

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

IN THE MATTER OF THE WAGE CLAIM)	Case No. 1076-2007
OF KEVYN D. BELTINCK,)	
)	
Claimant,)	
)	
vs.)	FINAL AGENCY DECISION
)	
GREG MATOSICH, D/B/A)	
GREG MATOSICH ENTERPRISES,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION

In this matter, Greg Matosich d/b/a/ Greg Matosich Enterprises appeals from a determination and default order of the Montana Department of Labor and Industry's Wage and Hour Unit finding that Matosich owed both wages and penalty to Beltinck. Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on August 14, 2007. By previous agreement of the parties, all parties were permitted to appear telephonically. Matosich appeared and represented himself. Beltinck appeared and represented himself. Both Beltinck and Matosich testified under oath. In addition, the parties stipulated to the admission of Documents 1 through 43. For the reasons stated below, th hearings officer finds that the default should be set aside but that Matosich owes additional wages and penalty to Beltinck.

II. ISSUES

Is Beltinck due additional wages and penalty as prescribed by law?

III. FINDINGS OF FACT

A. Facts related to the default order.

1. On January 4, 2007, Beltinck filed a wage claim against Matosich. On January 16, 2007, Matosich responded to the claim. Exhibit 37.
2. On January 17, 2007, Beltinck amended his claim seeking additional unpaid wages.
3. On February 23, 2007, the wage and hour unit issued a determination finding that Matosich owed unpaid wages to Beltinck. The determination was sent to Matosich at his

Locust Street Address in Anaconda, Montana and his Stewart Street address in Opportunity, Montana. The determination required Matosich to file an appeal no later than March 13, 2007.

4. Matosich received the mail at his address but was in Mexico at the time. His business, planting and selling Christmas trees, required him to be in a remote area out of cell phone contact at the time the determination was sent out.

5. Immediately upon becoming aware of the adverse determination, Matosich contacted the Wage and Hour Unit in writing by facsimile on March 21, 2007. Documents 14 and 15. In his facsimile, Matosich explained that he had been out of state. He further again stated with specificity the basis for his objection to Beltinck's claim. Nonetheless, the Wage and Hour Unit issued a default in this matter on March 22, 2007.

6. The Default order was provided to Matosich by facsimile on March 22, 2007. The default required Matosich to file an appeal no later than April 9, 2007. There is no indication in the file that Matosich did not receive the facsimile at the number he provided. Matosich filed his appeal on April 11, 2007.

7. On April 11, 2007, the Wage and Hour Unit acknowledged Matosich's April 11, 2007 facsimile as his appeal of the default. The Wage and Hour Unit, however, stated that because Matosich did not file a timely appeal to the determination, the timeliness of his appeal was the only issue to be considered on appeal to the Hearings Bureau. It is thus apparent that the issue of timeliness in this matter stems from Matosich's failure to timely appeal the Wage and Hour Unit's determination issued on February 23, 2007.

B. Facts related to the merits of the claim.

1. Matosich runs a business that sells Christmas trees at lots in different cities around Montana. One of the lots is located in Helena and another of the lots is located in Butte.

2. Matosich hired Beltinck to work the Christmas tree lot located in Helena. Matosich agreed to pay Beltinck \$7.00 per hour for selling trees at the Helena lot and for delivering trees to various lots. Matosich also agreed to pay Beltinck \$10.00 per hour when loading, unloading and bundling trees. Beltinck was to be paid on Friday each week for the work he had completed that week.

3. Beltinck began work for Matosich on December 1, 2006. Matosich fired Beltinck on December 23, 2006.

4. Beltinck kept a record of the hours he worked and the type of work that he did. Those records reveal that Beltinck worked the days, hours and types of work as shown in Findings of Fact 5 through 9. Matosich, did not keep track of Beltinck's hours nor did he keep

any type of time cards. Matosich was not present during much of the time that Beltinck worked. Matosich relied on Beltinck to keep track of his own hours.

5. From December 1 through December 2, 2006 Beltinck worked 14 ½ hours unloading and bundling trees and setting up a Christmas tree lot. At \$10.00 dollars per hour, he should have been paid \$145.00. Beltinck was not paid during this week.

6. For December 3 through December 9, 2006 Beltinck worked for 3 hours unloading tress and bundling trees(3 hours x \$10.00 = \$30.00). He also worked 37 hours selling trees at \$7.00 per hour (37 hours x \$7.00=\$259.00). In addition, he worked 19 overtime hours at a rate of \$10.00 per hour (\$7.00 x 1.5 = \$10.50 per hour x 19 hours= \$199.50). For this time period, he should have been paid a total of \$488.50. On December 8, 2006, Matosich paid Beltinck \$200.00. Crediting this against the amounts he was due that week leaves an unpaid balance of \$89.00 in regular wages and an unpaid balance of \$199.50 in overtime wages.

7. For December 10 through December 16, 2006, Beltinck worked 40 regular hours at \$7.00 per hour (40 hours x \$7.00=\$280.00). In addition, he worked 38.5 overtime hours at a rate of \$10.50 per hour (\$7.00 x 1.5 = \$10.50) and is due \$404.25 (\$10.50 per hour x 38.5 hours= \$404.25) in overtime wages. For this time period, he should have been paid a total of \$684.25(\$280.00+\$404.25=\$684.25). On December 10, 2006, Beltinck was paid \$50.00. Crediting this against the amounts he was due that week leaves an unpaid balance of \$230.00 in regular wages and an unpaid balance of \$404.25 in overtime wages.

8. For December 17 through December 23, 2006, Beltinck worked a total of 40 regular hours at \$7.00 per hour (40 hours x \$7.00=\$280.00). In addition, he worked 16 hours of overtime at a rate of \$10.50 per hour (\$7.00 x 1.5 = \$10.50) and is due \$168.00 (\$10.50 per hour x 16 hours= \$168.00). For this time period, he should have been paid a total of \$448.00. He took two draws during this week amounting to \$662.00. Beltinck is not due any additional wages for this week.

9. Matosich underpaid Beltinck \$464.00 in regular wages(\$145.00+\$89.00 +\$230.00=\$464.00). Matosich underpaid Beltinck \$389.75 in overtime wages. The overtime amount due is derived from totaling the amounts of unpaid overtime wages during the first three weeks (\$199.50 + \$404.75=\$604.25) and then crediting against that amount the additional amount he was paid during his fourth week of employment, \$214.00 (\$662.00-\$448.00=\$214.00), which leaves a net amount of unpaid overtime wages due of \$389.75(\$604.25-\$214.00=\$389.75).

10. Penalty on the unpaid amount of regular wages due amounts to \$255.20 (\$464.00 x .55=\$255.20). Penalty on the unpaid amount of overtime wages due is \$428.72 (\$389.75x1.10=\$428.72). Total penalty due on both unpaid and overtime wages is \$683.92 (\$255.20+\$428.72=\$683.92).

IV. DISCUSSION AND ANALYSIS¹

A. *Good Cause Exists to set aside the Order of Default.*

The applicable administrative rules provide that a default order, such as the one entered in this case, will be issued if the employer fails to timely file a written response to a determination. Admin. R. Mont. 24.16.7541 (1). An employer's failure to file a timely written response to a wage complaint will result in the entry of a determination that is adverse to the employer. Admin. R. Mont. 24.16.7527 (5).

The Montana Supreme Court has specifically held that the Montana Department of Labor and Industry has the authority to suspend, waive or modify its rules in order to prevent manifest prejudice to a party, to assure a fair hearing, or to afford substantial justice. *Centech Corporation v. Sprow*, 2001 MT 298, ¶20, 307 Mont. 481, ¶20, 38 P. 3d 812, ¶20. Unlike many cases where the employer fails to respond to any portion of the complaint, Matosich filed a thorough response to Beltinck's complaint in a timely fashion. Matosich had no way of knowing when the Wage and Hour Unit would issue its determination. Matosich kept the Wage and Hour Unit apprised of his correct address. He was out of town on business when the decision was rendered. As soon as he returned and got notice of the appeal, he immediately filed his appeal. Under the facts of this case, good cause exists to set aside the default.

B. *Beltinck is Due Additional Wages.*

Montana law requires that employers pay wages when due, in accordance with the employment agreement, pursuant to Mont. Code Ann. § 39-3-204. Except to set a minimum wage, the law does not set the amount of wages to be paid. That determination is left to the agreement between the parties. "Wages" are any money due an employee by the employer. Mont. Code Ann. § 39-3-201(6).

An employee seeking unpaid wages has the burden of proving work performed without proper compensation. *Anderson v. Mt. Clemens Pottery Co.* (1946), 328 U.S. 680; *Garsjo v. Dept. 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." *Garsjo* 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; *Marias Health Care Srv. v. Turenne*, 2001 MT 127, ¶¶13, 14, 305 Mont. 419, 28 P.3d 494.

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

¹Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

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, supra*, 359 Mich. at 576, 103 N.W. 2d at 497.

Beltinck's testimony is sufficient to meet his burden to show that each was not paid for the hours of work that each is claiming. His testimony is also found credible with respect to the amount of hourly wages he was to paid.

Matosich, on the other hand, kept no time cards or other records of the hours that Beltinck worked. Matosich, busy traveling from tree lot to tree lot and attending to business, was not even present during most of the time that Beltinck worked. Therefore, he is not in a position to refute Beltinck's testimony about the number of hours worked.

Moreover, Matosich asserted in his defense to the complaint that Beltinck stole \$662.00 from him, but the evidence at hearing belies that perception. It is plain from the testimony at hearing that Beltinck took a total of \$662.00 on draws against his wages and that Matosich permitted him to do so. Matosich's lack of credibility with regard to how Beltinck acquired the \$662.00 casts doubt on the remainder of his testimony. Mont. Code Ann. § 26-1-302(9)(the presumption of truthfulness that a witness enjoys may be overcome by other evidence in the case contradicting the witness' testimony). Matosich's testimony in this case, therefore, is not found to be credible. Accordingly, the hearing officer finds that Beltinck has proved by a preponderance of the evidence he worked the number of hours he claims and is due the wages as shown in the findings of fact.²

While the hearings officer has not found that Beltinck stole any money from Matosich, even if Beltinck had stolen that money, the hearing officer would be powerless in this case to offset Beltinck's claim. Under Montana Code Annotated § 39-3-205(3), it is only where the claimant has agreed to offset or where criminal charges are filed and a court exercising appropriate jurisdiction has ordered offset that an offset can be taken against wages owed. Neither of these things has occurred in this case. Accordingly, even if the hearing officer had found that Beltinck had taken money from Matosich, he could not offset sums due to Beltinck under the Montana Wage and Hour Act.

C. *Matosich Owes Penalty.*

²At the hearing, Beltinck attempted to introduce all sorts of evidence regarding Matosich's business not being in compliance with various state agency regulations and not having paid other employees. None of this evidence has been considered by the hearings officer in arriving at the result in this case because such evidence is not relevant to this proceeding and was based entirely on hearsay. While the hearings officer recognizes that the rules of evidence are not applicable to wage and hour proceedings before this tribunal, the hearing officer is required by law to base his determinations on substantial evidence. Hearsay evidence does not constitute substantial evidence upon which a decision in a wage and hour case may be based.

Montana Administrative Rules applicable to wage and hour cases require imposition of penalty when wages are found to be due and unpaid. Where overtime wages are found to be due, the applicable administrative rules require the imposition of a 110% penalty. Admin. R. Mont. 24.16.7561. Where regular wages are found to be due, the applicable administrative rules require the imposition of a 55% penalty. Admin. R. Mont. 24.16.7566. Where the wages due are a mixture of both overtime and regular wages, the rules require that the penalty be calculated by applying the appropriate administrative rule to each component of the claim. Admin. R. Mont. 24.16.7569. The hearing officer has no discretion in the application of these rules and must apply them as written to the facts of the case.

In this case, the parties did not present any evidence as to how the amounts paid to Beltinck should be credited. As the parties agreed to weekly pay, the proper method to determine the applicable penalty is to credit the amounts paid in the weeks they were paid against the amounts due during that week as the hearing officer has done in the findings of fact. Undertaking that analysis, Beltinck was underpaid \$464.00 in regular wages and \$389.75 in overtime wages. Applying the regulations noted above, penalty due on the unpaid regular wages is \$255.25 and penalty due on the unpaid overtime wages is \$428.72.³

D. Expense Reimbursement Is Not Compensable In This Proceeding.

Beltinck also claims to be owed a minimum of \$48.00 for travel reimbursement (expenses for gas and oil for driving). This tribunal, however, lacks jurisdiction over claims for expense reimbursement as these expenses are not recoverable under the wage and hour statutes. *Johnson v. K & T Manufacturing, Inc.* (1981), 191 Mont. 458, 652 P.2d 66. Accordingly, the department cannot award Beltinck any travel reimbursement in this proceeding.

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.

³ Even though Beltinck's claim sought both unpaid regular and overtime wages, the determination issued by the Employment Relations Division does not attempt to delineate which portions of the unpaid wages were regular wages and which portion were overtime wages. The determination states that if the wages found to be due "are paid within the time frame specified below, a penalty of 15% . . . is also owed. However, if the wages and penalty are not paid by then, a penalty of 55% . . . will be owed." While this statement is correct with respect to unpaid regular wages, it is not correct with respect to the portion attributable to the unpaid overtime wages. Since unpaid overtime wages were sought in this case and necessarily had to be found to be due, the determination should also have indicated that the penalty attributable to the overtime portion is 110% of the amount unpaid unless the employer pays the unpaid overtime wages plus a 55% penalty within the time delineated in the determination. See Admin. R. Mont. 24.16.7561. Since the Matosich did not pay the amount of unpaid overtime wages due within the time frame stated by the determination, the hearing officer by law must impose a 110% penalty on those wages.

2. Matosich owes Beltinck additional regular wages in the amount of \$464.00 and additional overtime wages in the amount of \$389.75. In addition, Matosich owes Beltinck penalty of \$255.20 on the unpaid regular wages and \$428.72 on the unpaid overtime wages.

3. This tribunal has no power to award Beltinck the \$48.00 he seeks for travel reimbursement.

VI. ORDER

Greg Matosich D/B/A Greg Matosich Enterprises is hereby ORDERED to tender a cashier's check or money order in the amount of \$1,537.67, representing \$464.00 in unpaid regular, \$389.75 in unpaid overtime wages, and \$683.92 in penalty, made payable to Kevyn D. Beltinck, and mailed to the Employment Relations Division, P.O. Box 6518, Helena, Montana 59624-6518, no later than 30 days after service of this decision. Matosich may deduct applicable withholding from the wage portion but not the penalty portion of the amount due.

DATED this 28th day of September, 2007.

DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

By: /s/ GREGORY L. HANCHETT
Gregory L. Hanchett
Hearings Bureau

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 service of the decision. See also Mont. Code Ann. § 2-4-702.

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.

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