicating whether or not Hawley took a lunch break or when Hawley left the store for personal reasons. Hawley further argues he is owed for every 30-minute break deducted by Pingree despite his admission that he regularly left the store on personal business for more than 30 minutes at a time at least four times per week. Hawley also argues that he did not track his hours more strictly once he became a salaried employee.

Laura Mooney, a former Kalispell Marine employee, testified Hawley “frequently” left the store every week to tend to his dog or to pick up his son. Mooney estimated Hawley was gone for 30 minutes or more when he left the store for personal reasons. Mooney conceded she did not review Hawley’s time cards and did not maintain her own records regarding Hawley’s comings and goings, but she did note that he left the store for personal reasons frequently enough for her to have noted his absences and the approximate lengths of those absences. Mooney appeared to bear no rancor toward either party; nor did she appear to be in a position to benefit if she offered testimony contrary to Hawley’s evidence. Further, it is plausible that a co-worker would take note of another employee’s frequent absences from the workplace.

Aaron Harris, who has been a Kalispell Marine employee for more than two years, testified he observed Hawley take lunch breaks most days and leave the store two to three times per week to tend to his dog and once a week to pick up his son. Harris’ testimony was clear and direct, and he appeared to bear no ill will toward Hawley. Further, there was no showing that Harris directly benefitted from offering testimony that contradicted Hawley’s testimony.

The testimony of Mooney and Harris, when considered in conjunction with Hawley’s time cards, pay stubs, and his own vague testimony, makes Hawley’s testimony less credible as to whether he left the store for personal reasons for 30 minutes or more without punching out. Hawley’s testimony was evasive as to his comings and goings during a typical work day, and described a less likely series of events given the documentary evidence and testimony of Mooney and Harris. Therefore, Hawley’s testimony that he never took a 30-minute break during any of the days in question is deemed less credible than the evidence presented by Kalispell Marine.

Kalispell Marine does, however, bear the ultimate burden of maintaining accurate employee time records. *Arlington*, 2015 MT ¶ 17. Hawley clearly frustrated those efforts by failing to punch out when he left the store for personal reasons.

Kalispell Marine maintained a time clock at the store that was easily accessible by Hawley. Hawley knew or should have known the time clock was intended to be used by all employees, including both hourly and salaried employees, to ensure the employer, who was located in another town several miles away, could track the number of hours they worked each day and pay them for the time worked. There was no evidence presented to suggest Hawley was ever relieved of the requirement he punch in and out once he became a salaried employee. Ultimately, it was Hawley's actions that caused the employer's timekeeping records to be incorrect and inadequate. If Hawley had correctly noted when he did or did not take a 30-minute break and when he left the store for personal reasons, the time cards would conceivably be the best evidence of the time worked, and the Hearing Officer would not be left to rely upon Hawley's faulty memory.

The Montana Supreme Court has stated, in no uncertain terms, that the claimant's claim for unpaid wages should not be dismissed in its entirety when the claimant has not produced sufficient records to counteract the evidence presented by the employer. *See Arlington v. Miller's Trucking, Inc.*, 2015 MT at ¶ 17. While mindful of that mandate, the Hearing Officer cannot find Hawley worked every work day without taking at least one 30-minute break. Hawley may not have taken a traditional meal break as contemplated by 29 CFR § 785.19 (requiring an employee to be completely relieved from duty for the purposes of eating regular meals for the break to qualify as a bona fide meal break). However, the employer has produced sufficient evidence to show he was gone from the store for at least 30 minutes, four days per week for personal reasons. Therefore, it is determined that Hawley's weekly hours worked should be reduced by a total 120 minutes or 30 minutes each day for four days per week.

3. *Hawley is not owed additional wages for the period beginning workweek ending December 5, 2015 through workweek ending March 4, 2017.*

The evidence shows Hawley performed work during the period of his wage claim that occurred prior to the implementation of the Salary Contract. During this period, Hawley worked more than 40 hours during eight weeks. During those weeks, Kalispell Marine paid him for those overtime hours at his regular rate of \$12.50 in cash. Accounting for the cash payments, as well as the two hour deduction discussed above, it is determined that Hawley was properly compensated for the hours he worked, as reflected in Addendum A.

4. *Hawley is owed overtime wages for work performed beginning March 5, 2017.*

Hawley's Salary Contract provided that he would be paid a monthly salary of \$2,250.00 with the expectation that he would work six days per week and up to 55 hours per week during the busy season. Doc. 114. The Salary Contract further provided that the contract was for 55 hours per week and a total of 220 hours per month minimum. *Id.* Hawley contends he should be compensated at the hourly rate of \$12.50, which was his hourly rate prior to the execution of the Salary Contract. However, the Hearing Officer is bound by Admin. R. Mont. 24.16.2512(2)(e)(i), which states:

An employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many. Where there is a *clear mutual understanding of the parties* that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than for working 40 hours or some other fixed weekly work period, such a salary arrangement is permitted by the Law if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours he works is greatest, and if he receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half his regular rate of pay. Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.

Id. (emphasis added).

Unlike the parties in *Lewis*, there was a clear and mutual understanding that Hawley's monthly salary was intended to cover "whatever hours the job may demand in a particular workweek" as required under Admin. R. Mont. 24.16.2512(2)(e)(iii). *See Lewis, 1998 MT ¶¶ 32-34. See also Craver v. Waste Mgt. Partners of Bozeman*

(1994), 265 Mont. 37, 874 P.2d 1 (lack of mutual agreement of the parties to a fluctuating hours salary is fatal to the application of the fluctuating workweek method).

Hawley signed the Salary Contract and worked under that agreement for several months. Hawley clearly understood that he would receive \$1,125.00 twice per month regardless of the number of hours he worked by virtue of the fact he worked less than 40 hours some weeks, more than 45 hours some weeks, and received the same rate of pay. Therefore, to determine the amount of unpaid wages owed to Hawley, it is necessary to determine his regular rate pursuant to Admin. R. Mont. 24.16.2512(2)(e)(i).

To determine Hawley's regular rate, his weekly salary of \$562.50 is divided by the number of hours he worked each week. As a result, his regular rate will vary week to week, as will the overtime compensation owed to him. *See* Addendum B. It is therefore determined that Hawley is owed overtime wages for the weeks noted in Finding of Fact 27 for a total of \$1,150.26 in unpaid overtime wages.

C. HAWLEY IS OWED REGULAR WAGES FOR ACCRUED VACATION TIME.

Hawley contends he is owed vacation pay for 49.06 hours, which he argues should be paid at the hourly rate of \$12.50, for a total of \$613.25. Kalispell Marine argues Hawley used 80 hours of vacation time from 2015 through December 2016. Kalispell Marine contends Hawley had 40 hours of vacation time available at the time he separated from employment, which it argues should be paid out at the hourly rate of \$8.31 for a total of \$332.40.

The Montana Attorney General addressed vacation pay in Attorney General Opinion No. 56, dated September 17, 1949:

Vacation pay which has been earned and is now owing is considered to be wages and is collectable in the same manner and under the same statutes as any other kind of wages.

The Montana Supreme Court examined a former employee's wage claim for two weeks of unpaid vacation in *Langager v. Crazy Creek Products*, 287 Mont. 445, 954 P.2d 1169 (Mont. 1998). In *Langager*, a former employee filed a wage claim seeking payment for two weeks of vacation. *Langager*, 287 Mont. at 447. The employer's vacation policy required the employee to work the shift prior to and after the requested time in order to be qualified to receive paid vacation time. *Langager*,

287 Mont. at 447 and 448. The court found this to be a condition subsequent that imposed an unreasonable restriction on the employee's accrual of paid vacation:

Langager earned her vacation pay when she completed the second year of her employment. The condition subsequent that she work the shift following her vacation does not pertain to whether she "earned" the vacation, rather it pertains to whether she will be paid for the vacation she earned. Conditions which purport to divest an employee that which the employee has earned are not reasonable and should not be upheld.

Langager, 287 Mont. at 456 and 457 (Leaphart, J., specially concurring).

The court noted the critical question was whether the former employee earned the vacation time and whether the employer was "obligated to pay that which is earned and due and owing." *Langager*, 287 Mont. at 453. A similar analysis is required in this case.

Kalispell Marine's vacation policy provides:

A regular employee who has been continuously employed for one year is entitled to one week's paid vacation after completion of the year. A regular employee who has been continuously employed for a period of five years is titled [sic] to two weeks paid vacation per year after the completion of five years. Vacation time must be approved by the office to arrange and distribute the work load you normally carry out. This does not include employees on a part-time basis.

Ex. I.

Hawley earned 15 days of vacation throughout his employment for a total of 120 hours. Hawley used 16 hours of vacation in February 2016; 14.94 hours in November 2016; and 40 hours of vacation in December 2016 for a total of 80 hours thereby leaving Hawley with 49.06 hours of paid vacation owed to him when he separated from employment. Hawley's regular rate for purposes of determining vacation time is \$10.22 (\$562.50 weekly salary/55 hours). Hawley is owed \$501.39 in regular wages for his accrued vacation time.

D. KALISPELL MARINE MUST COMPENSATE HAWLEY FOR SHORT BREAKS THAT CONSTITUTE REST PERIODS AND NOT BONA FIDE MEAL BREAKS.

Kalispell Marine argues Hawley's cigarette breaks and time he spent on social media during the work day, which he admitted doing for several minutes at a time, several times a day, through most of the workweek, should be deducted from any wages found to be owed.

As noted above, a "bona fide meal period" does not count as hours worked. 29 C.F.R. § 785.19. While bona fide meal periods may be unpaid, rest periods must be compensated. As noted in 29 C.F.R. §785.18:

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked.

Id.

Kalispell Marine had no policy requiring employees to punch in and out for short breaks. Further, it is difficult to ascertain the precise number of minutes these rest periods lasted during an average work day. It is not unreasonable for an employee to take short rest breaks if they do not interfere with the employer's business operations, which no evidence was presented to show that it did. Therefore, the short breaks Hawley took for smoking and checking social media are compensable time and will not be deducted in the calculation of Hawley's work hours.

E. KALISPELL MARINE'S PAYMENTS TO HAWLEY THAT WERE UNRELATED TO HAWLEY'S WORK PERFORMED DO NOT CONSTITUTE WAGES.

Kalispell Marine argues that Hawley received a total of \$2,740.00 in checks as "crisis money" that should be considered in determining whether Hawley is owed unpaid wages. These monies were given to Hawley to cover unexpected expenses that imperiled the care and health of his family. Kalispell Marine concedes that "[i]t was not well-clarified whether it would be considered wages or a loan, although Houck was thinking ultimately, he might be paid back." Respondent's Post-Hearing Brief, p. 6, ¶¶ 23-25. Kalispell Marine contends that it became clear when Hawley left the employment that the "crisis money" was a form of compensation" and the payments should be treated as advancements on Hawley's wages. *Id.*; *see also* p. 24.

29 USC § 207(e)(1) excludes "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the

amounts of which are not measured by or dependent on hours worked, production, or efficiency” from the definition of “regular rate.” The evidence shows the payments made to Hawley that amounted to approximately \$2,740.00 were payments wholly unrelated to his work and/or production.

Contrary to its argument that such payments constitute wages, Kalispell Marine inexplicably issued Hawley a 1099 after his termination for \$3,100.00 in payments presumably made to him during that tax year. Kalispell Marine offered no credible explanation as to how they came to report that precise figure to the federal government. However, the fact a 1099 was issued and not an amended W-2 wage and tax statement, suggests Kalispell Marine did not consider those payments as wages paid to Hawley or even as draws against future wages earned by Hawley. This is supported by the fact Pingree, who so zealously tracked Hawley’s breaks, failed to make any deductions from Hawley’s pay for those gifts. Therefore, the \$2,740.00 in gifts given to Hawley over the course of his employment with Kalispell Marine cannot be used to calculate Hawley’s regular rate or otherwise be used as an offset by Kalispell Marine.

F. KALISPELL MARINE IMPROPERLY WITHHELD \$300.00 FROM HAWLEY’S WAGES.

Kalispell Marine argues it properly withheld \$300.00 from Hawley’s wages to cover the cost of the Visa cash card it provided him when he traveled to an employer mandated training in January 2017. Kalispell Marine argues Hawley clearly spent the money and failed to produce receipts to substantiate the money was used for travel related expenses.

An employer cannot withhold the wages or any portion thereof due and owing to an employee as wages earned, and apply such wages to an account which the employee has with the employer unless the account existing between the employer and employee is for board, room or other incidentals which the employer has agreed may be deducted as a condition of the employment.

Att’y Gen’l Op. No. 25, Vol. 11 (March 25, 1953).

Kalispell Marine produced no evidence regarding any policies, directives, or formal agreements between the parties as to how the various “crisis money” payments were to be treated; nor was there was any such evidence presented as to the \$300.00 cash card given to Hawley for his training trip. It is therefore determined that Kalispell Marine is not entitled to an offset for any of the payments made to Hawley

as “crisis money,” which appear to be gifts and not wages, and the \$300.00 cash card given to Hawley for a training trip.

G. LIQUIDATED DAMAGES UNDER THE FLSA ARE APPROPRIATE.

Based on the foregoing, Hawley is due \$1,150.26 in unpaid overtime wages for the period beginning workweek ending March 11, 2017 through workweek ending December 9, 2017.

A claimant is allowed to pursue claims under both state law and the FLSA. However, a claimant may not recover damages under both. *See Roman v. Maietta Constr.*, 147 F.3d 71, 76 (1st Cir. 1998) (finding plaintiff who recovered under the FLSA for his claim cannot recover again under state law). *See also Reich v. Tiller Helicopter Services, Inc.*, 8 F.3d 1018, 1033 (5th Cir. 1993) (Secretary of Labor permitted to sue employer under both §§ 216(c) [providing for legal relief] and 217 [providing for equitable relief] “subject to the principle of unjust enrichment that precludes the Secretary from obtaining more than one recovery for back wage liability.”)

While the Montana Supreme Court has not addressed the issue of whether recovery can be had exclusively under the FLSA or the MWPA or both, other courts within the 9th Circuit have held that, while the plaintiff is to be made whole and not enjoy a windfall at the defendant’s expense, the plaintiff is entitled to whatever remedy is greater. *See Allen v. WTD Indus.*, 2000 U.S. Dist. LEXIS 22382, **14, 15 (Ore. D. Ct. 2000).

Montana law also assesses a penalty when an employer fails to pay wages when they are due. Mont. Code Ann. § 39-3-206. In this case, the potential penalties include 55% required under Montana Law or liquidated damages equal to the amount of wages found to be due owing under the FLSA. *See 29 U.S.C. § 216(b)*. Clearly, liquidated damages provides for greater recovery for the claimant, who suffered the loss of wages earned by him and owed by the employer. Therefore, liquidated damages are appropriate and will be imposed.

Kalispell Marine may only avoid the imposition of liquidated damages if it can show it acted in good faith and on reasonable belief that it was complying with the law. *See 29 U.S.C. § 216(b)*. The onerous burden to demonstrate good faith rests with the employer: “[D]ouble damages are the norm, single damages the exception. . . .” *Brock v. Wilamowsky*, 833 F.2d 11, 19 (2d Cir. 1987) (quoting *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986)). Even if an employer carries the burden, liquidated damages may still be awarded. *See Mireles v.*

Frio Foods, Inc., 899 F.2d 1407, 1416 n. 8 (5th Cir. 1990); *see also Tacke v. Energy W., Inc.*, 2010 MT 39, ¶¶ 25-30, 355 Mont. 243, 249, 227 P.3d 601, 607. Although liquidated damage awards are discretionary, there is a strong presumption in favor of liquidated damages. *See* 29 U.S.C. § 260; *Shea v. Galaxie Lumber & Constr. Co.*, 152 F.3d 729, 733 (7th Cir. 1998).

Kalispell Marine conceded it unilaterally reduced its employees' wages for purported meal breaks without consideration of the requirements of the FLSA or simple fairness to its employees. While Kalispell Marine clearly had reasons to be concerned about its employees working in a remote location and not taking the appropriate breaks, its practice of reducing the employees' wages without first seeking legal advice that such a practice was legal demonstrates that it engaged in a practice without any consideration of the legality of those actions.

The inescapable conclusion upon a review of the Salary Contract is that Kalispell Marine intended to evade both federal and state wage and hour laws. Hawley's regular rate rarely meets or exceeds his previous hourly salary of \$12.50. In fact, it does so only seven of the 39 weeks under which Hawley worked under the Salary Contract. It would appear that the benefit of the Salary Contract ran primarily to Kalispell Marine in that it could limit its overtime costs while not similarly limiting the number of overtime hours it required Hawley to work. Further, Kalispell Marine's admitted practice of paying Hawley his overtime wages in cash using his regular rate is directly contrary to federal and state law. The benefit of such a practice does not lie with the employee as contended by Kalispell Marine. Not only are the employees being cheated out of their rightful overtime rate, but such a practice has the long term effect of impacting the wages used to calculate unemployment benefits and Social Security Retirement benefits.

Given the obvious lack of consideration of both its legal duties and its duties of fairness to its employees, Kalispell Marine has failed to establish it acted in good faith and reasonable belief in its practice of unilaterally reducing Hawley's hours; paying him his regular rate in cash for overtime work; and implementing a pay scheme that resulted in Hawley not receiving the overtime wages owed to him. Therefore, liquidated damages in the amount of \$1,150.26 are proper in this case. *See* 29 U.S.C. §§ 216, 260.

H. A PENALTY OF 55% ON THE REGULAR WAGES OWED IS APPROPRIATE.

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 minimum wage and 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 amounts due within the time frame prescribed by the determination. Admin. R. Mont. 24.16.7561. The sole exception to this rule is 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.

Hawley has shown he is owed \$801.39 in unpaid regular wages, which includes \$501.39 in accrued vacation and \$300.00 that was improperly withheld. Hawley is owed a penalty on the unpaid vacation pay and improper withholding in the amount of \$440.76 ($\$801.39 \times 55\%$). *See* Admin R. 24.16.7566(1)(a).

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.*; *see also State v. Holman Aviation*, 176 Mont. 31, 575 P.2d 925 (1978).

2. Kevin A. Hawley was an employee of W B, Inc., a Montana Corporation d/b/a Missouri River Marine, a/k/a Kalispell Marine (Kalispell Marine) and not excluded from the minimum wage and overtime provisions of Mont. Code Ann. §§ 39-3-404, -405.

3. Kalispell Marine is engaged in interstate commerce and is subject to the FLSA.

4. Hawley is not subject to exclusion from the minimum wage and overtime requirements of the FLSA or the MWPA. 29 C.F.R. 213(b)(10); Mont. Code Ann. § 39-3-406(2)(d).

5. Hawley has shown he performed work for the employer during the period of his wage claim for which he was not properly compensated.

6. Kalispell Marine has negated the reasonableness of the inference raised from Hawley's evidence that he performed work for which he was not compensated by showing Hawley took a minimum of four breaks per week that were longer than 30 minutes. Therefore, Kalispell Marine established Hawley's weekly hours should be reduced by 120 minutes. *See Anderson*, 328 U.S. at 686-88.

7. Kalispell Marine improperly withheld \$300.00 for a Visa cash card issued to Hawley.

8. Kalispell Marine owes Hawley \$501.39 in regular wages for accrued vacation time.

9. Hawley has shown he is owed \$1,150.26 in unpaid overtime wages.

10. Kalispell Marine has failed to meet its burden of showing it acted in good faith and on reasonable belief that it was complying with the law when it unilaterally reduced Hawley's wages without confirming he took a meal break. 29 CFR § 785.19.

11. Liquidated damages on the amount of the overtime wages found to be owed, which amounts to \$1,150.26, are mandatory based upon the facts of this case. *See* 29 U.S.C. §§ 216, 260.

12. Hawley is owed a penalty on the unpaid vacation pay and improper withholding in the amount of \$440.76 (\$801.39 x 55%). Admin R. 24.16.7566(1)(a).

13. Kalispell Marine owes Hawley a total of \$3,542.67, including unpaid wages and liquidated damages and penalty.

VI. ORDER

W B, Inc., a Montana Corporation d/b/a Missouri River Marine, a/k/a Kalispell Marine is hereby ORDERED to tender a cashier's check or money order in the amount of \$3,542.67, representing \$1,150.26 in unpaid overtime wages and \$801.39 in unpaid regular wages, as well as \$1,150.26 in liquidated damages and \$440.76 in penalty, made payable to Kevin A. Hawley, 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.

DATED this 6th day of February, 2020.

DEPARTMENT OF LABOR & INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

By: /s/ CAROLINE A. HOLIEN
CAROLINE A. HOLIEN
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 59620-1503

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.

Addendum A

<u>Work Week</u>		<u>Hourly Rate</u>	<u>Regular Wages</u>		<u>Overtime</u>			
<u>Ending</u>	<u>Hours Worked</u>	<u>of Pay</u>	<u>Earned</u>	<u>Overtime Hours</u>	<u>Wages Earned</u>	<u>Wages Paid</u>	<u>Cash Paid</u>	
12/5/2015	30.00	\$ 12.50	\$ 375.00	0.00	\$ -	\$ 375.00		
12/12/2015	30.00	\$ 12.50	\$ 375.00	0.00	\$ -	\$ 375.00		
12/19/2015	20.00	\$ 12.50	\$ 250.00	0.00	\$ -	\$ 250.00		
12/26/2015	20.00	\$ 12.50	\$ 250.00	0.00	\$ -	\$ 250.00		
1/2/2016	0.00	\$ 12.50	\$ -	0.00	\$ -	\$ -		
1/9/2016	0.00	\$ 12.50	\$ -	0.00	\$ -	\$ -		
1/16/2016	30.97	\$ 12.50	\$ 387.13	0.00	\$ -	\$ 597.92		
1/23/2016	34.40	\$ 12.50	\$ 430.00	0.00	\$ -			
1/30/2016	32.63	\$ 12.50	\$ 407.88	0.00	\$ -	\$ 750.00		
2/6/2016	28.09	\$ 12.50	\$ 351.13	0.00	\$ -	\$ 750.00		
2/13/2016	46.83	\$ 12.50	\$ 585.38	6.83	\$ 42.69			
2/20/2016	31.83	\$ 12.50	\$ 397.88	0.00	\$ -	\$ 1,000.00		
2/27/2016	39.43	\$ 12.50	\$ 492.88	0.00	\$ -			
3/5/2016	36.83	\$ 12.50	\$ 460.38	0.00	\$ -			
3/12/2016	35.37	\$ 12.50	\$ 442.13	0.00	\$ -	\$ 984.58		
3/19/2016	35.23	\$ 12.50	\$ 440.38	0.00	\$ -			
3/26/2016	28.05	\$ 12.50	\$ 313.13	0.00	\$ -	\$ 928.75		
4/2/2016	42.35	\$ 12.50	\$ 529.38	2.35	\$ 14.50			
4/9/2016	38.43	\$ 12.50	\$ 480.38	0.00	\$ -			
4/16/2016	42.37	\$ 12.50	\$ 529.63	2.37	\$ 14.81	\$ 920.63		
4/23/2016	41.50	\$ 12.50	\$ 518.75	1.50	\$ 9.38			
4/30/2016	31.89	\$ 12.50	\$ 398.63	0.00	\$ -	\$ 1,000.00		
5/7/2016	34.57	\$ 12.50	\$ 432.13	0.00	\$ -	\$ 961.04		
5/14/2016	40.00	\$ 12.50	\$ 500.00	0.00	\$ -	\$ 1,000.00		
5/21/2016	43.30	\$ 12.50	\$ 541.25	3.30	\$ 20.63			
5/28/2016	40.97	\$ 12.50	\$ 512.13	0.97	\$ 6.25	\$ 1,075.50	\$ 75.50	
6/4/2016	40.00	\$ 12.50	\$ 500.00	0.00	\$ -			
6/11/2016	40.00	\$ 12.50	\$ 500.00	0.00	\$ -	\$ 1,000.00		
6/18/2016	40.05	\$ 12.50	\$ 500.63	0.05	\$ 0.31			
6/25/2016	44.97	\$ 12.50	\$ 562.13	4.97	\$ 31.06	\$ 1,000.00		
7/2/2016	41.93	\$ 12.50	\$ 524.13	1.93	\$ 12.06			
7/9/2016	40.05	\$ 12.50	\$ 500.63	0.05	\$ 0.31	\$ 1,000.00		
7/16/2016	46.33	\$ 12.50	\$ 579.13	6.33	\$ 39.56			
7/23/2016	48.84	\$ 12.50	\$ 610.50	8.84	\$ 55.25	\$ 1,200.00	\$ 200.00	
7/30/2016	50.50	\$ 12.50	\$ 631.25	10.50	\$ 65.63			
8/6/2016	38.00	\$ 12.50	\$ 437.50	0.00	\$ -	\$ 1,000.00		
8/13/2016	47.53	\$ 12.50	\$ 594.13	7.53	\$ 47.06			
8/20/2016	48.76	\$ 12.50	\$ 609.50	8.76	\$ 54.75	\$ 1,222.00	\$ 222.00	
8/27/2016	34.79	\$ 12.50	\$ 434.88	0.00	\$ -			
9/3/2016	44.48	\$ 12.50	\$ 556.00	4.48	\$ 28.00	\$ 990.83		
9/10/2016	38.90	\$ 12.50	\$ 434.88	0.00	\$ -			
9/17/2016	45.95	\$ 12.50	\$ 574.38	5.95	\$ 37.19	\$ 1,075.00	\$ 75.00	
9/24/2016	42.71	\$ 12.50	\$ 533.88	2.71	\$ 16.94			
10/1/2016	45.78	\$ 12.50	\$ 572.25	5.78	\$ 36.00	\$ 1,093.00	\$ 93.00	
10/8/2016	43.57	\$ 12.50	\$ 544.63	3.57	\$ 22.31			
10/15/2016	39.09	\$ 12.50	\$ 488.63	0.00	\$ -	\$ 1,063.00	\$ 63.00	
10/22/2016	40.33	\$ 12.50	\$ 504.13	0.33	\$ 2.06			
10/29/2016	41.08	\$ 12.50	\$ 501.00	1.08	\$ 6.75	\$ 1,048.00	\$ 48.00	
11/5/2016	47.15	\$ 12.50	\$ 589.38	7.15	\$ 44.69			
11/12/2016	48.85	\$ 12.50	\$ 610.63	8.85	\$ 165.94	\$ 1,213.00	\$ 213.00	
11/19/2016	43.36	\$ 12.50	\$ 542.00	3.36	\$ 2.60			
11/26/2016	39.06	\$ 12.50	\$ 488.25	0.00	\$ -	\$ 1,000.00		
12/3/2016	45.15	\$ 12.50	\$ 564.38	5.15	\$ 32.19			
12/10/2016	39.33	\$ 12.50	\$ 491.63	0.00	\$ -	\$ 1,000.00		
12/17/2016	38.00	\$ 12.50	\$ 475.00	0.00	\$ -			
12/24/2016	36.36	\$ 12.50	\$ 454.50	0.00	\$ -	\$ 960.42		
12/31/2016	31.15	\$ 12.50	\$ 389.38	0.00	\$ -			
1/7/2017	45.38	\$ 12.50	\$ 567.25	5.38	\$ 33.63	\$ 962.92		
1/14/2017	35.53	\$ 12.50	\$ 444.13	0.00	\$ -			
1/21/2017	45.00	\$ 12.50	\$ 562.50	5.00	\$ 31.25	\$ 1,000.00		
1/28/2017	51.30	\$ 12.50	\$ 641.25	11.30	\$ 70.63			
2/4/2017	44.81	\$ 12.50	\$ 560.13	4.81	\$ 30.06	\$ 1,060.00	\$ 60.00	
2/11/2017	41.14	\$ 12.50	\$ 514.25	1.14	\$ 7.13			
2/18/2017	42.00	\$ 12.50	\$ 525.00	2.00	\$ 12.50	\$ 1,000.00		
2/25/2017	36.79	\$ 12.50	\$ 459.88	0.00	\$ -			
3/4/2017	46.89	\$ 12.50	\$ 586.13	6.89	\$ 43.06	\$ 1,020.00	\$ 20.00	
TOTAL	2535.93		\$ 31,560.44	151.21	\$ 1,037.18	\$ 32,126.59	\$ 1,069.50	

Addendum B

Weekly Salary: \$ 562.50

<u>Work Week Ending</u>	<u>Base Hours</u>	<u>Overtime</u>	<u>Total Hours</u>	<u>Regular Rate</u>	<u>Overtime Rate</u>	<u>Wages Earned</u>	<u>Wages Due</u>
3/11/2017	37.01	0.00	37.01	\$ 15.20	\$ -	\$ 562.50	\$ -
3/18/2017	40.00	5.52	45.52	\$ 12.36	\$ 18.54	\$ 596.61	\$ 34.11
3/25/2017	34.06	0.00	34.06	\$ 16.51	\$ -	\$ 562.50	\$ -
4/1/2017	40.00	0.60	40.60	\$ 13.85	\$ 20.78	\$ 566.66	\$ 4.16
4/8/2017	40.00	2.70	42.70	\$ 13.17	\$ 19.76	\$ 580.28	\$ 17.78
4/15/2017	39.81	0.00	39.81	\$ 14.13	\$ -	\$ 562.50	\$ -
4/22/2017	38.53	0.00	38.53	\$ 14.60	\$ -	\$ 562.50	\$ -
4/29/2017	40.00	1.08	41.08	\$ 13.69	\$ 20.54	\$ 569.89	\$ 7.39
5/6/2017	40.00	2.00	42.00	\$ 13.39	\$ 20.09	\$ 575.89	\$ 13.39
5/13/2017	23.00	0.00	23.00	\$ 24.46	\$ -	\$ 562.50	\$ -
5/20/2017	40.00	8.49	48.49	\$ 11.60	\$ 17.40	\$ 611.74	\$ 49.24
5/27/2013	40.00	7.87	47.87	\$ 11.75	\$ 17.63	\$ 608.74	\$ 46.24
6/3/2017	40.00	8.05	48.05	\$ 11.71	\$ 17.56	\$ 609.62	\$ 47.12
6/10/2017	37.56	0.00	37.56	\$ 14.98	\$ -	\$ 562.50	\$ -
6/17/2017	40.00	9.24	49.24	\$ 11.42	\$ 17.14	\$ 615.28	\$ 52.78
6/24/2017	40.00	13.73	53.73	\$ 10.47	\$ 15.70	\$ 634.37	\$ 71.87
6/31/2017	40.00	15.11	55.11	\$ 10.21	\$ 15.31	\$ 639.61	\$ 77.11
7/8/2017	35.76	0.00	35.76	\$ 15.73	\$ -	\$ 562.50	\$ -
7/15/2017	39.74	0.00	39.74	\$ 14.15	\$ -	\$ 562.50	\$ -
7/22/2017	40.00	10.35	50.35	\$ 11.17	\$ 16.76	\$ 620.31	\$ 57.81
7/29/2017	40.00	9.94	49.94	\$ 11.26	\$ 16.90	\$ 618.48	\$ 55.98
8/5/2017	40.00	11.87	51.87	\$ 10.84	\$ 16.27	\$ 626.86	\$ 64.36
8/12/2017	40.00	14.41	54.41	\$ 10.34	\$ 15.51	\$ 636.99	\$ 74.49
8/19/2017	40.00	11.72	51.72	\$ 10.88	\$ 16.31	\$ 626.23	\$ 63.73
8/26/2017	40.00	5.51	45.51	\$ 12.36	\$ 18.54	\$ 596.55	\$ 34.05
9/2/2017	40.00	6.23	46.23	\$ 12.17	\$ 18.25	\$ 600.40	\$ 37.90
9/9/2017	40.00	8.07	48.07	\$ 11.70	\$ 17.55	\$ 609.72	\$ 47.22
9/16/2017	40.00	0.60	40.60	\$ 13.85	\$ 20.78	\$ 566.66	\$ 4.16
9/23/2017	40.00	9.79	49.79	\$ 11.30	\$ 16.95	\$ 617.80	\$ 55.30
9/30/2017	40.00	13.29	53.29	\$ 10.56	\$ 15.83	\$ 632.64	\$ 70.14
10/7/2017	40.00	16.28	56.28	\$ 9.99	\$ 14.99	\$ 643.86	\$ 81.36
10/14/2017	40.00	10.18	50.18	\$ 11.21	\$ 16.81	\$ 619.56	\$ 57.06
10/21/2017	37.52	0.00	37.52	\$ 14.99	\$ -	\$ 562.50	\$ -
10/28/2017	40.00	3.99	43.99	\$ 12.79	\$ 19.18	\$ 588.01	\$ 25.51
11/4/2017	21.74	0.00	21.74	\$ 25.87	\$ -	\$ 562.50	\$ -
11/11/2017	36.90	0.00	36.90	\$ 15.24	\$ -	\$ 562.50	\$ -
11/18/2017	37.35	0.00	37.35	\$ 15.06	\$ -	\$ 562.50	\$ -
11/25/2017	38.77	0.00	38.77	\$ 14.51	\$ -	\$ 562.50	\$ -
12/2/2017	26.22	0.00	26.22	\$ 21.45	\$ -	\$ 562.50	\$ -
12/9/2017	2.53	0.00	2.53	\$ 222.33	\$ -	\$ 562.50	\$ -
							\$ 1,150.26