

**STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
HEARINGS BUREAU**

<b>IN THE MATTER OF THE WAGE CLAIM</b>	) <b>Case No. 784-2001</b>
<b>OF ARVIN P. GALLAGHER,</b>	)
<b>Claimant,</b>	)
	)
<b>vs.</b>	) <b>FINDINGS OF FACT;</b>
	) <b>CONCLUSIONS OF LAW;</b>
	) <b>AND ORDER</b>
<b>GLACIER WELL SERVICE, INC.,</b>	)
a Montana corporation,	)
<b>Respondent.</b>	)

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**I. INTRODUCTION**

On November 6, 2000, Arvin P. Gallagher filed a wage claim with the Wage and Hour Unit of the Montana Department of Labor and Industry pursuant to § 39-3-201, et seq., MCA. The Claimant alleged he was owed \$435.37 in wages for services performed for the Respondent during the period from October 8, 2000 to October 14, 2000. On January 18, 2001, the Wage and Hour Unit issued a determination finding that the Respondent owed the Claimant \$176.89 in wages, plus a penalty, pursuant to §§ 39-3-205 and 39-3-206, MCA. The Respondent appealed from the determination and requested a hearing.

Gordon Bruce, Hearing Officer, conducted a pre-hearing conference on March 15, 2001. The Claimant failed to appear. The Respondent was present, represented by its legal counsel, Thane P. Johnson. The Respondent agreed that a telephone hearing would be held on May 3, 2001. The hearing took place at the time and date set. The Claimant appeared when telephoned and agreed to a telephone hearing. He represented himself. The Respondent appeared, represented by its counsel, Thane P. Johnson. The Respondent requested that this matter be resolved by summary judgment pursuant to its motion filed with the Hearing Officer on April 27, 2001. The Respondent argued that because the Claimant failed to respond to its discovery request for certain admissions, the case should be dismissed. In addition, the Respondent asked for expenses incurred in obtaining an order compelling discovery pursuant to Rule 37(a)(4), including attorney fees. The Hearing Officer agreed to consider the Respondent's motion for summary judgment, but proceeded with the contested case hearing on the substantive issues in the case.

Exhibits DF-1 through DF-12 and Exhibits A through G were admitted into the record without objections. Claimant Gallagher and witnesses Larry Brorson (rig superintendent), Gale LaPierre (rig operator), and Dave Withers (president of Glacier Well Service, Inc.) gave sworn testimony at the hearing.

## **II. ISSUE**

Whether the Claimant is entitled to a regular rate of \$10.25 an hour or \$7.50 an hour under his employment contract with the Respondent for the workweek October 8, 2000 to October 14, 2000.

## **III. FINDINGS OF FACT**

1. Glacier Well Service, Inc., employed Arvin P. Gallagher as a derrick hand from August 2000 until October 13, 2000. Gallagher's rate of pay his final week of work was \$10.25 per hour. Gallagher was paid every two weeks, usually on Tuesdays, and the workweek was from Sunday through Saturday. (Testimony of Gallagher and Exhibit DF-1)
2. In July 2000, prior to hiring Gallagher, Glacier raised its hourly wage from \$7.50 per hour to \$10.25 per hour. Employees were informed that if they had any unexcused absences, their hourly rate would revert back to \$7.50 per hour. Glacier placed notices in the "doghouse" (clothes changing building) at each company rig and in the company shop. (Testimony of Brorson, LaPierre, Withers, and Exhibits C and F)
3. When Gallagher was hired, his supervisor informed him of the unexcused absence policy. The written notice was posted at the rig site in the doghouse where Gallagher and other workers changed clothes and entered often during a typical work shift. (Testimony of LaPierre and Brorson)
4. Gallagher completed his last shift on Friday, October 13, 2000, his last day of work for the workweek of October 8 to October 14. That was the first week in the pay period ending October 21, 2000. During the early morning hours on Saturday, October 14, 2000, Gallagher was arrested and subsequently incarcerated in jail for at least a month. (Testimony of Gallagher and LaPierre)
5. Gallagher believed he was to notify his employer within 24 hours if he was unable to work his shift. Because he was in jail, he had a family member notify LaPierre on Saturday, October 14, 2000, that he was in jail and would not be at work on the following Monday. LaPierre never told Gallagher or his relatives that he was excused from work. After his arraignment, Gallagher was incarcerated and never returned to work for Glacier. (Testimony of Gallagher)
6. After Gallagher received his paycheck for the one week he worked during the two week pay period ending October 21, 2000, he learned that Glacier had applied its absence policy because he was not specifically excused from work. Glacier reduced his hourly pay rate to \$7.50. Glacier paid him \$311.00 for 40 hours regular time and one hour overtime ( $40 \times \$7.50 = \$300.00$  and  $1 \times \$11.25 = \$11.25$ ). (Testimony of Gallagher and Exhibit G)
7. Based on Gallagher's regular rate of pay at \$10.25, he earned a total of \$425.37 ( $\$10.25 \times 40$  hours = \$410.00 plus  $\$15.37 \times 1$  overtime hour = \$15.37). (Exhibit G)
8. Concerning Gallagher's failure to respond to Glacier's discovery requests, Gallagher was working out of town and did not regularly receive his mail; therefore, he was not able to respond

to the discovery matters. Further, the request for admission is directed to John Andrew, Bureau Chief, Labor Standards Bureau, not to Gallagher.

#### **IV. DISCUSSION**

##### **Summary Judgment**

Glacier filed a Motion For Summary Judgment pursuant to Rule 36(a) of the M.R.Civ.P. and Rule 56(c) because Gallagher failed to respond to its request for admissions under those rules. Pursuant to the Rules of Discovery In Contested Cases, ARM 24.2.105, the Department of Labor and Industry makes discovery available to the parties in accordance with Rules 26, 28 through 37 (except Rule 37(b)(1) and 37(b)(2)(d)). The Department has not adopted a rule applying Rule 56 of M.R.Civ.P. to wage and hour cases.

Resolving this claim on summary judgment grounds would be unjust in view of the absence of a rule on the subject, the fact that Gallagher is not represented by counsel, the fact that he was not able to respond to the discovery because he was working out of town, and the fact that the requests for admission were ambiguous because they were not directed to Gallagher. Moreover, Glacier's motion was not filed with the Hearing Officer until April 27, 2001, less than ten days before the hearing on May 3 when both parties and witnesses appeared for the contested case hearing.

Based on the record, there is nothing that shows Glacier was prejudiced by proceeding with a contested case hearing pursuant to Rule 36(b); therefore, Glacier's motion for summary judgment is denied.

To the extent that Glacier's motion is deemed as a request to treat the matters as admissions for evidentiary purposes, it is also denied.

##### **Substantive Issues**

Glacier argues that Gallagher did not have an excused absence from work pursuant to the company policy contained in its hand printed notice; therefore, Gallagher's hourly pay should be retroactively reduced from \$10.25 to \$7.50 per hour for his last week of work completed on Friday, October 13, 2000. It is clear, however, that Gallagher never worked after October 13. Furthermore, the absentee policy which was intended to inform workers of the potential for reduction in their rate of pay does not specifically address when the reduction in pay to the previous hourly rate would take effect.

Here, Gallagher had worked 41 hours in the workweek immediately preceding his incarceration in jail and prior to his absence from work on the next workday, Monday, October 16, 2000. Glacier is retroactively withholding wages from Gallagher that he is entitled to as earned wages. Pursuant to §§ 39-3-204 and 39-3-205, MCA, employers are required to pay employees wages earned and may not withhold those wages due and payable.

The Montana Supreme Court recently held in Langager v. Crazy Creek Products, 287 Mont. 445, 954 P.2d 1169 (1998), that payment of wages cannot be conditioned upon performance of conditions subsequent. The Court stated that it would certainly not uphold an employer's policy which provides that an employee will not be paid for accrued vacation unless the worker returns and works in the first week following the vacation.

Here, as in Langager, Gallagher has earned his wages for the workweek in question and he is entitled to be paid his regular rate of pay of \$10.25 per hour. Glacier should have paid Gallagher \$425.37 in wages and overtime. Glacier owes Gallagher a total of \$114.12 in wages (\$425.37 - \$311.25 already paid) pursuant to § 39-3-205, MCA. Because Glacier paid minimum wage and an overtime rate based on that wage during the workweek in question, a 55% statutory penalty in lieu of the maximum will be assessed in the amount of \$62.77, pursuant to § 39-3-206, MCA, and ARM 24.16.7566.

## **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 § 39-3-201 et seq. MCA. State v. Holman Aviation, 176 Mont. 31, 575 P.2d 925 (1978).
2. Glacier Well Service, Inc., violated §§ 39-3-204 and 39-3-205, MCA, by failing to pay Arvin P. Gallagher wages owed when due. Glacier Well Service, Inc., owes Arvin P. Gallagher \$114.12 in wages.
3. Glacier Well Service, Inc., is liable for a penalty of 55% of the wages owed, and pursuant to § 39-3-206, MCA, and ARM 24.16.7566, owes Arvin P. Gallagher \$62.77 in penalty.
4. The Motion For Summary Judgment submitted by Glacier Well Service, Inc., is hereby denied.

## **VI. ORDER**

Glacier Well Service, Inc., is hereby ordered to tender a cashier's check or money order in the amount of \$176.89 representing wages and penalty made payable to Arvin P. Gallagher and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518 no later than 30 days from the date of this Order.

DATED this 30th day of May, 2001.

DEPARTMENT OF LABOR & INDUSTRY

HEARINGS BUREAU

By: /s/ GORDON D. BRUCE

GORDON D. BRUCE

Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with § 39-3-216(4), MCA, by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also § 2-4-702, MCA.

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 § 39-3-212, MCA. Such an application is not a review of the validity of this Order.